

**CORRUPTION AND THE LAW: AN EVALUATION OF THE
LEGISLATIVE FRAMEWORK FOR COMBATING PUBLIC
PROCUREMENT CORRUPTION IN SOUTH AFRICA**

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DEDICATION

This thesis is dedicated to my daughter, Khushi. I look forward to reading her doctoral thesis one day.

DECLARATION

I, Prenisha Sugudhav-Sewpersadh, student number 961070774, hereby declare that the thesis entitled '**Corruption and the Law: An Evaluation of the Legislative Framework for Combating Public Procurement Corruption in South Africa**' is the result of my own research and that it has not been submitted in part or in full for any other degree or to any other University.

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SIGNATURE

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DATE

ACKNOWLEDGEMENTS

Sir Thomas More, in Robert Bolt's sixteenth century play 'A Man for All Seasons', was hailed as a lawyer and statesman who simply did not give in to temptation or corruption. Today it is an unfortunate reality that lawyers, especially criminal lawyers, are constantly denigrated as serving the interests of criminals and outlaws. I have always believed the opposite, that lawyers are people who first and foremost possess a profound love for the human race, a respect for human rights and an undying passion to ensure that those rights are always upheld. This makes their calling a selfless and sacred one. Most of my professional life I have had the honour of working in government and the broader public sector. While I cherished this opportunity to use my knowledge and skill as a lawyer, in whatever small way, to serve the people, my naivety was exposed when I came face to face with some of the ugly truths about the South African public sector. Corruption, I learnt, is probably the greatest obstacle to effective service delivery and respect for basic human rights in this country. This sparked my interest in conducting the evaluation undertaken in this thesis. As a lawyer I needed to contribute something, no matter how small, to the reform of public procurement laws in this country in order to combat corruption. I am by no means under the illusion that this study contains the panacea for a corrupt-free society. I hope however that it may find some small, but useful place in the broader fight against corruption. If it does I would have gone some way in fulfilling my calling as a lawyer.

This journey has been a long and challenging one for me and one which I would not have been able to undertake had it not been for certain key people in my life. My first word of thanks will always go to my parents, for bringing me into this world and grooming me into the person I am today. I thank the Lord for providing me with everything I needed to be able to complete this journey. My supervisor and mentor Professor John Mubangizi, thank you for never giving up on me. I thank you sincerely for your intellectual guidance. They say in life it is important to find a person who never fails to believe in you. I found that person in Rakesh Sewpersadh, my partner in life and father of my child. I thank you for every time you had to play the role of father and mother to our daughter while I was absorbed in seemingly endless hours of research on this thesis. Nothing you have done to support me in my studies has gone unnoticed and unappreciated. To my sister, Rekha thank you for sowing the very first seeds of academic interest in me. Our shared love for the written word and education is something which will always serve us well.

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SUMMARY

It is widely accepted that public procurement is an area that is particularly susceptible to corruption. South Africa has a supreme Constitution which places obligations on the public sector to render effective service delivery. Government procures or disposes of goods and services in order to execute its functions. Corruption within this sector stands as a threat to the fulfilment of government's constitutional mandate. The effects of public procurement corruption are borne most acutely by the population of a country as it directs government resources away from service delivery and into the hands of unscrupulous and dishonest persons. The regular review of laws is important to ensure that a public procurement legislative framework contains sufficient mechanisms to guard against corruption. The aim of this study is therefore to undertake an evaluation of the legislative framework pertaining to public procurement in South Africa and the salient provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (hereinafter referred to as the 'PCCA') with a view to recommending legal reform which may contribute to combating public procurement corruption. The study is confined to public tendering as a specific method of tendering within the three levels of government in South Africa.

Chapter one provides a contextual background of the study and identifies the research problem which is stated as follows: the legislative framework applicable to public procurement as well as the provisions of the PCCA are not sufficiently conducive to combating corruption within this sector. In order to undertake the evaluation of laws as aforesaid it is necessary to identify key research questions which would assist in identifying problematic areas in the legislative framework. Chapter one therefore introduces the topic of study and provides an explanation of the relevance and importance of the study in the South African context. This chapter also sets out the aim of the study as aforesaid as well as five key research questions. Finally chapter one explains the research methodology used. While the study employs neither a purely quantitative nor a purely qualitative research methodology, the evaluation of laws through legal interpretation can be said to have characteristics of a qualitative approach in that the interpretation is supported and aided by views of eminent scholars, organisations or judicial officers. However such views are not obtained through a process of interviews, focus groups or case studies, but through review of relevant literature. The study also includes a comparative dimension wherein the salient laws of Hong Kong, Nigeria and Botswana are reviewed.

Chapter two is a literature review on the phenomenon of corruption. Since understanding corruption is the first step to combating it, this exercise is necessary. This chapter provides authority for the views that corruption, as a phenomenon, is difficult to define in precise terms and that differing social and cultural norms may be attached to it. Within the context of the South African public sector, it is concluded that corruption has been a reality in the past and continues to plague the country. A failure to adopt measures aimed at reducing public procurement corruption may lead to a failure by government to meet its constitutional mandate.

The role of international law, and the constitutional framework in South Africa are indispensable for a study which entails the evaluation of laws. The South African Constitution not only entrenches the role of international law in its legal system, but also entrenches procurement principles. Chapter three therefore reviews the anti-corruption international instruments to which South Africa is a party. It also provides a discussion of each of the constitutional public procurement principles. Any legislative framework aimed at reducing public procurement corruption must be compliant with South Africa's international law obligations against corruption, as well as the constitutional public procurement principles.

Chapter four contains an evaluation of the domestic legislative framework. The research questions identified in chapter one are used to focus the evaluation. The conclusion is that both public procurement legislation as well as the PCCA contain significant shortcomings which may be cured by appropriate legal reform.

The issue of government tendering has been the subject of frequent judicial adjudication. Chapter five provides the approach of the courts to the interpretation of constitutional procurement principles as well as the judicial approach to public tendering processes. The submission is that the judiciary could do more to ensure the reduction of public procurement corruption. It is submitted that legislation may come to the assistance of courts with regards to such issues as the admittance of evidence of alleged corruption in matters involving the adjudication of a tender process.

For comparative purposes chapter six contains a review of three foreign jurisdictions. Each jurisdiction selected presented various lessons and shortcomings. Hong Kong is hailed as a city which has taken great strides in substantially reducing public procurement corruption. Its laws have sound financial management processes and the legislative provisions governing its

anti-corruption agency are noteworthy. Nigeria on the other hand suffers from undue political and official involvement in government procurement processes, although useful legislative elements may be distilled from its laws, Botswana presents a public procurement legal framework which has an interesting mechanism of independent monitoring and supervision of public procurement decisions. Other valuable lessons and shortcomings with respect to each jurisdiction are discussed in this chapter.

Chapter seven proposes recommendations for legal reform or areas worthy of further study. This chapter also shows that since South Africa is currently embarking on a review of its supply chain management processes such review may be assisted by the recommendations contained in this study. The conclusion is that although South Africa seems to have a public procurement system that is largely compliant with international best practice, the actual implementation of this system presents problems. Most recommendations for legal reform therefore pertain to implementation of public procurement processes which may contribute to the combating of corruption. This chapter also provides a conclusion to the study.

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CHAPTER ONE: INTRODUCTION AND BACKGROUND

1 INTRODUCTION

This is a study of the salient laws applicable to public procurement in South Africa with a view to recommending appropriate legal reform for combating corruption within this sector. While the phenomenon of corruption will be defined more extensively further below it can be stated at the outset that generally corruption is seen as the abuse of public power for private gain.¹ Not only does corruption affect almost every facet of human life, it also actually *occurs* within almost every facet of human life. It can therefore be studied neither in a vacuum nor as a general phenomenon. This is particularly important when one intends to recommend legal reform.

In order for laws to be readily enforceable the application of such laws must relate to precise and clearly defined contexts. For instance the Labour Relations Act² is applicable only to parties within an employment relationship. Therefore whenever one embarks on any legal study it is imperative to do so within a specific context. Finding appropriate solutions to the problem of corruption requires one to focus on a specific context within which the problem persists. For instance a set of laws to curb corruption within the sporting fraternity may be very different in content to a set of laws designed to prevent corruption within the policing sector.

Corruption can be studied from differing perspectives, such as social, economic, political, or legal. The perspective from which one chooses to study corruption depends on the outcome one intends to achieve. For instance a social scientist may study corruption from a socio-economic or socio-political perspective in order to assess the effect of corruption on the standards of living on ordinary citizens of a country. A political scientist may study corruption in order to assess the prevalence of corrupt practices such as vote rigging in government elections or to understand what effect corruption may have on countries with differing governmental regimes, such as democracies as opposed to autocracies. This is a study of corruption from a legal perspective, particularly in respect of public procurement in order to recommend legal reform which could reduce the levels of corruption in this sector.

¹ See chapter two dealing with literature review.

² 66 of 1995.

This chapter sets out the background and provides a statement of the problem. It also sets out the aim of the study, the key research questions as well as the research methodology and design.

2 BACKGROUND

The preamble of the South African Constitution³ envisages a society based on democratic values, social justice and fundamental human rights. Government is to be based on the will of the people; the quality of life of all citizens is to be improved and the potential of each person freed. Corruption is one of the greatest threats to the construction and maintenance of such a society, as it directs resources away from service delivery, undermines the principles of democracy as a few benefit from what ought rightfully to be utilised for the good of the majority. It denies basic human rights as the majority of the populace is often left powerless and defenceless against those whom they have entrusted to govern with transparency, accountability and integrity.

It is undeniable that a major feature of South Africa's politics has been the issue of corruption. Major scandals and incidences of corruption have centred around high profile public figures and the procurement of government contracts. The case of *S v Shaik*⁴ is arguably the most well-known fraud and corruption case in South Africa and notoriously famous as it had implications for the man who currently holds the highest public office in the country. In this case Shaik was convicted of corruption in terms of the then Corruption Act⁵ as well as of fraud and other statutory offences. The gist of the State's case against Shaik was that Shaik had made certain payments of money over to Jacob Zuma (who then held an influential public office) with the corrupt intention to influence Zuma to use his name and political influence for the benefit of Shaik's business enterprises or as an on-going reward for having done so from time to time. The court found that Shaik did in fact act with a corrupt intention in that there existed a causal link between Shaik's admitted payments to Zuma and the assistance which Shaik sought in return from Zuma. This case brought corruption within the higher echelons of the South African government and the private sector to the fore. Another case which involved a high profile public figure was that of a National Commissioner of Police⁶. The National Commissioner of Police was convicted of corruption

³ Constitution of Republic of South Africa (1996).

⁴ 2007(1)(SACR)142 D.

⁵ 94 of 1992.

⁶ See *Selebi v S* [2012] 1 ALLSA 332 (SCA).

in contravention of section 4(1)(a) of the Prevention and Combatting of Corrupt Activities Act⁷ and sentenced to fifteen years' imprisonment.

In 1999 the South African government announced its largest-ever post-apartheid arms deal, signing contracts in excess of 40 billion rands to modernise its national defence force. This deal illustrated how government procurement may be fertile ground for possible large scale corruption. In the Applicant's Heads of Argument in *Crawford-Browne v The President of the Republic of South Africa and Another*⁸ it was stated that the 'Institute for a Democratic South Africa has called the government's response to allegations of wrongdoing in the arms deal the 'litmus test' of the country's commitment to democracy and good governance.'⁹ The common thread which runs through most of the corruption cases reported in the media is the implication or involvement of some politicians and public figures in order to manipulate or secure government contracts.¹⁰ The ideals of the Constitution mentioned above are a promise to be fulfilled by Government. Warren CJ in *Trap v Dulles* observed:

'The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our Nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.'¹¹

In South Africa law or conduct inconsistent with the Constitution is invalid.¹² If corruption stands as a threat to the attainment of constitutional principles, and further if government officials and politicians are continuously implicated therein, it may be cogently argued that the Government is failing in its constitutional mandate. In *South African Association of Personal Injury Lawyers v Heath and Others* the Court stated as follows:

⁷ 12 of 2004.

⁸ CCT 103/10.

⁹ Ibid at para 9.

¹⁰ Another contentious issue which brought to light allegations and suspicions of major corruption within government procurement was the issue of the improvements made to the Nkandla homestead of the South African President. It was reported that such improvements have cost over 200 million rands. See S Grootes 'Nkandla – A typical South African Scandal' available at www.dailymaverick.co.za accessed on 05 October 2015. Further examples of corruption include the Travelgate scandal in which members of the South African Parliament were found to have illegally used travel vouchers worth millions of rands for personal use. See P Vecchiato 'Parliament to write off Travelgate losses' available at www.news24.com accessed on 05 October 2015. The Oilgate scandal in which the petrol company Imvume Holdings was accused of paying eleven million rands of state money to the ruling African National Congress party during the 2011 local government elections is another example of corruption. See S Brummer, S Sole & W W K Ngobeni 'The ANC's Oilgate' available at www.mg.co.za accessed on 05 October 2015.

¹¹ (1958) 356 US 86.

¹² Section 2 of the Constitution.

‘Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.’¹³

In its first month of existence, Corruption Watch received about five hundred complaints from the public pertaining to corruption.¹⁴ In its written submissions as *amicus curiae* in the case of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others*¹⁵ Corruption Watch emphasised that ‘while the concern about corruption is a general one, it applies with particular force in the context of public procurement.’¹⁶ This sentiment is shared by Bolton speaking specifically within the South African context when she asserts that:

‘The size and volume of government procurement does give rise to considerable potential for corruption. Both contractors and public officials may resort to corrupt practices.’¹⁷

It is broadly accepted that public procurement is particularly susceptible to corrupt practices. Williams-Elegbe explains that:

‘Public procurement is susceptible to corruption due partly to the large sums involved, the (usually) non-commercial nature of procuring entities, the nature of the relationship between the decision-maker and the public body, the measures of unsupervised discretion, bureaucratic rules and budgets that may not be tied to specific goals as well as non-performance-related pay and low pay. Public procurement also presents the opportunity for corruption because of the asymmetry of information between the public official and his principle – i.e. government. As the public official holds more information about the procurement process and the procurement market, the official is able to use this knowledge to his advantage by manipulating the procurement process, should he choose to do so.’¹⁸

Specifically within the public procurement sector Corruption Watch received 287 reports of corruption and irregularities between the period January 2012 and March 2013.¹⁹ The fact that a non-profit organisation alone received close to 300 reports of corruption and

¹³ 2001 (1) SA 833 (CC) para 4.

¹⁴ Corruption Watch was started as a non-profit organization in South Africa by the Congress of SA Trade Unions in January 2012.

¹⁵ 2014 (1) SA 604 (CC).

¹⁶ Corruption Watch Practice Note and Written Submissions in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* (ibid) para 14.

¹⁷ P Bolton *The Law of Government Procurement in South Africa* (2007) 1st ed 4.

¹⁸ S Williams-Elegbe *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* (2012) 1st ed. 24-25.

¹⁹ Corruption Watch (note 16 above) para 18.

irregularities within a fourteen-month period, illustrates that public procurement corruption is not confined only to the spectacular incidences highlighted in the media. It would not be unfair to state that public procurement corruption occurs systemically and routinely in South Africa.

3 AIM OF THE STUDY

The aim of this study is to conduct an evaluation of the legislative framework pertaining to public procurement in South Africa, as well as the salient provisions of the Prevention and Combating of Corrupt Activities Act,²⁰ (hereinafter referred to as the 'PCCA') with a view to recommending legal reform which may contribute to combating public procurement corruption.

4 STATEMENT OF THE PROBLEM

Since the country's transition to democracy in 1994, South Africa afforded constitutional recognition of public procurement principles through section 217 of the Constitution. This section provides that public procurement is to be implemented in a manner which promotes fairness, equity, transparency, competitiveness and cost-effectiveness. In 2003 South Africa also adopted an integrated supply chain management system where value is added at every stage of the procurement process.²¹ It is fair to state that a procurement system that is underpinned by constitutional principles should not be susceptible to corruption. In response to the constitutional obligations imposed by section 217 of the Constitution South Africa then enacted a number of laws aimed at fulfilling the constitutional mandate.

However, notwithstanding this constitutional stance South African case law is replete with cases involving irregularities within the public procurement sector, most especially with respect to contracts awarded in terms of the public tender system.²² The Supreme Court of Appeal noted in *Groenewald NO and Others v M5 Developments (Cape) (Pty) Ltd* that the

²⁰ Note 7 above.

²¹ Government of the Republic of South Africa 'Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government' (2003) available at <https://www.gov.za> accessed on 08 January 2015.

²² In terms of regulation 1(s) of the Preferential Procurement Policy Framework Act 5 of 2000: Preferential Procurement Regulation, 2011 Government Gazette No.G 34350 (hereinafter referred to as the 2011 PPPFA Regulations) 'tender' is defined as a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals.

‘awards of tenders in the public sector are a fruitful source of litigation which has led to courts being swamped with cases concerning complaints about award of tenders.’²³

The interesting feature of such decisions though is that no findings of corruption were made as defined in the PCCA. The courts merely set aside decisions where findings of irregularities and non-compliance with procurement procedures were found.²⁴ An attempt to gauge the extent to which actual corrupt practices may have played in such irregularities is therefore difficult. Yet taking into account that courts regularly hear cases of tender irregularities, it would be foolhardy to believe that corruption had no role to play in any of such cases.

It is submitted that in a sector known to be regulated by constitutional principles of fairness, equity, transparency, competitiveness and cost-effectiveness, it is anomalous to find frequent irregularities in tender processes with credible suspicions of corruption. A reasonable assertion in this regard is that although the sector is premised on a foundation of sound constitutional principles, the legislative framework enacted to give effect to the constitutional principles is not sufficiently conducive to minimising corruption.

Further in a sector which has proven to be a fruitful source of litigation and wherein corruption may be reasonably suspected, an anomaly is presented if there appears to be a lack of actual findings of corruption in cases involving procurement irregularities. A cogent reason for this anomaly is that the provisions of the PCCA were not drafted specifically for the procurement sector and therefore do not adequately take into account the various ways and the circumstances under which procurement corruption may occur. The PCCA is the principle anti-corruption statute in South Africa. Findings of corruption can only be made in terms of the provisions of this Act if the conduct fits into the definition of corruption as contained in this Act. This means that even if procurement legislation were to be reformed such that corrupt acts are more readily detected, convictions of corruption will be rare if there is a lack of sufficient correlation between procurement corruption and the provisions of the PCCA.

Du Plessis and Louw submit that:

²³ 2010 (5) SA 82 (SCA) para 1.

²⁴ Chapter five provides a review of such judgements.

'one of the first challenges facing the South African government in 1994 was the arduous task of aligning the country's law to the values and principles enunciated in the Constitution.'²⁵

Near the top of the list of government priorities was the development of a comprehensive and effective crime prevention strategy. This led to the development of the 1996 National Crime Prevention Strategy²⁶ (hereinafter referred to as the 'NCPS'). This document was intended to be the guiding framework for a wide range of interdepartmental programs aimed at increasing safety.²⁷

However the change of administration in 1999 ushered in a new approach to how government would deal with crime. Du Plessis and Louw further submit that 'political pressure was mounting on government to deal with the rampant crime problem, and the longer-term approach of the NCPS was not appeasing the fears of the public or of politicians.'²⁸

This led to the formulation of the 2000 National Crime Combatting Strategy²⁹ (hereinafter referred to as the 'NCCS'). Whereas the NCPS was largely drafted by a panel of civilians and was widely distributed for comment, the NCCS was produced in-house by the South African Police Service and was never issued as a public document.³⁰ These differences are indicative of the pressure to respond quickly to crime reduction. In the wake of the NCCS followed many new laws addressing specific crime problems. The PCCA was among those laws. It would not be unfair to state that the PCCA was enacted with the same mind-set of responding quickly to the problem of corruption, without much thought been afforded to corruption within specific contexts.

It is in this context and against this background that the research problem may therefore be stated as follows: the legislative framework applicable to public procurement and the provisions of the PCCA are not sufficiently conducive to combating corruption within this sector. This problem therefore necessitates an evaluation of both the public procurement laws, as well as the salient provisions of the PCCA, in order to ascertain appropriate legislative reform to curb public procurement corruption.

²⁵A Du Plessis & A Louw 'Crime and Crime Prevention in South Africa: 10 Years After' (2005) 47 *Canadian Journal of Criminology and Criminal Justice* 427, 430.

²⁶ Published 15 March 1997.

²⁷ Ibid.

²⁸ Du Plessis & Louw (note 25 above).

²⁹ The National Crime Combatting Strategy was implemented in April 2000 as part of the South African Police Service Strategic Plan 2000 to 2003.

³⁰ Ibid 31.

5 KEY RESEARCH QUESTIONS

Public procurement in South Africa is regulated by a number of statutes, policies as well as treasury regulations, practice notes, circulars, guidelines and instructions.³¹ All these laws are intended to give effect to the procurement principles enunciated in section 217 of the Constitution. Williams-Elegbe cited bureaucratic rules as one of the elements which make public procurement susceptible to corruption.³² This contention, it is submitted, may be supported by findings in case law.³³ It is submitted that a large number of rules and laws, may cause bureaucrats to selectively apply laws or rules which favour a particular situation in an attempt to disguise an underlying corrupt intention.

A system which has a large number of laws and technical rules relating to a specific subject matter will almost always be inaccessible as the user may be uncertain which provision to apply in a given situation. Not only do a large number of inconsistent laws create fertile ground for corrupt practices, it is submitted that laws which afford more weight to form over substance will also have the same effect. Transparency International³⁴ submits that the exclusion of experienced applicants on minor technicalities is one of the indicators of corruption.³⁵ It is submitted that a system which prescribes a large number of technical formalities which may enable corrupt officials to use such technicalities to unduly favour a pre-selected bidder is not one which is conducive to meeting the principles enunciated in the Constitution. A relevant research question therefore is whether the current legislative framework on public procurement is plagued by a plethora of laws, thereby creating uncertainties, ambiguities and technical formalities which may promote corruption.

In addition it is submitted that in a system where invalid decisions are already implemented before they are subjected to any scrutiny, the opportunity to engage in corrupt acts will be increased. In the public procurement process tenderers aggrieved by a procurement decision often approach a court for interdictory relief, seeking to interdict the procuring entity from executing or implementing the contract with the successful tenderer.³⁶ Often such interdict proceedings are ineffective in ensuring that allegedly corrupt procurement decisions are not implemented prior to the finalisation of the appeal process.

³¹ Chapter four provides an evaluation of the salient laws.

³² Williams-Elegbe (note 18 above).

³³ Chapter five provides a review of case law.

³⁴ Transparency International is a global non-partisan organisation working in partners with government, business and civil society around the world to put effective measures in place to curb corruption.

³⁵ Corruption Watch (note 16 above) para 55.

³⁶ See Chapter five for a discussion of such cases.

It is submitted that where decisions are arrived at through corrupt means, the ability to implement and complete a contract prior to the finalisation of an appeal or objection process makes the procurement process more attractive to corrupt persons. A relevant research question arising is whether current public procurement legislation provides effective appeal and review mechanisms which ensure that corrupt decisions are not implemented prior to the finalisation of any appeal or review.

It is accepted that evidence of procurement corruption is generally difficult to uncover, ‘often only becoming available long after a contract has been awarded.’³⁷ In the process of assessing and investigating reports of corruption and irregularities in public procurement, Corruption Watch found that:

‘Deviations from standard procedures, especially without good reason, and amendments to standard procedures, particularly at a late stage, are strongly indicative of corruption; and small irregularities, as they first appear, are very often symptomatic of significantly larger concerns.’³⁸

Corruption by its very nature takes place in secret, and as Corruption Watch observed, evidence of procurement corruption is generally difficult to uncover.³⁹ This makes it imperative for a procurement system to have in place mechanisms which will foster the early detection of possible corrupt practices. It is often too late if corrupt acts are detected after procurement awards and decisions are made. This would in fact promote corruption. In this respect a necessary research question is whether the current public procurement legislation contains effective mechanisms to detect acts of corruption prior to the finalisation of a procurement process.

Once a procurement decision is taken generally contracts are entered into between the organ of state and the party from whom it was decided to procure the good or service. The need for effective contract management is therefore important to ensure that ensuing contracts are implemented according to the terms of the procurement specifications. Poor contract management processes may result in corruption during the execution phase of a contract. If such practices continue unchecked, it would be meaningless to have in place a legislative framework which ensures flawless procurement processes, as corruption will simply creep in at a later stage *after* the decision to procure has already been made. In this respect the

³⁷ Corruption Watch (note 16 above) para 20.

³⁸ Ibid para 19.

³⁹ Corruption Watch (note 16 above) para 20.

following research question is necessary: does the public procurement legislative framework provide for effective anti-corruption measures after procurement decisions are made?

It was stated earlier that case law is replete with cases involving public procurement decisions wherein courts have set aside decisions by organs of state for being invalid. However findings of corrupt practices, as envisaged by the PCCA have not been made in the judgements. Indeed, as will be seen in chapter five allegations of corruption have not been adequately considered in these judgments. However there has been judicial pronouncement that deviations from procedural rules may be symptoms of corruption.⁴⁰ On the other hand there is also judicial pronouncement which seeks to distinguish deviations from procedural rules and actual corrupt activities.⁴¹ However the former judicial pronouncement seems to be shared by both the World Bank and Transparency International. These organisations hold that irregularities in procurement processes are ‘red flags’ or ‘indicators’ of corruption.’⁴² Arising from this, a relevant research question relates to the applicability of salient provisions of the PCCA to public procurement corruption. In summary the five key research questions are as follows:

- is the current public procurement legislative framework plagued by a plethora of laws thereby creating ambiguities, uncertainties and technical formalities which promote corruption?
- does public procurement legislation provide effective appeal and review mechanisms which ensure that corrupt acts are not implemented prior to the finalisation of any appeal or review?
- does the legislative framework contain effective mechanisms to detect acts of corruption prior to the finalisation of a procurement process?
- does the procurement legislation provide for effective anti-corruption mechanisms after procurement decisions are made? and
- what are the salient shortcomings of the PCCA in respect of procurement corruption?

⁴⁰ Corruption Watch (note 16 above) para 27.

⁴¹ The court in *Moseme Road Construction CC and Others v King Civil Engineering Contractors and Another* 2010 (3) ALL SA 549 (SCA) stated at para 1 ‘Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders.’

⁴² Corruption Watch (note 16 above) para 21.

6 RESEARCH METHODOLOGY

It is submitted that the research methodology adopted must be suited to achieve the aim of the study.⁴³ The aim of this study is to conduct an evaluation of the legislative framework pertaining to public procurement as well as salient provisions of the PCCA with a view to recommending legal reform in order to further reduce procurement corruption. Todorova asserts that the quantitative method of research ‘explains phenomena by collecting numerical data that are analysed using mathematically based methods in particular statistics.’⁴⁴ On the other hand Merriam asserts that ‘qualitative researchers are interested in understanding the meaning people have constructed, that is, how people make sense of their world and the experiences they have in the world.’⁴⁵

An evaluation of laws involves, in the main, interpretation. Traditionally legal research methodologies have been largely doctrinal, that is, research involved a purely internal analysis of the legal system involved, isolated from any societal context. In other words ‘legal reality’ was confined to legislation and case law.⁴⁶ Yet law is aimed at ordering society and influencing human behaviour. Van Hoecke therefore states that ‘adding a social science dimension or comparative dimension has proven fruitful.’⁴⁷ Caution, however, must be employed when using the term ‘social science’. During the middle ages, Van Hoecke states, law was seen as a ‘scientific discipline because at that time authoritative interpretation and not empirical research was seen as the main criterion for scientific status.’⁴⁸ But this changed fundamentally from the nineteenth century when physics became the model, and empirical data, mathematics and hypotheses became the basis of ‘scientific research’. It is submitted that this refers to a quantitative method of research. Van Hoecke questions: ‘where in law do we study empirical data, handle it with mathematical models or check hypotheses.’⁴⁹ The core business of legal research, Van Hoecke states is interpretation.

The research methodology employed in this study can therefore be said to be neither purely quantitative nor purely qualitative. This study entails the evaluation of laws through legal

⁴³ M R Todorova *The Valence of Electronic Word of Mouth (eWOM) and Choice of Online Opinion Platform: What Role do Motivations to engage in Positive and Negative WOM play in Consumers’ Platform Choice* (Master of Science thesis, Copenhagen Business School, 2012) 11.

⁴⁴ Ibid 12.

⁴⁵ S Merriam *Qualitative Research: A Guide to Design and Implementation* (2009) 13.

⁴⁶ M Van Hoecke *Methodologies of Legal Research. Which Kind of Method for what kind of Discipline* (2011) 1.

⁴⁷ Ibid 3.

⁴⁸ Ibid.

⁴⁹ Ibid.

interpretation. The study can be said to have characteristics of a qualitative approach in that the interpretation is aided by views of eminent scholars, organisations or judicial officers. However such views are not obtained through a process of interviews, focus groups or case studies, but through review of relevant literature. The study also contains a comparative dimension wherein the laws of three foreign jurisdictions are reviewed.

Since interpretation is essential to the research method employed it is submitted that where the mechanisms and methods of interpretation are accepted in terms of the principles of legal interpretation then the results of such study ought to be accepted. Dworkin submits that ‘legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally.’⁵⁰ And according to Goldswain ‘it has long been accepted that the strict rule of interpretation requires that the ordinary grammatical meaning of words must be applied.’⁵¹

This is referred to as the primary rule of interpretation. However if the ordinary grammatical language of a text gives rise to a glaring absurdity, then this approach may be departed from in order to give effect to the true intention of the legislature. This is also known as the purposive approach.⁵² Ascertaining the intention of the legislature in the interpretation of laws has long been held to be the golden rule of legal interpretation. This approach has however been criticised. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* the Supreme Court of Appeal held that

‘an expression such as “the intention of the legislature” is to be avoided, because it is a misnomer in so far as it connotes that interpretation involves an enquiry into the mind of the legislature. The enquiry is restricted to ascertaining the meaning of the language of the provision itself. There is no basis upon which to discern the meaning that the members of parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware. The sole benefit of expressions such as “intention of the legislature” is to serve as a warning to courts that the task they are engaged in is discerning the meaning of words used by others, not one of imposing their own views as to what it would have been sensible for those others to say.’⁵³

⁵⁰ R Dworkin ‘Law as Interpretation’ *Critical Inquiry* (1982). 9 No. 179.

⁵¹ GK Goldswain ‘The Purposive Approach to the Interpretation of Fiscal Legislation- the winds of change’ *Meditari Accountancy Research* (2008). 16 No. 2 107. 111.

⁵² *Ibid* .

⁵³ 2012 (4) SA 593 (SCA).

It is submitted that this approach of ascertaining the ‘intention of the legislature’ is to be avoided not only because it is a misnomer as pointed out by the Supreme Court of Appeal, but because South Africa has moved away from a system of parliamentary sovereignty to one of constitutional supremacy. Section 2 of the Constitution provides that:

‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’

In *Du Plessis and Others v De Klerk and Another* it was said that constitutional interpretation is concerned with the recognition and application of constitutional issues and not with the literal meaning of legislation.⁵⁴ In *Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others* the court remarked that the concept of the ‘intention of the legislature’ does not apply in a system of judicial review based on the supremacy of the Constitution because the Constitution and not Parliament, is sovereign.⁵⁵ As such, constitutional interpretation is not concerned with a search to find the literal meaning of legislation but with the recognition and application of constitutional values.

Flowing from the foregoing discussion, it is submitted that the method of interpretation used in this study is one which seeks to give effect to the provisions of the Constitution. With regard to public procurement, section 217 of the Constitution has laid down certain basic constitutional principles which all procurement related legislation must promote and give effect to. The legislative framework is evaluated using the constitutional method of interpretation.

The addition of a comparative dimension assists in meaningful interpretation. Comparison of domestic laws with those of other jurisdictions ensures that interpretation does not occur in a vacuum. The comparative dimension includes the study of procurement laws in three other jurisdictions. These are Hong Kong, Nigeria and Botswana. The rationale for choosing these jurisdictions, is as follows.

Hong Kong, like South Africa, has in place a common law legal system. During its time as a British colony Hong Kong was criticised as being one of the most corrupt places in the

⁵⁴ 1996 (5) BCLR 658 (CC) 722.

⁵⁵ 1994 (3) BCLR 80 (CC) 87.

world.⁵⁶ It no longer bears this stigma. The 2014 Transparency International Corruption Perception Index ranked Hong Kong number 17 out of a total of 175 countries.⁵⁷ In comparison South Africa ranked 67 in the same index. Lam states that: ‘Hong Kong has transformed itself from a graft-plagued city into a place distinguished by its strong anti-corruption regime.’⁵⁸ Kwok Man-wai submits that the success in reducing corruption so significantly in Hong Kong is attributable to a number of factors.⁵⁹ One of those factors, he states, is support from the legislature in fighting corruption.⁶⁰ He submits that Hong Kong has ‘comprehensive legislation to deal with corruption.’⁶¹

The main anti-corruption legislation is the Prevention of Bribery Ordinance⁶² (hereinafter referred to as ‘POBO’) which became effective since 1971. The POBO was tailor-made and designed specifically for Hong Kong.

With respect to procurement the Hong Kong government procurement process is governed by the Stores and Procurement Regulations issued by the Financial Secretary under the Public Financial Ordinance.⁶³ These Regulations are supplemented by Financial Circulars and Financial Services and Treasury Bureau Circular Memoranda.⁶⁴ The Stores and Procurement Regulations are applicable to stores purchased or acquired on behalf of government, excluding land and buildings, as well as services performed by firms or organisations for and on behalf of government and revenue contracts that generate revenue for and on behalf of government.⁶⁵

⁵⁶ T Kwok Man-wai ‘Formulating an Effective Anti-Corruption Strategy-The Experience of Hong Kong ICAC’ Paper presented at the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders available at http://www.unafei.or.jp/english/pdf/PDF_rms/no69/16_P196-201.pdf accessed on 19 June 2015.

⁵⁷ The Transparency International Corruption Perception Index ranks countries and territories on how corrupt their public sector is perceived to be. The lower the number of the ranking the less corrupt the country is perceived to be in relation to other countries. Available at: <https://www.transparency.org/cpi2014/results#myAnchor1> accessed on 15 June 2015.

⁵⁸ S Lam ‘Tackling Corruption: The Hong Kong Experience’ Visiting experts paper presented at the 2013 United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders available at: http://www.unafei.or.jp/english/pdf/RS_No83/No83_16VE_Lam.pdf accessed on 15 June 2015.

⁵⁹ Kwok Man-wai (note 56 above).

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² 102 of 1970.

⁶³ 3 of 1983.

⁶⁴ www.fstb.gov.hk/tb/en/guide-to-procurement.htm#topic-3 accessed on 12 April 2014.

⁶⁵ Ibid.

Owing to Hong Kong's transformation it is submitted that a review of its laws on public procurement as well as its anti-corruption legal framework, may serve to provide certain best practices which may be useful in evaluating the South African legislative framework.

The other country considered for comparison is Nigeria. One persistent but dubious accolade conferred on Nigeria is that it is one of the most corrupt countries in the world.⁶⁶ Nigeria ranked 136 in Transparency International's Corruption Perception Index for 2014. In 2007 Nigeria's first public procurement law was signed into effect. This is the Public Procurement Act.⁶⁷ Referring to this statute, Jacobs submits that:

'Many believed that this new law would curb corruption and abuse of power in the award and execution of government contracts, but seems to be a tool in the hands of government functionaries and politicians to loot treasury funds.'⁶⁸

The World Bank is reported to have noted that about 50% of projects in Nigeria are dead before they commence, as 'projects are designed to fail because the object is not to implement them but to use them as a vehicle to loot public funds.'⁶⁹ If the procurement laws of Nigeria are used readily as a tool by venal politicians and officials to execute corrupt acts, then a discussion of Nigeria's laws, including its anti-corruption legislation,⁷⁰ would perhaps grant insight into legislative loopholes and shortfalls which ought to be avoided in South Africa.

Botswana is the third country considered for comparison. In some respects the Botswana experience is similar to that of South Africa in that the independence gained by Botswana in 1966 presented both benefits and problems. The Government of Botswana states that:

'With independence came an increased rate of development. Development entailed both the acquisition of considerable revenue and an expansion of the public service. Maintaining tight control of both proved difficult despite political determination. Botswana acted resolutely in response to the increase in corruption and passed laws which defined acts of corruption, provided for specific powers of investigation and created effective deterrent punishment.'⁷¹

⁶⁶ Salisu, M 'Corruption in Nigeria' (2006) Lancaster University Management School.

⁶⁷ 14 of 2007.

⁶⁸ Jacobs O A. (2010) 'Procurement Laws in Nigeria: Challenge for attainment of its objectives' *University of Botswana Law Journal* 131.

⁶⁹ Ibid.

⁷⁰ Corrupt Practices and Related Offences Act 5 of 2000.

⁷¹ See official government website <http://www.gov.bw/en/Business/Topics/Fighting-Corruption-and-Money-Laundering/Low-corruption-level-in-Botswana/> accessed on 19 June 2015.

With respect to public procurement it appears that Botswana has adopted a more centralised approach as opposed to South Africa's decentralised approach.⁷² In Botswana the Public Procurement and Asset Disposal Board adjudicates and awards tenders for central government.⁷³ This approach however relates only to procurement in the Central Government. Procurement in the local authorities is attended to by the local authorities themselves, as is the situation in South Africa. As in South Africa, the Botswana Local Authorities Procurement and Asset Disposal Act⁷⁴ provides for the mechanism for procurement at local government level. Similarities to the South African system, such as the establishment of bid committees⁷⁵ are noted.

The Transparency International 2014 Corruption Perception Index rates Botswana as the least corrupt country in Africa, and ranked 31 globally.⁷⁶ Botswana has elements of the South African procurement model, most notably at the local government level. It would be prudent to study this jurisdiction. If Botswana has elements of the South African model and yet fares far better on the Transparency International Corruption Perception Index than South Africa, it is probable that significant lessons may be learnt from a review of the Botswana legal framework and its manner of implementation, both in respect of its procurement laws and its anti-corruption laws.

7 CONCLUSION

Public procurement is a sector prone to corruption. The research problem identified in this chapter is that the legislative framework applicable to public procurement and the provisions of the PCCA are not sufficiently conducive to reducing corruption within this sector. The aim of this study is to conduct an evaluation of the laws applicable to public procurement as well as salient provisions of the PCCA with a view to recommending appropriate legal reform in order to reduce public procurement corruption.

This chapter has identified five key research questions, which will inform the legislative evaluation to be undertaken. The Constitution sets out five basic principles which all procurement legislation must promote. It is accepted that constitutional interpretation is the

⁷² South Africa does not have a central tender board which adjudicates and awards tenders at any level of government. All public procurement in South Africa is carried out by the government department seeking to procure a good or service.

⁷³ <http://www.ppadb.co.bw> accessed on 12 April 2014.

⁷⁴ 17 of 2008.

⁷⁵ Sections 8-24 of Act 17 of 2008.

⁷⁶ www.transparency.org Country Perception Index for 2014.

authoritative method of interpretation in South Africa. Therefore the legislative analysis will be undertaken with a view to giving effect to the provisions of the Constitution. Further to this a discussion of procurement and corruption laws applicable in Hong Kong, Nigeria and Botswana will provide a comparative dimension to the study.

The following chapter provides a review of literature on the phenomenon of corruption. This literature review assists and informs an understanding of corruption. Chapter three provides a discussion of the international law framework pertaining to anti-corruption as well as the constitutional framework pertaining to public procurement in South Africa. In South Africa, international law plays an important role in legal interpretation. If the study is to recommend legal reform aimed at reducing corruption, an understanding of domestic obligations in terms of international law is important. An understanding of the constitutional procurement framework is also important to ensure that the interpretation of laws is undertaken in a manner which gives effect to the Constitution.

This is followed by the evaluation of the domestic legislative framework in chapter four. In South Africa the principle of judicial precedent plays an important role in legal development. Case law therefore cannot be ignored in understanding and interpreting the law. The factual scenarios provided in case law also ensure that the legal interpretation undertaken is not done in an academic vacuum. A discussion of salient case law is presented in chapter five.

Chapter six provides a discussion of the laws in each of the foreign jurisdictions mentioned above. From this discussion, best practices are distilled or problematic legislative provisions are identified. Chapter seven concludes the study with recommendations for legal reform emanating from the domestic legislative evaluation as well as lessons learnt from the comparison of foreign laws.

CHAPTER TWO: THE PHENOMENON OF CORRUPTION: A LITERATURE REVIEW

1 INTRODUCTION

In this chapter the phenomenon of corruption is discussed. This literature review includes the views of various scholars as well as those whose writings and opinions are informed by their experiences from working in sectors or organisations which face corruption regularly. Corruption has plagued human societies for generations.¹ According to Venegas, ‘people everywhere are more concerned than they ever have been about corruption and business ethics.’²

Corruption occurs around the world, across a range of institutional, organisational and cultural settings.³ Its manifestations are varied and its causes are many.⁴ Different cultures, societies and nations may also view corrupt acts differently. This is succinctly demonstrated by Rosen in the following excerpt:

‘Gathered in the guest room of a Berber friend’s house in the Atlas Mountains of Morocco after the Friday prayers, Hussein turned from the assembled village men and asked me: “Is there corruption in America?”

“Yes”, I answered.

“Give us an example”, he gently inquired. So, as the room quieted I gave an example of a kickback arrangement. “Ah, no”, said Hussein, as the others’ heads shook in unison, “that is just buying and selling.” So I mentioned the Watergate scandal. “No, no”, Hussein replied to common assent, “that is just politics.” So I gave an example of nepotism. “No, no, no”, all the voices cried out, “that is just family solidarity.” So, as I struggled to think of an example that would maintain the honor of my country for being every bit as corrupt as anyone else’s, Hussein turned to the others and said, with genuine admiration: “You see why America is so strong – the Americans have no corruption!”⁵

¹ In the 16th Century play ‘A Man for All Seasons’ the character Richard Rich’s opening remark is: ‘But every man has his price’. It is submitted that that statement is as relevant today as it was in the sixteenth century.

² J C Venegas ‘Understanding and Preventing Corruption: Risk, Prevention and Reporting’ available at <http://www.globalbankersinstitute.com/articles/understanding-and-preventing-corruption/pdf> , accessed on 29 April 2014.

³ Ibid.

⁴ E R Klitgaard *Controlling Corruption* (1989) xi.

⁵ L Rosen ‘Understanding Corruption’ (2010) 5 *The American Interest* 576, 576.

It can be seen from the above excerpt that an act must offend a person's sense of morality in order for it to be viewed as corrupt. However despite such differing views about which practices constitute corruption, it is accepted that the single most devastating effect of corruption is that the cost of corrupt acts is borne by the poor and powerless, while the benefits are enjoyed by the rich and powerful.⁶ This is particularly so in the realm of the public sector, as corruption in this sector involves the resources and commodities that legally and rightfully belong to the public, and which are administered by public figures.⁷

According to Transparency International understanding corruption is essential to combating it.⁸ It is submitted that despite the varying opinions on whether certain acts would qualify to be denounced as corrupt as illustrated above, there is a generally accepted world view on what constitutes corruption. This literature review therefore provides a global understanding of the phenomenon of corruption as well as an understanding of corruption within the South African context, more specifically the public procurement context.

2 UNDERSTANDING CORRUPTION

2.1 Defining Corruption

For much of the twentieth century corruption was a taboo subject.⁹ But after the end of the Cold War the West showed greater interest in developing and under-developed countries for the purposes of market penetration and foreign investment.¹⁰ A substantial body of current literature on the topic of corruption centres around the effects of corruption on foreign direct investment. In the 1970's the United States of America (hereinafter referred to as the 'U.S') initiated the first legal step to combating corruption in international business as a result of investigations by its Securities and Exchange Commission.¹¹ This led to the passing of the Foreign Corrupt Practices Act in 1971 which makes the bribing of foreign officials by U.S firms a criminal offence.¹² While the U.S expected other developed countries to follow suit

⁶ Venegas (note 2 above).

⁷ Wang, Wai-hong & Kenny *Comparative Studies of anti-corruption law between Hong-Kong and China* (Master of Laws in Chinese Law Thesis, University of Hong Kong, 2003).

⁸ Available at <https://www.transparency.org/topic/detail/education/> accessed on 01 May 2013.

⁹ I Carr 'Corruption, Legal Solutions and Limits of Law' (2007) 3 *International Journal of Law in Context* 227.

¹⁰ W De Maria 'Cross Cultural Trespass: Assessing African Anti-Corruption Capacity' (2008) 8 *International Journal of Cross Cultural Management* 318.

¹¹ Carr (note 9 above).

¹² M Szeftel 'Misunderstanding African Politics: Corruption & the Governance Agenda' (1998) 25 *Review of African Political Economy* 222.

and enact similar legislation, the spotlight on corruption really began to shine brightly from the mid 1990's.

From the time of the 1996 speech of the then Chief Executive Officer of the World Bank, when he famously referred to the '*cancer of corruption*' in Africa, the World Bank has taken a leading role in the anti-corruption crusade.¹³ Thai also states that 'research on corruption has mushroomed since the 1990's when donor communities began to increasingly recognise that corruption is a major impediment to economic development.'¹⁴ Emanating from this efflorescence of literature on the topic are attempts by many to define corruption.

Anderson asserts that:

'Corruption is a term carrying many different and complex interpretations. Derived from the Latin "corruptio", meaning depraved condition, state of decay or bribery, corruption has traditionally been associated with moral decadence.'¹⁵

Tanzi asserts that:

'Corruption has been defined in many different ways each lacking in some aspect. A few years ago, the question of definition absorbed a large proportion of the time spent on discussions of corruption at conferences and meetings. However, like an elephant, while it may be difficult to describe, corruption is generally not difficult to recognise when observed. The most popular and simplest definition of corruption is that it is the abuse of public power for private gain.'¹⁶

The above definition offered by Tanzi is also the definition adopted by the World Bank.¹⁷

Aligned to this definition but stated differently Nye defines corruption as:

'Behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.'¹⁸

¹³ E Harrison 'Corruption' (2007) 17 *Development in Practice* 673.

¹⁴ V.K Thai 'Measuring Losses to Public Procurement Corruption: The Uganda Case' Paper presented at 3rd International Public Procurement Conference Proceedings available at http://www.ippc.ws/ippc3_proceedings.html accessed on 14 May 2013.

¹⁵ S Anderson 'Corruption in Sweden: Exploring Danger Zones and Change' (2002) Research Report Department of Political Science, Umea University, Sweden available at <http://www.diva-portal.org> accessed on 30 April 2014.

¹⁶ V Tanzi 'Corruption Around the World: Causes, Consequences, Scope and Cures' (1998) 45 International Monetary Fund Staff Papers 564.

¹⁷ Available at <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> accessed on 12 May 2013.

Fijnaut and Hubert define corruption as:

‘involving behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and *unlawfully*¹⁹ enrich themselves, or those associated with them, by the misuse of the public power entrusted to them.’²⁰

Manzetti and Wilson define corruption as an *illegal*²¹ transaction where ‘public officials and private sector actors exchange goods for their own enrichment at the expense of society at large.’²²

It is submitted that the attractive feature of these two latter definitions is that they introduce the concept of unlawfulness. Often corruption is defined (in scholarly works, academic literature and general discourse as opposed to instruments of law such as statutes) with reference to morality. It is described as an act of greed and illicitness caused by such various factors as gambling, job frustration, administrative disorganisation and vanity.²³ Williams and Quinot state as follows:

‘First of all, corruption is an issue that is steeped in morality and ethics, which even in secular societies is imbued with elements of disapprobation, shame and wrongdoing, making it a sensitive subject to address.’²⁴

It is submitted that because corruption is defined with such close reference to ethics and morals, one finds the kind of differing views about it, as illustrated in the excerpt by Rosen earlier.²⁵ This is because issues of morality and ethics are subjective. A discussion of the different perspectives of corruption will assist in obtaining a broader understanding of it.

2.2 Corruption: A Divergence of Perspectives

This section highlights differing perspectives on corruption, including those views or theories which may link corruption to positive outcomes and even accord a cultural acceptability to corrupt practices.

¹⁸ J Nye ‘Corruption and Political Development: A Cost-Benefit Analysis’ (1967) *American Political Science Review* 419.

¹⁹ Own emphasis.

²⁰ C Fijnaut & L Hubert *Corruption, Integrity and Law Enforcement* (2002) 4.

²¹ Own emphasis.

²² L Manzetti & J.C Wilson ‘Why do Corrupt Governments Maintain Public Support’ (2007) *Comparative Political Studies* 950.

²³ Klitgaard (note 4 above) xi.

²⁴ S Williams & G Quinot ‘Public Procurement and Corruption: The South African Response’ (2007) 124 *SALJ* 339,340.

²⁵ Rosen (note 5 above).

Rose-Ackerman asserts as follows:

‘Corruption has different meanings in different societies. One person’s bribe is another person’s gift. A political leader or public official who aids friends, family members and supporters may seem praiseworthy in some societies and corrupt in others.’²⁶

De Sarden offers some valuable insight on corruption in Africa from the viewpoint of the participants and argues that corruption is ‘socially embedded in African societies due to different African practices, ways of living and beliefs.’²⁷ Referring to Nye’s definition of corruption cited above, de Sarden begins by asserting that the illegality of the practices implied in that definition can be perfectly legal in other historical and social contexts.²⁸ The following assertion by de Sarden is particularly insightful:

‘Everyone in Africa has routine experience in dealing with corruption (and the like), this being a part of the social landscape. It has even become a part of popular know-how, at the base of good usage of administrative services, and is indispensable for survival in the post-colonial milieu.’²⁹

The above quotation is indicative of certain realities. Firstly that corruption is almost a way of life in Africa, and being part of the social landscape, means it has found some form of acceptance, while not in a legal sense, but certainly from a social standpoint. The word ‘survival’ may also indicate a lack of legitimate alternatives available to people. Similarly in Nigeria, Smith contends that what may appear to be corruption to the onlooker is actually survivalist behaviour as people navigate Nigeria’s clientelistic political economy.³⁰ De Sarden cites various types of logics which may lead to the ‘cultural embeddedness’ of corruption in Africa.³¹

2.2.1 *The Logic of Negotiation*

The logic of negotiation stems from the view that corruption is, in its simplest form, a transaction.³² Bargaining is a common tool employed in transactions of almost any kind. De Sarden explains that bargaining is commonly part of African tradition, citing an example as

²⁶ S Rose-Ackerman *Corruption and Government. Causes, Consequences and Reform* (1995) 5.

²⁷ J P Olivier de Sarden ‘A Moral Economy of Corruption in Africa’ (1999) 37 *Journal of Modern African Studies* 25-52.

²⁸ Ibid.

²⁹ De Sarden (note 27 above) 28.

³⁰ D Smith ‘Kinship and Corruption in Contemporary Nigeria’ available at www.sundaytimes.co.za/printedition/news/article.aspx?id=402137 accessed on 26 October 2013.

³¹ De Sarden (note 27 above).

³² *ibid* 36.

socially acceptable as marriage where bargaining plays a very crucial role in African tradition, and asserts that the practice of corruption benefits from this logic of negotiations and bargaining.³³

2.2.2 *The Logic of Gift-Giving*

The logic of gift-giving bears a significant influence on the practice of corruption. In the context of African culture de Sarden points out that:

‘The giving of little gifts is one of the thousands of actions of everyday life, mostly as thanks for services rendered.’³⁴

The act of gift-giving is above all an act of moral duty. According to de Sarden’s explanation of this logic, the act of gift-giving shows appreciation for some kindness or goodness shown to the giver, and is in fact expected by the person who renders the kindness. This reciprocity is practised equally in the direction of superiors, equals or inferiors.³⁵ He then argues that many practices of petty corruption fall into this gift-giving category: ‘one owes a little something by way of thanks to a compliant or helpful civil servant.’³⁶

In traditional Africa, Van der Walt points out, it was a common feature to offer gifts to people in authority or in some respectable position in society.³⁷ Some of these gifts were bribes in anticipation of a reciprocal favour. Sissener talks of the logic of gift-giving in Chinese society as well.³⁸ In China Sissener states, there is a set of practices called ‘guanixi’ which literally translates to ‘social relationships or social connection’.³⁹ Sissener describes this as a ‘social practice which helps foster good relations, a practice of reciprocity among neighbours, friends and family.’⁴⁰ He also acknowledges though that in the Chinese cultural discourse there is often a fine line between the practice of ‘guanixi’ and bribery.⁴¹

The act of gift-giving in African societies though may go beyond just good neighbourliness. Apter states, that ‘African civil servants may be obliged to share the proceeds of their public

³³ Ibid 36-37.

³⁴ Ibid 38.

³⁵ Ibid 39.

³⁶ Ibid 39.

³⁷ B J Van der Walt ‘Corruption: A Many-Headed Monster’ (2001) 66 *Koers Journal* 691.

³⁸ K T Sissener ‘Anthropological Perspectives on Corruption’ (2001) Report for the Chr. Michelson Institute, Development Studies and Human Rights 11.

³⁹ Ibid.

⁴⁰ Ibid 13.

⁴¹ Ibid at 13.

offices with their kinfolk.’⁴² In Africa and in South Africa there is a concept known generally as ‘Ubuntu’. Chaplin points out that the cardinal spirit of Ubuntu is expressed in isiXhosa⁴³ as ‘Umntu ngumntu ngabanye abantu’, understood in English as ‘a person is a person because of other people’⁴⁴. Does this mean, however, that the practice of Ubuntu encourages corruption? It is submitted that certainly a distorted understanding and application of this humanistic and socially cohesive practice may indeed be used by some to justify acts of corruption. In addition it may blur the line between acts of genuine humanness and acts of venal corruption. Khomba and Kangaude-Ulaya assert that:

‘Africans are social beings that are in constant communion with one another in an environment where a human being is regarded as a human being only through his or her relationships to other human beings. Therefore, the survival of a human being is dependent on other people – in the community and society.’⁴⁵

Ubuntu is therefore a means of ensuring survival through communal caring and sharing. De Sarden asserts that corruption may be seen as indispensable in Africa as a means of survival.⁴⁶ Therefore if both, the practice of Ubuntu as well as corruption, are capable of being viewed as survival mechanisms in Africa, then certainly one living within such a context may find difficulty in distinguishing a venal act of corruption from a genuine and humane act of Ubuntu.

Perhaps the definition offered earlier that corruption is the misuse of public office for private gain, ought to be revisited, in order to distinguish Ubuntu practices from venal acts of corruption. Where Ubuntu is primarily concerned with the common good of the collective, corruption is perpetrated in the pursuit of individual gain. Corruption as a practice is ‘rooted in the pursuit of individual prosperity as opposed to the common good.’⁴⁷ In this sense corruption is the antithesis of Ubuntu.

The survivalist argument also tends to lend credence to the argument of Manzetti and Wilson that people in countries where ‘government institutions are weak and patron-client

⁴² As quoted by M Mbaku ‘Bureaucratic Corruption in Africa: The Futility of Cleanups’ (1996) 16 *CATO Journal*.

⁴³ isiXhosa is one of South Africa’s eleven official languages as prescribed by section 6 of the Constitution.

⁴⁴ K Chaplin ‘The Ubuntu Spirit in African Communities’ available at www.coe.int/dg4/cultureheritage/culture accessed on 26 October 2013.

⁴⁵ KJ Khomba & CE Kangaude-Ulaya ‘Indigenisation of Corporate Strategies in Africa: Lessons from the African Ubuntu Philosophy’ (2013) 12 *China-USA Business Review* 674.

⁴⁶ De Sarden (note 27 above) 28.

⁴⁷ G Fraser-Moleketi ‘Towards a Common Understanding of Corruption in Africa’ (2009) 24 (3) *Public Policy and Administration* 331.

relationships strong, are more likely to support a corrupt leader from whom they expect to receive tangible results.’⁴⁸ If officials were not corrupt, people would not have access to basic services needed for survival.

2.2.3 *The Logic of Solidarity Networks*

The logic of solidarity networks in Africa is another influence on the practice of corruption. De Sarden asserts that there are a number of solidarity networks in Africa and that these networks include a general obligation of mutual assistance.⁴⁹ These networks stem not only from family relations, but extend far beyond these to peer groups, school relations, working colleagues and even political party comrades. He asserts that:

‘solidarity networks in Africa are far more elaborate and sizeable than in the Northern regions of the world where factors such as the withdrawal of the nuclear family, confinement of friends and acquaintances to limited circles, the absence of relations between neighbours among them, have made it negligible.’⁵⁰

Within such networks in Africa de Sarden points out that:

‘One cannot refuse a service, a favour, a bit of string-pulling or compliance to a relative, neighbour, party comrade or friend.’⁵¹

2.2.4 *The Logic of Predatory Authority*

The logic of predatory authority de Sarden asserts is:

‘The right that many persons holding positions of power accord themselves to proceeds to various types of extortion, to the detriment of their “subjects”. These royal prerogatives which their victims describe as rackets, appear in the eyes of the beneficiaries, not simply as a matter of personal choice, but rather as a rightful aspect of their office.’⁵²

2.2.5 *The Logic of Redistributive Accumulation*

De Sarden explains the logic of redistributive accumulation as follows:

⁴⁸ Manzetti and Wilson (note 22 above).

⁴⁹ De Sarden (note 27 above) 40.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid 41-42.

‘A civil servant who accedes to a prestigious position, a post of responsibility, and of course to an appointment to be “juicy”, must, in the sight of his relatives, profit from this and spread the benefit around.’⁵³

These ‘logics’, while exerting continuous pressure on social actors, also help to accord a cultural acceptability to corruption. Given the strong emphasis on social structures and human relations within African communities, even the enforcement of corruption, in instances where it is condemned, is difficult. This is because it is extremely difficult to report a friend or neighbour to the police. In a face-to-face society de Sarden points out, the price of open conflict is too high. He asserts that:

‘It is unthinkable to denounce to the police a relative, a neighbour, or a friend, that is, someone with whom one has a personal tie, even a weak one: social disapproval would be too heavy.’⁵⁴

The complexities of African societies have a huge influence on corruption. While African traditional and cultural practices, such as Ubuntu, may be worthy of praise for their humanitarian characteristics, the opportunities for corruption cannot be ignored. However such practices and beliefs are not confined to Africa. Sissener asserts that in many developing nations, holders of public office derive their administrative and professional legitimacy from ‘training in modern European administration, but their social legitimacy may imply to act in conformity with different socio-cultural logics.’⁵⁵

When corruption is looked at from an economic point of view there seems to be little agreement about its effect on economic growth. Some researchers such as Huntington suggest that corruption might be ‘desirable, especially to avoid bureaucratic delay.’⁵⁶ Mo states that from this perspective:

‘Corruption works like piece-rate pay for bureaucrats, which induces a more efficient provision of government services, and it provides a leeway for entrepreneurs to bypass inefficient regulations. From this perspective, corruption acts as a lubricant that smoothens operations and, hence, raises the efficiency of an economy.’⁵⁷

⁵³ Ibid 42.

⁵⁴ Ibid 30.

⁵⁵ Sissener (note 38 above) 11.

⁵⁶ S P Huntington *Political Order in Changing Societies* (1968) 65.

⁵⁷ H P Mo ‘Corruption and Economic Growth’ 29 *Journal of Comparative Economics* 66.

Manzetti and Wilson refer to this as the ‘functionalist theory.’⁵⁸ Mo, however, argues that this practice once again shows how corruption favours the ‘haves’ as opposed to the ‘have nots’. He argues that:

‘small businesses and innovators, who generally have less disposal money will not be able to offer as high bribes as more established businesses can.’⁵⁹

Further, he states, smaller businesses generally need government supplied goods, ‘such as permits and import quotas, more than established businesses do.’⁶⁰

Mauro suggests that a second reason why corruption might raise economic growth is that government employees work harder when they are allowed to levy bribes.⁶¹ It is undoubtedly so that corruption has been linked to economic growth. In Indonesia, Thailand and Korea, for example, corruption and growth have gone together.⁶² In light of this Rose-Ackerman questions that perhaps then such countries ought not to be overly concerned with corruption when designing economic reform policies and that perhaps such countries should accept the diversion of funds. However Rose-Ackerman asserts that there are two fundamental arguments against such tolerance:

‘Firstly systemically corrupt countries that have nevertheless experienced satisfactory economic growth risk sinking into a downward spiral. Corruption can feed on itself to produce higher illegal payoffs until growth is undermined. Second, economic growth is not the only goal worth pursuing. Corruption also tends to distort the allocation of economic benefits, favouring the haves over the have-nots and leading to less equitable income and distribution.’⁶³

While corruption may lead to economic growth it is submitted that such growth is superficial. If such growth occurs as a result of corruption it is unsustainable. From an economic perspective it has also been argued that corruption offers the less advantaged an opportunity to access government services.

However from a social perspective Ward contends that while some may recognise the opportunities that corruption, illegality and informality may offer, such practices do little to address the underlying structural inequalities within society that lead to poverty in the first

⁵⁸ Manzetti & Wilson (note 22 above) 950.

⁵⁹ Mo (note 57 above).

⁶⁰ Mo (note 57 above) 66.

⁶¹ P Mauro ‘Corruption and Growth’ (1995) *The Quarterly Journal of Economics* 681.

⁶² S Rose-Ackerman ‘Corruption and the Global Economy’ (1997) *Institute for International Economics* Edited by A K Elliot 33.

⁶³ *Ibid.*

place.⁶⁴ Therefore while offering some relief, corruption may intensify and extend existing relations of exploitation, dependency and stunted life-chances for the majority of the population.

While different cultures and perspectives may tend to reveal a certain level of acceptability of corrupt practices, the extent of the evil consequences of corruption, particularly to those who are the most vulnerable in any society, cannot be successfully argued against. It is a serious indictment on those nations, where studies have revealed that corruption is seen as the only option available to access government services. But it would be perverse to use this finding to suggest then that corruption presents positive consequences by ensuring that red tape in bureaucracy is avoided. Corruption, in whatever form, is harmful. As Skweiyiya pointed out: 'Every single act of corruption chips away at our efforts at employment creation, poverty alleviation and nation building.'⁶⁵

Arriving at a universally accepted definition of corruption may prove impossible. Yet it is a practice which occurs not only in certain regions of the world but globally, including those countries which are generally lauded for being corruption free.

2.3 Corruption: A Global Phenomenon

A study of Transparency International's Corruption Perception Index reveals that the countries mostly perceived to be corrupt are countries in Africa, Asia and Eastern Europe, that is, countries which have gone through major political change, political revolutions and countries which are in transition, mainly from autocratic authoritarian rule to democratic forms of governance.⁶⁶

In Eastern Europe a phenomenon has arisen of making corruption synonymous with democracy. When reformers announce political change from repressive or authoritarian systems, people living under those regimes then believe that they experience increases in corruption under the new governance regime. These perceptions of increased corruption following democratisation and economic change are a result, mainly of the inability of

⁶⁴ M.P Ward *Corruption, Development and Inequality* (1989) 1.

⁶⁵ Skweiyiya as quoted by S Sangweni & D Balia 'Fighting Corruption: Strategies for Reform' (1999) University of South Africa 13.

⁶⁶ Transparency International is a global non-partisan organisation with a presence in over 100 countries whose mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. Transparency International's Corruption Perceptions Index is a study which measures perceived levels of public sector corruption in 177 countries and territories. Available at www.transparencyinternational.org accessed on 27 April 2014.

delivering on promises made by proponents of the democratic order prior to assenting to power.⁶⁷ When people are not given what they were promised the perception is that corruption is the reason for this failure. This may explain why according to Transparency International's studies, countries in such regions are seen to be most corrupt. The fact that Transparency International's studies are based on *perceptions*, should not be over-looked. However on the other hand Goel and Nelson submit that it is practically impossible to measure the extent of corrupt activity in a country as such practices are shrouded in secrecy.⁶⁸ It may therefore be unfair to make a general statement that corruption occurs more in certain nations as opposed to others.

As Klitgaard points out, corruption is a worldwide phenomenon.⁶⁹ Corruption is not just a reality in the developing and poorer world. In the United Kingdom, for instance, complacency and hypocrisy about corruption make it more dangerous.⁷⁰ Redlawsk and McCann state that there are few subjects in American politics that attract as much attention as corruption.⁷¹ Evans points out that some spectacular scandals in the western world have brought home the fact that corruption is not confined to the developing world.⁷² Tanzi asserts the following:

‘In countries developed and developing, large or small, market-oriented or otherwise, governments have fallen because of accusations of corruption, prominent politicians have lost their official positions and in some cases whole political classes have been replaced.’⁷³

The five Scandinavian countries, Denmark, Iceland, Sweden, Norway and Finland are known to be among the least corrupt countries in the world. According to Transparency International's 2014 Corruption Perceptions Index these countries are within the top twelve countries perceived to be the least corrupt in the world.⁷⁴

⁶⁷ Ibid.

⁶⁸ R K Goel & M A Nelson ‘Causes of Corruption: History, Geography and Government’ (2010) 32 *Journal of Policy Modelling* 434.

⁶⁹ Klitgaard (note 4 above).

⁷⁰ R B Evans ‘The Cost of Corruption’ A discussion Paper on Corruption, Development and the Poor for Tearfund which is a Christian International Development charity organisation available at www.tearfund.org accessed on 18 September 2015.

⁷¹ P D Redlawsk & A J McCann ‘Popular Interpretations of ‘Corruption’ and their Partisan Consequences’ (2005) 27 *Political Behaviour* 261.

⁷² Evans (note 70 above) 2.

⁷³ Tanzi (note 16 above) 559.

⁷⁴ Available at <https://www.transparency.org/cpi2014/results> accessed on 22 June 2015.

Even in such countries venal acts of corruption do take place. The Rafsanjani-Statoil corruption case was one such example, where Norwegian company Statoil was found guilty of paying \$15 200 000.00 to an Iranian consulting firm to bribe political figures in Iran to grant oil contracts to Statoil.⁷⁵

Norway has been ranked 5 in the 2014 Transparency International Corruption Perceptions Index, while Iran has been ranked 136.⁷⁶ This case is indicative of something interesting about corruption as a phenomenon. It illustrates how societies perceived to be more corrupt, such as Iran, create opportunities for corruption in international business deals involving companies from those countries that are generally lauded for being almost graft-free. This also lends credence to the argument that corruption is a crime of opportunity. Where opportunity presents itself, the temptation to succumb to corruption will be high.

In Sweden, Anderson conducted research and found that from September 1995 until May 1997 there were ninety-five cases of suspected improprieties and corruption reported in the Swedish *Dagens Nyheter* newspaper.⁷⁷ Anderson explains as follows:

‘Many of these cases involved misuse of public resources by public servants or politicians for their own benefit without the involvement of outside influence. About twenty-five of the cases concerned indirect transactions, indicating more unspecified transactions and tending to be of a more collective character. More than half of these involved politicians, mainly in conflict of interest situations in regards to decision-making and political financing. Cases implicating upper-level servants mainly were in the area of public procurement.’⁷⁸

Corruption scandals have also touched the Vatican and linked the political class directly to organised crime.⁷⁹ The global nature of corruption is clear. It afflicts traditional and modern societies, rich and poor countries, developed and underdeveloped nations.⁸⁰ As globalisation increasingly makes countries more dependent on one another, corruption anywhere in the world would, in most instances have an impact on others elsewhere. Goodman, Ma and Parbarue assert that:

⁷⁵ A Morten ‘Falske Fakturaer’ Dagens Naeringsliv (2011) available at www.dn.no accessed on 13 May 2013.

⁷⁶ Transparency International (note 74 above).

⁷⁷ Anderson (note 15 above).

⁷⁸ Ibid.

⁷⁹ Szeftel (note 12 above) 222.

⁸⁰ Van der Walt (note 37 above) 691.

‘in the new world order, which will see the rise of other nations, and not just the United States of America as the penthouse of power, corruption will start to have a greater global impact.’⁸¹

While the phenomenon of corruption may be difficult to define in a precise universal manner, an understanding of this phenomenon from a global perspective reveals that the effects of corruption are most severely borne by the poorest and most marginalised people in societies. In some societies especially where the efficient provision of services is dependent on acts of reciprocity, corrupt acts may be resorted to as a survivalist strategy; and the existence of specific traditional or cultural practices may blur the line between venal acts of corruption and genuine acts of generosity or gratitude.

Seeing that different cultures and societies have differing views on what constitutes corruption, it may be futile to attempt to define corruption in a universal manner. However, while nations and countries may view or define corruption differently, one thing is clear: corruption in whatever form exists in almost every corner of the globe. It is incumbent therefore on every nation seeking to reduce or combat corruption to articulate appropriate legal definitions of such practices which it seeks to combat.

That said, one should also be mindful of the new world order and countries’ mutual dependence on one another, as cited by Goodman, Ma and Parbarue above.⁸² This means that while cultural and societal idiosyncrasies and practices will have an impact on the manner in which corruption is defined and viewed domestically, globalisation requires that the prescripts of international instruments emanating from global and regional institutions such as the United Nations and the African Union are considered in the development or reform of local laws.

A broad definition of corruption is also undesirable, since as pointed out in chapter one, corruption occurs in almost every facet of human activity. Legal enforcement against such practices will require legally technical and specific definitions accorded to corrupt practices within strictly defined contexts. As already outlined in chapter one, one of the key research questions to be addressed in this study is whether provisions of the Prevention and Combating of Corrupt Activities Act⁸³ (hereinafter referred to as the ‘PCCA’) are suitably applicable to public procurement corruption. This question will include a discussion of

⁸¹ J Goodman, M Ma & J Parbarue ‘Confronting Corruption in the Developing World’ available at www.thepolitic.org accessed on 23 October 2013.

⁸² Ibid.

⁸³ 12 of 2004.

whether or not the legal definition of corruption in South Africa as outlined in the PCCA is adequately applicable to corruption occurring within the South African public procurement sector specifically. At this point it is prudent to examine corruption in the South African context, and specifically within the public procurement sector.

3 CORRUPTION: THE SOUTH AFRICAN CONTEXT

Since South Africa's political transition in 1994, a major feature of the country's new politics has been the centrality of issues around corruption in public controversy.⁸⁴ Corruption in the developing world, including South Africa is condemned most severely because the channelling of public funds into the pockets of a few means that millions live without adequate basic services. Hanyane and Naidoo aver that, since the advent of a democratic dispensation in South Africa, many people 'still lack access to the most basic necessities, and that poor service delivery has led to protests and unrest.'⁸⁵ South Africa has been dubbed 'the protest capital of the world'⁸⁶ and has one of the highest rates of public protests in the world.⁸⁷ It has been argued that widespread service delivery protests may soon take on an organisational character that will start off as discrete formations and then coalesce into a full-blown movement.⁸⁸ According to Alexandar:

'As many commentators and activists now accept, service delivery protests are part of a broader rebellion of the poor. This rebellion is massive. I have not yet found any other country where there is a similar level of on-going urban unrest. South Africa can reasonably be described as the "protest capital of the world".'⁸⁹

Hanyane and Naidoo submit that since 2004 an 'unprecedented wave of popular and violent protests has flowed across the country', and that allegations of rampant corruption and nepotism are among the reasons for such protests.⁹⁰

⁸⁴ See chapter one.

⁸⁵ B Hanyane & G Naidoo 'Progress and Challenges of Service Delivery in South Africa since 1994' (2012) 3 *Mediterranean Journal of Social Sciences* 178.

⁸⁶ C Rodrigues 'Black Boer and other Revolutionary Songs' available at <http://www.thoughtleader.co.za/chrisrodrigues/2010/04/05/on-revolutionary-songs/> accessed on 01 May 2014.

⁸⁷ P Alexandar 'Protests and Police Statistics: Some Commentary' available at <http://www.amandla.org.za/general-downloads/protests-and-police-statistics> accessed on 10 May 2014.

⁸⁸ N Ndebele 'Liberation Betrayed By Bloodshed' available at http://www.njabulondebele.co.za/images/uploads/Liberation_betrayed_by_bloodshed.pdf accessed on 01 May 2014

⁸⁹ P Alexandar 'A Massive Rebellion of the Poor' available at <http://mg.co.za/article/2012-04-13-a-massive-rebellion-of-the-poor> accessed on 01 May 2014.

⁹⁰ Rodrigues (note 86 above).

Mbeki argues that it would not be surprising if South Africa follows the same route as Tunisia where corruption within the highest political office eventually led to an angry insurrection which saw that country's president flee to Saudi Arabia.⁹¹ Mbeki states:

'The population had had enough of corruption by the powers that be and especially by the President's family which commanded vast amounts of wealth through business deals.'⁹²

Mbeki then goes on to compare and draw commonalities between the situation in Tunisia and business interests held by the South African First Family, since Jacob Zuma assumed office as President in 2009. Mbeki submits that in less than two years since Zuma took presidential office in 2009 the First Family owned iron ore prospecting rights, oil wells in the Congo, shipping businesses and gold mines.⁹³ While allegations or suspicions of corruption in the acquiring of such rights and business interests have not yet been proven, it is submitted that the point made by Mbeki is valid. In a country wracked by service delivery protests, the issue of corruption will often be first and foremost in the minds of ordinary citizens. This mind-set is justifiable taking into account the numerous instances wherein corruption has indeed been found or legitimately suspected within government departments and among government officials and politicians.

Hanyane and Naidoo explain that during the service delivery protests between 2009 and 2012, the protestors explained that they 'took to the streets because there was no way for them to get to speak to government, let alone to get government to listen to them.'⁹⁴ Taking into account these realities and the people's response to perceptions of corruption, it would be foolhardy to jettison Mbeki's caution that South Africa may follow the same route as Tunisia.

It is submitted that the government's response to corruption though has been shown to be less passionate in its desire to see the crime eradicated. Although allegations and suspicions of corruption have plagued high level government officials and politicians, the complexity of post-apartheid South African politics has, at times, prevented these allegations and suspicions from being dealt with by the independent hand of the law, but have rather been handled in politically expedient ways.

⁹¹ M Mbeki 'Corruption and Dependence: South Africa's Road to Ruin or Salvation' available at www.opendemocracy.net accessed on 01 May 2014.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Hanyane & Naidoo (note 85 above) 171.

The *Shaik* case⁹⁵ brought to the fore allegations of corruption against a senior African National Congress⁹⁶ member and politician, Jacob Zuma who later became Head of State. It was common cause during the *Shaik* trial that between October 1995 and September 2002, Shaik and/or his group of companies made numerous payments totalling a substantial amount of money over to Zuma.⁹⁷ It was common knowledge that the manner in which corruption charges were levelled and then dropped by the National Prosecuting Authority, at various times, raised many questions in South Africa. Initial charges of corruption against Zuma were brought by the then National Director of Public Prosecutions, one Bulelani Nqecuka. The National Director investigated both Zuma and the then Chief Whip of the African National Congress, one Tony Yengeni after allegations of abuse of power were levelled against them. While the erstwhile Chief Whip was found guilty, the case against Zuma was dropped, with the then National Director of Public Prosecutions stating that ‘there was *prima facie* evidence of corruption, but insufficient to win the case in court.’⁹⁸ Charges were subsequently reinstated by the National Prosecuting Authority only to be dropped again in April 2009.

It is worthy to note that Zuma became President of South Africa shortly thereafter after what South Africans agree was a ‘curious political drama between the former President and Zuma.’⁹⁹ Law experts have strongly questioned the grounds on which the National Director of Public Prosecutions withdrew the charges and suggested that this decision of the Prosecuting Authority was both ‘wrong and indefensible.’¹⁰⁰ It is evident from the various decisions of the Prosecuting Authority that the rule of law and the independent prosecution of corruption charges were probably not first and foremost in the mind of the Prosecuting Authority in the handling of this particular case.

The involvement of a high profile member of the ruling political party had seemingly brought along with it considerable political pressure. The court in *Zuma v National Director of Public Prosecutions* stated as follows after analysing the conduct of the then Director of Public Prosecutions:

⁹⁵ *S v Shaik* chapter one (note 4).

⁹⁶ The African National Congress has been the ruling political party in South Africa since 1994.

⁹⁷ *Zuma v National Director of Public Prosecutions* [2009] 1 ALL SA 54 (N) para 8.

⁹⁸ Available at http://news.iafricacom/specialreport/armsdeal_focus/265106.htm accessed on 13 May 2013.

⁹⁹ C Basset & M Clarke ‘The Zuma Affair, Labour and the Future of Democracy in South Africa’ (2008) 29 *Third World Quarterly* 787

¹⁰⁰ M Camerer *After Apartheid: Reinventing South Africa?* (2011) Edited by I Shapiro & K Tebeau 269.

‘There is a distressing pattern in the behaviour which I have set out above indicative of political interference, pressure or influence.’¹⁰¹

It was the reasoning of the court that had there been a *prima facie* case (as indicated by the Prosecuting Authority) against Zuma then the Prosecuting Authority was bound to institute a prosecution. The court went on to state the following after establishing that in law a prosecuting authority has the duty to prosecute where a *prima facie* case was established:

‘In other words Mr Nqcuca was saying that he had what would normally be sufficient to prosecute the applicant and yet he declined to do so. This decision is most strange. It was a total negation of the constitutional imperatives imposed on the NDPP to prosecute without fear and favour, independently and in consistent, honest and fair fashion.’¹⁰²

It appears that in instances where corruption involves high profile government figures, the arm of the law in South Africa is constrained by undue political pressure. A further example of such alleged constraint was the suspension of the former National Director of Public Prosecutions, one Vusi Pikoli, by the then State President Mbeki in 2007. Although the alleged basis for such suspension was irretrievable breakdown in the working relationship between the then Minister of Justice and Constitutional Development and the National Director of Public Prosecutions, the erstwhile National Director believed that he was removed from office for issuing a warrant of arrest in the case of former Police Commissioner, one Jackie Selebi.¹⁰³

It is evident that the South African political environment plays a significant role in determining how the law takes its course with respect to high profile corruption cases. It is comforting to note though that the courts, as seen in the *Zuma*¹⁰⁴ decision cited above, are quick to recognise political interference.

Basset and Clarke also point out how party politics within South Africa prevent political parties and political organisations from holding government accountable for instances of corruption. They illustrate how the country’s largest trade union federation, The Congress of South African Trade Unions (hereinafter referred to as ‘COSATU’) supported the current President in his 2009 election campaign despite the corruption charges levelled against him. Basset and Clarke state as follows:

¹⁰¹ *S v Zuma* (note 97) 120.

¹⁰² Ibid para 48-50.

¹⁰³ See note 98 above.

¹⁰⁴ *S v Zuma* (note 97 above).

‘COSATU soon prioritised campaigning for Zuma to triumph in the leadership race rather than taking the opportunity to push for stronger and more transparent oversight over the government. Its tolerance for his (Zuma’s) association with corrupt practices was disturbing, since ...corruption was becoming systemic and pervasive For the same reason however, the COSATU leadership did not need to be convinced that Zuma was innocent of the corruption charges. They were willing to defend him on the belief that the charges against him were politically motivated, rather than inspired by any real attempt to tackle corruption.’¹⁰⁵

The reason for COSATU’s action was motivated by political imperatives, which took precedence over an attempt to genuinely uncover any substance in the allegations of corruption. These political imperatives, as Basset and Clarke point out, were associated with a concern of the trade union federation that an outright condemnation of the corrupt practices within the African National Congress would ‘encourage the private sector to pull the ruling party to the far right of South African politics where private business interests take precedence over worker needs.’¹⁰⁶ It is submitted that under such a political climate, it will be extremely difficult to cultivate the political will to genuinely address the scourge of corruption.

This lack of urgency and enthusiasm to deal decisively with corruption, it is submitted, may also be seen in the planning strategies of the South African government. In 2011 the National Planning Commission¹⁰⁷ released its Diagnostic Document as a basis of the national dialogue among all South Africans.¹⁰⁸ This report identified the following nine challenges which needed to be addressed in order to reduce poverty and to achieve equality:

- ‘1. Too few South Africans are employed;
2. The quality of education for most black people remains poor;
3. Poorly located, inadequate and badly maintained infrastructure;
4. Spatial challenges continue to marginalise the poor;
5. South Africa’s growth path is highly resource-intensive and hence unsustainable;

¹⁰⁵ Basset & Clarke (note 99 above) 797.

¹⁰⁶ Ibid 791.

¹⁰⁷ The National Planning Commission is an initiative of the South African government and chaired by the Minister in the Presidency of National Planning. It is responsible for strategic planning for the country to ensure one national plan to which all spheres of government must adhere.

¹⁰⁸ Diagnostic Overview. National Planning Commission available at <http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Diagnostic%20Overview.pdf> accessed on 07 May 2014.

6. The ailing public health system confronts a massive disease burden;
7. The performance of the Public Service is uneven;
8. Corruption undermines state legitimacy and service delivery;
9. South Africa remains a divided society.¹⁰⁹

It is interesting to note the position which corruption occupies on the above national list of government priorities. Corruption is almost at the end of the list. While unemployment and education are indeed critical issues, it is submitted that such problems are often symptomatic of the deep-rooted existence of a more insidious disease called corruption.

Looking at the issue of education, in 2011 the Provincial Department of Education in Limpopo failed to timeously deliver textbooks to schools, which prompted a Presidential Task Team to investigate the late delivery of the books. Steyn, from rights group Section 27 was of the view that the Task Team ‘could have looked deeper into issues of fraud and corruption.’¹¹⁰ Chisholm explains that there were a number of revelations linking what became known as the ‘textbook debacle’ with corruption and argues that the question of corruption in textbook selection, procurement and distribution is not a new one.¹¹¹ The apartheid regime was notorious for corruption in textbook writing and selection procedures. While it is commendable that a Presidential Task Team was appointed to investigate the delivery of the books, Steyn’s question about why the report of the Task Team did not look closer at corruption is a valid one. It is therefore not surprising to see that corruption features almost at the end of a list of serious challenges as identified by the government.

It would be incorrect to deduce though that corruption has only become a reality in South Africa since 1994. There is no doubt that incidences of corruption or suspected corruption within the public sector have led to the popular belief that the government of the day led by the African National Congress is largely corrupt.¹¹² More so, Hyslop points out that:

¹⁰⁹ Ibid.

¹¹⁰ N Steyn ‘Task Team Releases Report on Limpopo Textbooks Debacle’ available at <http://www.mg.co.za/article/2012-10-05-task-team-releases-report-on-limpopo-textbooks-debacle> accessed on 08 May 2013.

¹¹¹ L Chisholm ‘Corruption in Education: The Textbook Saga’ available at <http://www.pari.org.za/wp-content/uploads/Chisholm-Corruption-in-education.-The-textbook-saga-Aug20121.pdf> accessed on 08 May 2013.

¹¹² T Lodge ‘Political Corruption in South Africa’ (1998) *African Affairs* 157.

‘the largely white opposition party, the Democratic Alliance has leaped on such issues to argue that the African National Congress government is riddled with malpractice and systemically covers up for supporters who are corrupt.’¹¹³

This thinking is seen also in *Crawford-Browne v The President of the Republic of South Africa and Another* wherein the applicant stated in his court papers that:

‘Political expedience or the protection of those involved nefariously in the arms deals is not a basis for refusing to appoint a commission of enquiry.’¹¹⁴

In 1999, the South African government announced its largest-ever post-apartheid arms deal, signing contracts totalling almost R 44 billion, to modernise its national defence force. This deal, known as the ‘arms-deal’ became the centre of controversy and allegations of large-scale corruption.

The African National Congress often responds stating that such perceptions are motivated by racism and resistance to change.¹¹⁵ However as with many other issues studied in South Africa, the political realities of the country, both past and present cannot be ignored. Hyslop argues that much of the corruption debate in South Africa centres around whether the new or the old regimes are more corrupt, but that such ‘simplistic polarisation of the public debate is inaccurate.’¹¹⁶

South Africa has been described as a ‘world in one country’.¹¹⁷ Schlemmer and Moller state that South Africa is one of the most complex societies of the world, divided by:

‘very considerable socio-economic inequality, ethnicity, race and by a distinction between a well-established, industrialised and commercialised economy on the one hand and a marginal economy based on subsistence production in traditional rural areas on the other.’¹¹⁸

¹¹³ J Hyslop ‘Political Corruption: Before and After Apartheid’ (2005) 31 *Journal of Southern African Studies* 773.

¹¹⁴ Applicant’s Heads of Argument in *Crawford-Browne v The President of the Republic of South Africa and Another* CCT 103/10 available at <http://www.constitutionalcourt.org.za/uhtbin/cgiisirsi/5tA5pNvbYE/MAIN/299830016/523/11745> accessed on 01 May 2014.

¹¹⁵ Rodrigues (note 86 above).

¹¹⁶ Hyslop (note 113 above) 774.

¹¹⁷ E Schwella ‘Public Sector Policy in the New South Africa: A Critical Review’. (2001) 24 *Public Performance and Management Review* 367.

¹¹⁸ L Schlemmer & V Moller ‘The Shape of South African Society and Its Challenges’ *Quality of Life in South Africa* (1997) 15.

This division is due largely to a previous system of governance which sought primarily to advance the interests of only a segment of the population and a system which focussed on the development of those regions inhabited only by such segment of the population. Many argue, that this system of apartheid itself was inherently corrupt, benefitting a few South Africans at the expense of the vast majority. Camerer submits that by its very nature and operation, the apartheid state and its ‘multiple systems of retaining power were corrupt.’¹¹⁹ Lodge states that:

‘Arguably a bureaucracy which was deliberately used as an instrument to foster the social and economic fortunes of one ethnically defined group has at least a form of transactive corruption built into its functioning from the inception of National Party rule.’¹²⁰

Lodge further submits that the belief that corruption during the days of apartheid were motivated by a desire to strengthen Afrikaaner nationalism, as opposed to personal gain and individualised relationships, is also not true.¹²¹ By the 1980’s, Lodge claims:

‘there was plenty of evidence indicating that corruption, not necessarily motivated by this desire, was common cause in certain government departments as well as in the homeland administrations.’¹²²

In 1978, the scandal involving the then Department of Information and one Louis Luyt,¹²³ wherein Luyt was loaned thirteen million rands by the Department to start up a newspaper, is one example which Lodge uses to support this claim.¹²⁴ In the 1980’s, Lodge comments further:

‘The department of Defence’s secret account and covert operations inside South Africa undertaken by the military also supplied plenty of opportunities for private gain.’¹²⁵

However the apartheid era was also not immune to routine petty corruption. Lodge mentions that in the Transkei in 1975 more than six hundred thousand rands were stolen by civil

¹¹⁹ Camerer (note 100 above) 274.

¹²⁰ Lodge (note 112 above) 164.

¹²¹ Ibid

¹²² According to Schedule 6 of the Constitution ‘homeland’ means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or self-governing territory. These were the former Transkei, Ciskei, Bophutiswana and Venda.

¹²³ Louis Luyt was a South African businessman, former president of the South African Rugby Federation Union and politician. He was prominent in establishing the Citizen newspaper which was embroiled in the information scandal of the late 1970’s. Available at <http://www.sahistory.org.za/people/louis-luyt> accessed on 5 May 2014.

¹²⁴ Lodge (note 112 above)164.

¹²⁵ Ibid.165.

servants from pensioners.¹²⁶ It would therefore not be accurate to state that corruption during the apartheid era was motivated solely by a desire to strengthen Afrikaaner nationalism.

Corruption, in every form, existed during the days of apartheid and currently exists in South Africa. It would be unfair though not to acknowledge that at least some of the corruption that occurs today is as a result of the legacy of apartheid. Lodge submits that:

‘it is interesting to note that today the least corrupt regions in South Africa are those which did not incorporate any of the former homeland states.’¹²⁷

Lodge further submits that much of the post 1994 corruption has occurred in bureaucratic spheres which were already notoriously venal such as social welfare and the police.¹²⁸

However even though the previous regime was inherently corrupt and even though a sizeable portion of that venality and cupidity may have spilled over to the new order, the new governance system also produced many new sources of stimulation for corrupt behaviour. Lodge explains that:

‘the new sources of corruption include non-meritocratic processes of bureaucratic recruitment and promotion inherent in certain kinds of affirmative action, tendering principles which favour small businesses, increasing shortages of skilled manpower in the public service and an ambitious expansion of the kinds and quantity of citizen entitlements to public resources.’¹²⁹

Freund makes an interesting finding. He asserts that the creation of a black elite involves enriching a small number of black African National Congress supporters but that probably this is necessary given the propensities of what remains of the established ‘embedded elites’ of the past.¹³⁰ It is interesting to note, therefore, that while some may prefer to believe that corruption in the past may have been attributed to the enhancement of Afrikaaner nationalism and not strictly individual gain or greed, in present day South Africa it may be asserted that corruption may be necessary to create a ‘black elite’ in response to the ‘embedded elites’ that the legacy of apartheid has produced. The challenge this creates, is that corruption may be seen as a means to re-distribute wealth which was unjustifiably channelled away from the

¹²⁶ Ibid 169.

¹²⁷ Ibid 172.

¹²⁸ Ibid

¹²⁹ Note 109 above at 182-183

¹³⁰ B Freund ‘South Africa: The End of Apartheid and the Emergence of the ‘BEE’ Elite’ (2007) 34 *Review of African Political Economy* 661.

majority in the past. The infamous words of a former African National Congress spokesman that ‘we did not struggle to remain poor’¹³¹ are quite telling in this respect.

This mind-set, it is submitted, may dilute the unlawfulness and immorality of corrupt acts. If senior statesmen and women and officials subscribe to such a mind-set, the challenge becomes greater and South Africa risks slipping into what Freund describes as a ‘predatory State’, that is one where there is plenty of state involvement of the wrong kind where private interests systematically loot the State.¹³² Freund states that in South Africa:

‘efforts have been made to create a new elite able to navigate the waters of corporate South Africa, but fundamentally loyal to the ruling political party.’¹³³

One can recognise the opportunities for corruption this would create. A review of corruption within the South African context has revealed the following. Corruption, whether grand or petty, has been prevalent in South Africa both during and post-apartheid. Neither the repressive apartheid regime, nor the democratic constitutional regime which succeeded apartheid, have been able to immunise itself from corruption motivated by private interests and individualised relationships. In present day South Africa there does not appear to be a strong and genuine political will to deal decisively with corruption as a crime. In fact the desire to re-distribute wealth may contribute to such state involvement which will see state resources being looted to satisfy private interests.

It is submitted that the lack of political will strengthens the argument for legal reform. Political will, while certainly a necessary factor in the fight against corruption, is not by itself the only mechanism with which to fight corruption. On the contrary it is submitted that where there are shortcomings and inadequacies in the laws themselves, no amount of genuine political will, will in any event assist in meaningfully eradicating corruption. It is evident from the *Zuma* judgement¹³⁴ that South Africa has a judiciary which is independent enough to recognise political interference in certain corruption matters. In a country which still has the benefit of respect for the rule of law through an independent judiciary, legal reform is probably the most effective way to create a bureaucracy that is as least corrupt as possible.

The fact that State resources and public funds may be used as means to redistribute wealth, strengthens the argument for legal reform specifically within the public procurement sector.

¹³¹ Camerer (note 100 above)271.

¹³² Freund (note 130 above) 662.

¹³³ Ibid 664.

¹³⁴ *Zuma v The National Director of Public Prosecutions* (note 97 above).

Corruption in the public sector most often involves the private sector especially in instances where the private sector is competing for government work. If the ruling political party is keen on creating economic opportunities for its loyalists, within the private sector, while at the same time being in control of the governmental processes involved in allocating government work to the private sector it is unavoidable and a certainty that corruption will occur. Freund goes so far as to state that the multi-billion rand annual state budget is an important tool in the quest to establish a black bourgeoisie.¹³⁵ Legal reform to close loopholes in procurement legislation and to make the legal framework less susceptible to irregularities is needed in order to ensure that the state budget is not looted to satisfy private and political interests.

Further to this corruption in South Africa is not confined to high profile matters involving senior politicians or bureaucrats. A review of cases in chapter five will show that the problem of procurement corruption or irregularities in the procurement processes are strongly suggestive of corruption having played a part, whether or not senior political figures or bureaucrats are involved.

The following section focuses on corruption in the South African public procurement sector specifically. In this section the South African public sector is discussed in brief. Thereafter this section addresses corruption specifically within the public procurement sector.

4 WHAT IS PROCUREMENT CORRUPTION?

4.1 The South African Public Sector in Brief

The Constitution proclaims South Africa as one sovereign, democratic State.¹³⁶ A state is defined as an ‘organised political community living under a government.’¹³⁷ South Africa is a sovereign state. This means it has supreme and independent authority over its geographical area. The idea that a state could be sovereign is connected to its ability to guarantee the best interests of its own citizens. From this general definition of a state, it is clear that the state is a concept different from government. Government is part of the broader state. Since a government is an entity under which an organised political community lives, government can be defined as an entity which exercises political direction and control over the actions of the members, citizens or inhabitants of communities.

¹³⁵ Freund (note 130 above) 666.

¹³⁶ Section 1 of the Constitution.

¹³⁷ *Concise Oxford English Dictionary* (1995) 544.

The preamble of the Constitution speaks of a united and democratic South Africa in which government is based on the will of the people and is made up of freely elected individuals. The South African government consists of three spheres: national, provincial and local government.¹³⁸ All three spheres exist under the principle of co-operative governance, meaning that each sphere is distinct, but interrelated and inter-dependent.¹³⁹ Government in turn has certain organs of state which are necessary to ensure its operations. These are the judiciary, the legislature and the executive.

Pragal offers a clear summary of how corruption may occur in all of these organs of state.¹⁴⁰ He asserts that corruption within the executive or the administration is often regarded as the 'classic' form of corruption wherein public officials or politicians may be bribed or improperly induced to confer benefits such as building permits, government contracts or trading licences on the briber. The legislature, being the supreme law making body, may be bribed by various lobbyists or sectors of society either to pass or disapprove legislation which may have an impact on their industries or sectors. Corruption within the judiciary may occur when a party to a law suit tries to influence the outcome of the trial by bribing the presiding officer.

The term public sector is broader than the term government. Government is part of the public sector but the public sector is not made up entirely and exclusively of government. Any entity which performs a public function is defined as falling within the category of the public sector. This will, for instance, include all institutions which fall under Chapter 9 of the Constitution, as well as all municipal entities and parastatals.¹⁴¹ Public sector institutions are however not confined to such organisations and will also include, but not limited to organisations such as universities. The public sector may therefore be broadly defined as consisting of those institutions, including government, whose mandates and functions are to act in the interests of the public or community in performing a public function.

Since government is the largest public sector institution, corruption in the public sector is almost always taken to mean corruption in government. Bolton states that in South Africa, public sector procurement is estimated to amount to approximately fourteen percent of the

¹³⁸ Section 40 of the Constitution.

¹³⁹ Ibid.

¹⁴⁰ O Pragal *An Evaluation of the Prevention and Combatting of Corrupt Activities Act No 12 of 2004* (LL.M Dissertation, Stellenbosch University, 2005) 5-7.

¹⁴¹ A municipal entity or parastatal may be generally defined as a company or agency that is owned or controlled wholly or partly by government.

gross domestic product.¹⁴² Thereafter Bolton concludes that government procurement is therefore of huge significance.¹⁴³ The interchangeable manner in which the terms ‘public sector’ and ‘government’ are used is clear. Often the term ‘public sector’ is used to mean government. Therefore within the context of this study, ‘public sector’ refers to the three levels of government, that is national, provincial and local.

The South African government consists of national departments, provincial departments and municipalities at the local level. The powers and functions of each level of government are provided in the Constitution.¹⁴⁴ This study focuses on procurement corruption within national departments, provincial departments and municipalities.

4.2. Corruption in Public Procurement

Corruption occurs in both the public and the private sectors. However the occurrence of corruption in the private sector has not enjoyed nearly as much attention as its occurrence in the public sector. This is because corruption in the public sector involves the resources and commodities that legally and rightfully belong to the public and which are administered by public figures in trust and on behalf of the public. Wang, Wai-hong and Kenny state that corruption by government servants should be regarded as the ‘most hated type of corruption in the eyes of the public.’¹⁴⁵ South Africa’s Public Protector¹⁴⁶ has remarked as follows:

‘Procurement-related corruption needs urgent attention. It eats all our resources through shady work, overcharging and false billing. It also destroys genuine entrepreneurship.’¹⁴⁷

Government procurement is of huge significance as government is the largest procurer of goods and services. Therefore a seemingly logical argument may be that if one reduces government spending then corruption will decrease as well. However this approach, it is submitted, is one which simply treats the symptom and not the cause of the disease. The

¹⁴² P Bolton *The Law of Government Procurement* (2007) 3.

¹⁴³ Ibid.

¹⁴⁴ Schedules 4 and 5 of the Constitution, set out functional areas which may fall into national, provincial and local competencies. Schedule 4 lists functional areas of concurrent national and provincial competence. Schedule 5 lists those functional areas which fall exclusively within the competency of provincial legislation. Part B of both Schedules 4 and 5 lists the areas of local government functionality.

¹⁴⁵ Wang, Wai-hong & Kenny (note 7 above).

¹⁴⁶ The Office of the Public Protector is established in terms of section 182 of the Constitution, and has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.

¹⁴⁷ T Madonsela ‘Woman’s Day: South Africa’s Corruption Crusader’ available at <https://blog.transparency.org/2013/03/08/thuli-madonsela-south-africas-corruption-crusader/> accessed on 23 May 2013.

manner in which government functions and the laws which regulate its activities are far more important than the size of the public sector activity.

Relatively little has been written about the South African public procurement system since the political transformation of the country in 1994.¹⁴⁸ In contrast the academic literature world is rich with writings on corruption. The gap therefore is that while much has been written about corruption in general, not much has been written about corruption within the public procurement context specifically.

Williams and Quinot define public procurement as the ‘purchasing by a government of the goods and services it requires to function and pursue public welfare.’¹⁴⁹ While this is true, it is respectfully submitted that this definition is inadequate in that it refers only to the acquisition element of procurement while ignoring the disposal element, which it is submitted, is of equal importance. Bolton asserts that while there are some who would argue that the word ‘procurement’ as used in the Constitution refers only to the acquisition of goods and services and not the selling and letting of assets, the word ‘procurement’ should be afforded a broad meaning and refer to both the acquisition of goods and services as well as the selling and letting of assets.¹⁵⁰ She asserts that failure to include the disposal mechanism would be unwarranted and unfortunate.¹⁵¹ It is submitted that this contention has merit in that corruption may take place within the acquisition as well as the disposal aspects of procurement. For instance in South Africa government officials and politicians have sold state-owned farms to themselves for as little as seven thousand rands and resold them for as much as seven hundred and fifty thousand rands.¹⁵² The entire process of public procurement presents wide scope for corruption.

In regulating procurement a government tries to ensure that it obtains (and disposes of) services at the economically most advantageous price and that the process is transparent and competitive. Despite this, DeAses states that corruption within procurement systems has been prevalent throughout the world and is not limited to developing countries.¹⁵³ Soreide argues that the public procurement context may present very specific reasons for the occurrence of

¹⁴⁸ P Bolton ‘The Public Procurement System in South Africa: Main Characteristics’ (2008) 37 *Public Contract Law Journal* 781.

¹⁴⁹ Williams & Quinot (note 24 above) 340.

¹⁵⁰ Bolton (note 142 above) 784.

¹⁵¹ *Ibid.*

¹⁵² Evans (note 70 above) 7.

¹⁵³ J A DeAses ‘Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process’ (2005) 34 *Public Contract Law Journal* 554

corruption within this realm.¹⁵⁴ She refers to what is called ‘capitulation wage’, that is, in most developing countries officials earn less than one hundred dollars a month and so the government ‘capitulates’, aware of the ‘bureaucrat’s ability to manage on bribes and stealing.’¹⁵⁵ She also asserts that ‘preparing for a tender is a costly and time consuming process and the company may not trust their winning chances on legal basis alone.’¹⁵⁶ The major reason for bribery in public contract assignments, she asserts, however, is probably because everyone believes that everyone else is involved in such kind of business.¹⁵⁷ The message from this is that it is often taken for granted that corruption definitely takes place within public procurement and that often it is resorted to simply because there may be no other way to secure government business. Nichols refers to this as an ‘assurance problem’, in that if all actors abide by the rules, if no business resorts to corruption, then all will be better off. On the other hand, if defection occurs, then those that do defect – those that act corruptly – will at least survive, whereas those that attempt to abide by the rules will probably suffer and could be driven out of business.¹⁵⁸

It is important to stem corruption within the procurement system, not only because it is the area within government activity which involves the largest sums of money, but because procurement is often used by government as an instrument of policy to achieve other important, but non-procurement related goals. Bolton states that public procurement is ‘business’ because it is a ‘means for the State to obtain goods and services at reasonable cost but such procurement also has broader social, economic and political implications.’¹⁵⁹ It is therefore not uncommon for governments to use procurement as a means of promoting objectives unconnected with the immediate or primary object of procurement. These broader objectives are often referred to as ‘secondary’ or ‘collateral’ objectives.¹⁶⁰ In fact Bolton argues that in South Africa public sector procurement is of particular significance because of such secondary objectives.¹⁶¹ Ambe and Badenhorst-Weiss assert that public procurement in South Africa is used as a policy tool in order to redress the discriminatory and unfair

¹⁵⁴ T Soreide ‘Corruption in Public Procurement. Causes, Consequences and Cures’ (2002) A report for the Chr. Michelson Institute available at <http://www.cmi.no/publications/2002%5Crep%5Cr2002-1.pdf> accessed on 16 May 2014.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ M P Nichols ‘Multiple Communities and Controlling Corruption’ (2009) 88 *Journal of Business Ethics* 806.

¹⁵⁹ P Bolton ‘The Use of Government Procurement as an Instrument of Policy’ (2004) 121 *SALJ* 619, 619.

¹⁶⁰ Ibid.

¹⁶¹ Ibid 620.

practices during apartheid.¹⁶² Williams points out that during the apartheid regime, public procurement was used to protect the interests of the ‘minority large white-owned enterprises and discriminated against small, medium and black-owned business.’¹⁶³ Bolton therefore points out that in South Africa public sector procurement has become an important tool to remedy past injustices.¹⁶⁴

In South Africa the principles on which public procurement is based have been afforded constitutional significance. In terms of section 217 of the Constitution the five constitutional principles upon which public procurement must be based in South Africa are: fairness, equitability, transparency, competitiveness and cost-effectiveness.

Williams is of the view that the principles of fairness and equitability must be interpreted in the context of South Africa’s political history and that they accordingly require a system without discrimination and unjustifiable preferences.¹⁶⁵ The principle of transparency is one which is found in most regulated procurement systems, and entails the requiring of publicised contracts, disclosure of rules of procurement and decisions taken according to pre-determined rules. Williams states that this constitutional provision is a response to the culture of secrecy in the former apartheid regime. She asserts, again, that transparency also has an anti-corruption implication in that:

‘if the rules that define the procurement process are clear and the opportunities for contracting are publicly available, this will make it more difficult to conceal improper practices.’¹⁶⁶

The principles of competition and cost-effectiveness have complimentary effect. Competition suggests that a sufficient number of suppliers should be invited to tender for available contracts, ensuring that government does not pay uncompetitive prices. Williams once again asserts that competition supports anti-corruption efforts in that:

‘if all qualified suppliers have access to available contracts, this will limit the scope for corruption-induced awards and remove restrictions to participation created against non-corrupt suppliers.’¹⁶⁷

¹⁶² M I Ambe & A J Badenhorst-Weiss ‘Procurement Challenges in the South African Public Sector’ (2012) 6 *Journal of Transport and Supply Chain Management* 242.

¹⁶³ S Williams ‘The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa’ (2007) 51 *Journal of African Law* 2.

¹⁶⁴ Bolton (note 159 above) 624.

¹⁶⁵ Williams (note 163 above) 4.

¹⁶⁶ *Ibid* 5.

¹⁶⁷ *Ibid*.

Cost-effectiveness refers to the obligation to obtain value for money. This requirement, Williams argues has anti-corruption implications as it seeks to avoid the waste and inefficiency that corruption can engender in a procurement system.¹⁶⁸ The constitutional procurement principles are discussed further in chapter three.

In response to section 217 of the Constitution South Africa enacted various laws, which are discussed further in chapter four. Suffice to mention here that, while it appears that South Africa has enacted legislation to give effect to each of the five constitutional principles, the practical effect of actually curbing corruption has not been achieved. Pauw and Wolvaardt assert that the five constitutional procurement criteria are set for the system as a whole as well as for each individual procurement decision.¹⁶⁹ Both the promulgation of legislation and an actual procurement decision that clash with these five criteria would be unconstitutional, and therefore legally invalid.

The stemming of corruption within the public procurement system in South Africa carries with it also a strong moral dimension. Procurement was used as a tool of repression and discrimination during the years of apartheid. It is insufficient to simply design a system of laws that seek to satisfy constitutional provisions. Such cherished constitutional provisions can only really be given practical effect if those very same laws have effective and focused anti-corruption strategies built into them. It is submitted that corruption within the public procurement system subverts the constitutional principles on which the system is based and failure by government to control and prevent corruption within this sector amounts to government's failure to meet its constitutional mandate.

5 CONCLUSION

Chapter one highlighted the current prevalence of public procurement corruption in South Africa. The need to undertake an evaluation of laws aimed at recommending appropriate legal reform in order to curb public procurement corruption has also been established. An understanding of corruption, particularly within the context under study is necessary if legal reform is to be effective and appropriate.

The literature review has highlighted that corruption as a phenomenon is regarded in various ways by different societies, cultures and those from differing schools of thought. The

¹⁶⁸ Ibid 5.

¹⁶⁹ J C Pauw & J S Wolvaardt 'Multi-criteria Decision Analysis in Public Procurement – A Plan for the South' (2009) 28 *Poleteia* 67-68.

difficulty in assigning a universal definition to corruption, does not detract from the common belief that the effects of corruption are borne most acutely by those who are most vulnerable in society.

In South Africa, corruption was prevalent during the days of apartheid and it continues to plague the country. The climate in South Africa, marked by service delivery protests and a political climate in which political expediency seemingly stands in the way of decisive legal action against corruption is unfortunate. The evidence presented in this chapter also suggests that government procurement is susceptible to corruption as state resources are increasingly at risk of being corruptly used or squandered by those wanting to engage in wealth redistribution. This situation places South Africa at risk of becoming a predatory state. This makes a study of legal reform within the public procurement sector important and relevant in order to prevent either total anarchy or the continuation of corrupt practices with impunity at the peril of ordinary citizens.

While the term ‘public sector’ may include entities other than government departments, evidence has been presented which shows that the term ‘public sector’ is generally used to refer to government. Therefore for the purposes of this study public sector procurement refers to procurement by government departments. The South African government consists of three spheres. This study is confined to procurement in national, provincial and local government.

Public procurement ought to be pursued in order to ensure the functionality of government and to pursue public welfare. This advances the primary and the secondary aims of procurement in South Africa. Corruption within this sector will therefore render a government incapable of fulfilling its obligations. The South African Constitution has set out fundamental principles on which public procurement must be based. Corruption within the procurement process undermines these principles. The following chapter provides a discussion of the international law anti-corruption framework as well as the constitutional framework on public procurement.

CHAPTER THREE: INTERNATIONAL AND CONSTITUTIONAL LAW FRAMEWORK

1 INTRODUCTION

This chapter provides a discussion of the international law framework pertaining to anti-corruption, as well as the constitutional procurement framework in South Africa.

As explained further below, public international law is afforded constitutional recognition in South Africa. South Africa is a signatory to a number of international and regional anti-corruption instruments. Not all of these instruments are directly applicable to corruption within public procurement. However they all purport to establish universal anti-corruption principles. This chapter also addresses provisions of the 2011-United Nations Commission on International Trade Law Model Law on Public Procurement (hereinafter referred to as ‘2011 UNCITRAL Model Law’).¹

Public procurement in South Africa is implemented in terms of a framework of five broad constitutional principles. The Constitution is the supreme law of South Africa.² Therefore, while the South African legislative framework pertaining to public procurement consists of a number of laws, all laws must be consistent with the provisions of the Constitution. An understanding of the international law framework as well as the constitutional framework is indispensable for a meaningful evaluation of the domestic legislative framework.

2 INTERNATIONAL ANTI-CORRUPTION FRAMEWORK

2.1 Significance of International Law in South Africa

International law is a combination of treaties and customs that regulate the conduct of states among themselves.³ A treaty is a written agreement between states or between states and international organisations which is governed by international law.⁴ Kapindu submits that:

¹ United Nations Commission on International Trade Law Model Law on Public Procurement. United Nations General Assembly Resolution 66/95 of 2011.

² Section 2 of the Constitution of the Republic of South Africa (1996).

³ Section 27 ‘The Role of International Law in South African Health Law and Policy-Making’ available at www.section27.org.za accessed on 02 June 2015. Section27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights in South Africa.

⁴ J Dugard ‘Public International Law’ (1998) *Revision Service* 2 13-i.

‘prior to World War II, the concept of state sovereignty meant that each state was responsible for the manner in which it treated its own citizens, and that international law largely did not intrude on this issue which was seen as falling within the exclusive domain of domestic law.’⁵

However after the gross human rights violations seen during World War II, and with the creation of the United Nations in 1945, certain fundamental and universal human rights were adopted. This gave rise to an international human rights culture, which dominates a large portion of international law, if it is not indeed the core itself of international law. Corruption stands as a threat to a multitude of fundamental human rights. Accordingly a number of international anti-corruption instruments have been established and adopted by various states.⁶

Prior to 1993, international law did not play a significant role in the South African legal system. The system of apartheid was contrary to most international human rights instruments. South Africa was therefore ostracised by the international community and its legal system was subject mainly to its domestic laws. Although South Africa did, during this time, enter into international treaties, international law did not receive any constitutional recognition.⁷ On the contrary, Dugard submits that during this time in South Africa’s history, international law was seen as a threat to the State.

⁵ R E Kapindu ‘From the Global to the Local: The Role of International Law in the Enforcement of Socio-Economic Rights in South Africa’ (2009) *Socio-Economic Rights Project*, Community Law Centre, University of the Western Cape 1.

⁶ The key anti-corruption international instruments are as follows: United Nations (UN) Convention Against Corruption, UN Convention Against Transnational Organised Crime, Southern African Development Community Protocol Against Corruption, Organisation for Economic Cooperation and Development (OECD): Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, African Union (AU) Convention on Preventing and Combating Corruption. The other key anti-corruption international instruments are: UN Declaration against Corruption and Bribery in International Commercial Transactions; UN Action Against Corruption; Council of Europe: Civil Law Convention on Corruption; Council of Europe: Criminal Law Convention on Corruption; Council of Europe: Model Code of Conduct for Public Officials; Resolution (99) 5 of the Committee of Ministers of the Council of Europe: Agreement Establishing the Group of States against Corruption; Resolution (97) 24 of the Committee of Ministers of the Council of Europe: Twenty Guiding Principles for the Fight against Corruption; Council of European Union (EU): Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU; Council of the EU: Convention on the Protection of the European Communities’ Financial Interests; Council of the EU: Protocol to the Convention on the protection of the European Communities’ Financial Interests; Second Protocol to the Convention on the Protection of the European Communities Financial Interests; Economic Community of West African States Protocol on the Fight against Corruption; Excerpts from the Economic Community of West African States Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peackeping and Security; Organisation of American States Inter-American Convention against Corruption.

⁷ J Dugard ‘International Law and the South African Constitution’ (1997) 1 *EJIL* 77, 77.

In 1993 however, South Africa began to shed its pariah status in relation to the rest of the world, when it adopted its interim constitution.⁸ The interim constitution as well as the final Constitution afforded international law a significant place in the South African legal system. Accordingly the Bill of Rights contained in the Constitution guarantees the protection of rights which are universally recognised and protected according to international human rights laws. Various sections within the Constitution affirm the role that international law plays in the South African legal system. Section 39(1)(b) of the Constitution states that:

‘When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.’

Section 232 of the Constitution states that:

‘Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’

Section 233 of the Constitution provides that:

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

Since the constitutional recognition of international law in South Africa, the courts have considered international law in the vast majority of cases wherein international law is relevant.⁹ In fact, in certain instances failure to consider relevant international law has been met with sharp criticisms questioning whether the decision has passed the constitutional test.¹⁰ Perhaps the most well-known judgement which confirms the authority of international law in South Africa is that of *Hugh Glenister v President of the Republic of South Africa and*

⁸ Interim Constitution of the Republic of South Africa (1993).

⁹ As examples: *S v Makwanyane* 1995 (3) SA 391 (CC), which dealt with the right to life and the constitutionality of the death penalty; *S v Williams* 1995 (3) SA 632 (CC), which dealt with the constitutionality of corporal punishment; *Bernstein v Bester* 1996 (2) SA 751 (CC), which dealt with the right to privacy and the right to a fair trial; *Ferreira v Levin N. O* 1996 (1) SA 984 (CC), which dealt with the rule against self-incrimination and the right to a fair trial; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), which dealt with the constitutionality of imprisonment for judgement debts; *S v Rens* 1996 (1) SA 1218 (CC), which dealt with the right of appeal; *Dabelstein v Hildebrandt* 1996 (3) SA 42 (C), which dealt with the constitutionality of Anton Pillar Orders and *Ex Parte Gauteng v Provincial Legislature In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), which dealt with language and religious rights of minorities.

¹⁰ Kapindu (note 5 above) 40-41, has questioned the validity of the Constitutional Court’s decision in *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC), wherein the Court did not at all consider international law in a case which related to the provision of medical services. Kapindu asserts that due to this failure the decision of the court in this case failed to pass the constitutional test.

Others, wherein the Constitutional Court pronounced as follows referring to anti-corruption international conventions to which South Africa is a signatory:

‘The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty to international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.’¹¹

The relevance of international law was also highlighted in chapter two, where it was submitted that globalisation requires that the prescripts of international law are considered in the development or reform of local laws. With regard to the eradication of corruption, South Africa has either signed or ratified a number of international instruments. Signature constitutes the preliminary endorsement of the instrument. While it does not create any binding legal obligation on the part of the signatory State, signature does oblige the State to refrain from acts that would defeat or undermine the instrument’s objective or purpose.¹² Ratification or accession on the other hand signifies an agreement to be legally bound by the terms of the instrument.

South Africa is a signatory to or has ratified the following international or regional instruments: United Nations (hereinafter referred to as ‘UN’) Convention Against Corruption,¹³ UN Convention Against Transnational Organised Crime,¹⁴ Southern African Development Community Protocol Against Corruption,¹⁵ Organisation for Economic Cooperation and Development (hereinafter referred to as ‘OECD’): Convention on Combating Bribery of Foreign Public Officials in International Business Transactions¹⁶ and African Union (hereinafter referred to as ‘AU’) Convention on Preventing and Combating Corruption¹⁷.

International anti-corruption instruments play a critical role in the fight against corruption. They set universal and legally binding standards and principles, which signatory states undertake to be bound by. Such documents ‘foster both the domestic action and international

¹¹ [2011] ZACC 6 para 183.

¹² UNICEF ‘Convention on Rights of the Child’ available at http://www.unicef.org/crc/index_30207.html accessed on 21 January 2016.

¹³ UN Convention Against Corruption: UN General Assembly Resolution 58/4 of 2003.

¹⁴ UN Convention Against Transnational Organised Crime: UN General Assembly Resolution 55/25 of 2000.

¹⁵ Southern African Development Protocol Against Corruption (2003).

¹⁶ OECD: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999).

¹⁷ AU Convention on Preventing and Combating Corruption (2003).

co-operation needed to tackle the many facets of corruption.¹⁸ Taking into account the role which international law plays in the South African legal system, as well as the number of international anti-corruption instruments to which South Africa is a party, it can hardly be said that international law is irrelevant to any enquiry relating to whether a specific body of law contains sufficient anti-corruption mechanisms. An understanding of the international anti-corruption law framework is therefore necessary if one is to ensure a meaningful and constitutionally compliant legislative evaluation. Since this study addresses the issue of corruption within the context of public procurement, the 2011 UNCITRAL¹⁹ Model Law on public procurement will also be discussed.

2.2 United Nations Convention Against Corruption

The UN General Assembly recognised the need for an effective international legal instrument against corruption, and hence adopted the UN Convention Against Corruption (hereinafter referred to as 'UNCAC'). UNCAC focuses on prevention²⁰, criminalisation²¹, international cooperation²², asset-recovery²³ and implementation mechanisms.²⁴ The Convention recognises public procurement as a critical area and sets specific requirements for the prevention of corruption within this sector.²⁵

Article 9(1) of UNCAC provides as follows:

'Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.'

It will be seen from the discussion on the constitutional framework later in this chapter, that the above principles mirror some of the procurement principles enunciated in the South African Constitution. Articles 9(1)(a-e), provide for a system which includes procedures for public distribution of information relating to procurement procedures and contracts, selection

¹⁸Organisation for Economic Cooperation and Development available at <http://www.oecd.org/cleangovbiz/internationalconventions.htm> accessed on 04 August 2014.

¹⁹ UNCITRAL is the legal body of the United Nations system in the field of international trade law, with a general mandate to further the progressive harmonisation and unification of the law of international trade, through the issue of conventions and model laws, cooperation with other international organisations, and technical assistance.

²⁰ Chapter II, Articles 5-14.

²¹ Chapter III, Articles 15-42.

²² Chapter IV, Articles 43-50.

²³ Chapter V, Articles 51-59.

²⁴ Chapter VII, Articles 63-64.

²⁵ Chapter II, Article 9.

and award criteria and tendering rules, objective and predetermined criteria for decisions, a system of effective review and appeal as well as measures to regulate the declaration of interests by personnel responsible for procurement. UNCITRAL submits that these provisions ensure accountability in the procurement process, while the principles in Article 9(1) enhance integrity.²⁶

It is interesting to note further that the UNCAC links public procurement to good governance. Article 9(2) states that:

‘Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances.’

It is submitted that the UNCAC therefore, appreciates the role that transparency and accountability in financial management may play in procurement processes. UNCITRAL submits that this means the ‘objective of avoiding corruption has to be balanced with ensuring the efficient use of public resources.’²⁷ It also means, it is submitted, that measures to avoid corruption must be taken at all stages of the procurement process, not only during the actual selection and award process. The measures provided in Articles 9(2)(a-e), call for adoption of national budgets, reporting of expenditure and revenue, oversight mechanisms in accounting and auditing standards, systems of risk management and internal control and corrective action where necessary. This means that the procurement system must have systems which link budgeting and planning, procurement procedures and contract implementation.

Transparency International submits that the phases in the procurement process dealing with budgeting and planning as well as contract administration or implementation, are ‘increasingly exposed to corruption’.²⁸ UNCITRAL submits that typically procurement systems focus mainly on the selection and award process of the procurement cycle.²⁹ It appears therefore that the UNCAC recognises the need for domestic systems to have in place appropriate systems of procurement throughout the procurement cycle, from budgeting and planning through to contract implementation. This is not surprising since the United Nations

²⁶ UNCITRAL ‘United Nations Convention against Corruption: Implementing Procurement-Related Aspects’ Conference of the States Parties to the United Nations Convention against Corruption (2008) 8.

²⁷ Ibid 3.

²⁸ Transparency International Handbook ‘Curbing Corruption in Public Procurement’ 2007 available at http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/curbing_corruption_in_public_procurement_handbook accessed on 04 June 2015.

²⁹ UNCITRAL (note 26 above) 15.

Office on Drugs and Crime (hereinafter referred to as ‘UNODC’), which is the custodian of the UNCAC, has identified corruption risks at every stage of the procurement process.³⁰

During the pre-tender stage³¹, UNODC avers as follows:

‘An inability or failure to link budgets to needs, as well as an inability or failure to budget for the whole life cycle cost of a product may also lead to corruption. In such instances, where the procuring entity has not performed proper budgeting activities and conducted market research prior to embarking on the procurement process, competitors may easily decide to collude and fix prices at a level which is considerably higher than the market price...concluding a contract with a company that offered a considerably higher-than-market price could also indicate collusion between this winning company and the responsible officer.’³²

During the tender stage there are also a number of corruption risks. UNODC submits that:

‘The public notice advertising the intended procurement is one of the cornerstone elements of an appropriate procurement system. A public notice which fails to give all bidders the same information, will not ensure a level competitive field and may thereby advantage a particular bidder over others’.³³

During this phase, it also happens, especially in large complex projects that bidders request additional information for purposes of clarity. It is submitted that if this process is not managed properly, it is possible that corrupt persons may use this as an opportunity to furnish insider information to the requesting bidder, thereby granting such bidder an undue advantage over others. UNODC submits that:

‘Clarifications of the solicitations should typically be provided in writing, and should be circulated to each company which was originally provided with the tender documents so as to ensure equal treatment.’³⁴

During the bid opening process, this UN Office further submits that:

³⁰ United Nations Office on Drugs and Crime ‘Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practice in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption available at https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf accessed on 24 February 2015.

³¹ The terms pre-tender, tender and post-tender stages, are generally used to describe the budgeting and planning, selection and contract implementation phases respectively, of a procurement process.

³² UNODC: ‘Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practice in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption (note 30 above).

³³ Ibid.

³⁴ Ibid.

‘Apart from such process being conducted in public, good practice requires that not only the price but all the other elements of a bid which are necessary for applying the award criteria should be announced.’³⁵

During the tender stage the actual manner of the evaluation of tenders is important in ensuring that the evaluation is conducted strictly in terms of the advertised award criteria and that such evaluation is conducted, not by a single individual, but by a committee with the relevant technical and economic experience. The evaluation stage is also important in ensuring that unscrupulous officials do not attempt to use their positions to secure government contracts for themselves, as well as to readily identify elements of corruption within bidding documents. UNODC further submits that:

‘After evaluation and ranking of bids, bidders should be promptly notified about the procuring entity’s intention to award the contract to the successful bidder, and that such notification should contain sufficient information about the successful bidder’s bid, to allow all bidders and stakeholders to assess whether the procuring entity’s decision is reasonably based.’³⁶

Long unexplained delays in the award of contracts may also be indicative of corruption as it may point to possible manipulation of bids. The post-tender stage is generally the stage when the procuring entity has signed a contract with the successful bidder. UNODC submits that this stage is particularly susceptible to corruption.³⁷

Therefore taking into account the provisions of the UNCAC as well as the views of UNODC, state parties to the UNCAC are required to have in place anti-corruption mechanisms at all stages in the procurement process.

2.3 United Nations Convention Against Transnational Organised Crime

Although this Convention is aimed mainly at the fight against organised crime, it includes several provisions which are related to corruption.³⁸ The context within which corruption is addressed in the Convention is furthermore not confined to transnational or organised crime. However the Convention does not contain any specific provision relating directly to public procurement. Notwithstanding this, Article 8 may be applicable to corruption occurring during a public procurement process. This provision calls for the criminalisation of acts by

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Article 8 provides for the criminalisation of corruption, Article 9 provides for measures against corruption specifically and Article 10 provides for the liability of legal entities involved in corrupt acts.

public officials, which may involve the giving, offering, acceptance, promise or solicitation of an undue advantage either by a public official or to a public official. Unlike the UNCAC however, this Convention does not contain any provision relating to the system of public procurement to be adopted by domestic states in order to prevent corruption.

This Convention introduces and promotes the concept of integrity of public officials and obliges each State Party to take measures to ensure effective action by its authorities in the prevention, detection and punishment of corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.³⁹

2.4 African Union Convention on Preventing and Combating Corruption

This Convention places emphasis on the need for member states to develop mechanisms of preventing, eradicating, and punishing acts of corruption.⁴⁰ Although this Convention also does not contain provisions relating directly to public procurement, it does contain provisions which, if adhered to by member states, may have the effect of reducing or preventing public procurement corruption.

Article 7 is dedicated to the fight against corruption and related offences in the public service. The requirement in Article 7(1) to have all public officials declare their assets at the time of assumption of office and after their term of office, it is submitted, may be a useful tool in detecting wealth acquired through illicit means. Article 8(1) goes further and obliges state parties to create, within their domestic legal systems, an offence of illicit enrichment. Article 7(2) calls for the creation of an internal committee mandated to establish a code of conduct for public officials and to monitor implementation thereof. It is submitted that such a measure may promote integrity and respect for accepted codes of ethics.

Specifically with respect to tendering procedures, the Convention emphasises the need for transparency, equity and efficiency.⁴¹ The requirement of member states to adopt legislative or other measures to prevent and combat acts of corruption in and by the private sector, is critical in the fight against corruption within the public sector.⁴² It is submitted that

³⁹ OECD, Office on Drugs and Crime. 'Compendium of International Legal Instruments on Corruption' 2nd Edition available at http://www.unodc.org/documents/corruption/publications_compendium_e.pdf accessed on 08 January 2015.

⁴⁰ Article 2.

⁴¹ Article 7(4).

⁴² Article 11(1).

corruption within public procurement, may in certain instances, not involve public officials at all. Government therefore has a duty to establish sound mechanisms to detect and prevent corruption within the private sector, most especially in instances where such corrupt acts are designed to compromise a public procurement process.

2.5 Southern African Development Community Protocol Against Corruption

This Protocol was the first sub-regional anti-corruption treaty in Africa. It has a threefold purpose: (a) to promote the development of anti-corruption mechanisms at the national level; (b) to promote cooperation in the fight against corruption by States parties; and (c) to harmonise national anti-corruption legislation within the Southern African Development Community member states.

As with the AU Convention on Preventing and Combating Corruption, this Protocol calls for codes of conduct for public officials and systems of government hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems, as well as mechanisms for access to information. As with the AU Convention, this Protocol also places a duty on States to provide for mechanisms to detect corruption within the private sector.

2.6 OECD: Convention on Combating Bribery of Foreign Officials in International Business Transactions

The main purpose of this Convention is to provide a framework for criminalising corruption in international business transactions. State parties to the Convention undertake to punish those accused of bribing officials of foreign countries for the purpose of obtaining or retaining international business, including officials in States that are not parties to the Convention. This Convention is not directly applicable to corruption within domestic systems.

2.7 2011 UNCITRAL Model Law on Public Procurement

In 1994 UNCITRAL issued a Model Law on Procurement of Goods, Construction and Services.⁴³ In 2004 UNCITRAL set out to revise this Model, to make provision for modern

⁴³ European Bank for Reconstruction and Development '2011-UNCITRAL Model Law on Public Procurement' available at <https://www.ppi-ebd-uncitral.com/index.php/uncitral-model-law> accessed on 05 June 2015.

procurement methods, in particular electronic procurement. This culminated in the 2011 UNCITRAL Model Law on Public Procurement.

The 2011 UNCITRAL Model Law contains international best practices on public procurement procedures and principles in a national setting, and seeks to harmonise public procurement processes across nations. This text has been lauded by experts, in being unique as opposed to other international public procurement texts.⁴⁴ Nicholas comments as follows:

‘The Model Law, unlike the other international texts...is not an agreement but a template for national public procurement legislation. Without compromising its main principles and procedures, which have been designed to be consistent with international standards it can be adapted to local circumstances.’⁴⁵

As opposed to other international texts on public procurement, such as the World Trade Organisation’s Government Procurement Agreement⁴⁶, which tend to apply to international public procurement and international trade, the 2011 UNCITRAL Model Law, provides procedures and principles which may be applied by nations in domestic procurement. It is therefore helpful to those nations undertaking legal reform in the field of public procurement.

The 2011 UNCITRAL Model Law provides guidance on various aspects of the open tendering process.⁴⁷ Such guidance includes *inter alia*, best practices pertaining to communication during a procurement process,⁴⁸ the participation of supplier or contractors,⁴⁹ qualification of suppliers and contractors, minimum information to be disclosed in solicitation documentation and invitations to tender,⁵⁰ guidance on evaluation and award criteria,⁵¹ rules pertaining to requests for information or clarifications sought by bidders,⁵² rules regarding the acceptance of the successful bid,⁵³ rules regarding the manner in which

⁴⁴ Such as the World Trade Organisation’s Government Procurement Agreement, the UNCAC or the various European Union Directives on Public Procurement.

⁴⁵ C Nicholas ‘Public Procurement Reform: UNCITRAL Model Law on Public Procurement’ available at <https://www.ppi-ebd-uncitral.com/index.php/public-procurement-policy-seminar-london> accessed on 05 June 2015.

⁴⁶ World Trade Organisation Government Procurement Agreement (1994) as revised in 2011.

⁴⁷ Since this study is confined to the tendering method of procurement in South Africa, discussions with respect to the 2011 UNCITRAL Model Law focuses on the open tendering method of procurement. Other methods of procurement in terms of the UNCITRAL Model Law include restricted tendering, request for quotations, request for proposals without negotiation, two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations, electronic reverse auction and single-source procurement.

⁴⁸ Article 7.

⁴⁹ Article 8.

⁵⁰ Article 10, Article 37 and Article 39.

⁵¹ Article 11.

⁵² Article 15.

⁵³ Article 22.

records of procurement proceedings are to be maintained,⁵⁴ various methods of procurement,⁵⁵ the manner in which tenders are received, opened and evaluated⁵⁶ and challenge proceedings.⁵⁷

The South African equivalent of much of the procedural rules outlined in the 2011 UNCITRAL Model Law are scattered among various subordinate legislation and government prescripts.⁵⁸ By contrast the 2011 UNICTRAL Model Law is a single text which provides comprehensive guidance on procurement procedures. However a fair criticism of the 2011 UNCITRAL: Model Law, is that, like most other public procurement texts, the focus is mainly on the selection and award stages of procurement. This is despite the fact that UNCITRAL itself has recognised this as a shortcoming of most procurement instruments, as mentioned earlier. Notwithstanding this criticism though, the provisions of the 2011 UNCITRAL Model Law are worthy of discussion. Further reference to specific provisions of this Law, is made in chapter four, during the evaluation of South Africa's domestic legislative framework.

3 CONSTITUTIONAL FRAMEWORK FOR PROCUREMENT

3.1 Section 217

Section 217 of the Constitution provides the constitutional basis for public procurement in South Africa. This section reads as follows:

'Procurement. –(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

⁵⁴ Article 25.

⁵⁵ Article 27.

⁵⁶ Articles 40-43.

⁵⁷ Chapter VIII.

⁵⁸ Salient laws are discussed in chapter four.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

Subsection 217(1) sets out five constitutional principles, on which all procurement practices must be based. These are fairness, equity, transparency, competitiveness and cost-effectiveness. Subsection 217(2) recognises that public procurement may be used as a tool to promote social and policy objectives by, for example, promoting the development of previously disadvantaged groups.⁵⁹ The legislative framework pertaining to public procurement must therefore adhere to and promote these constitutional provisions.⁶⁰ In order to fully appreciate the constitutional framework, it is prudent to examine, in greater detail, the meaning of each of the five principles mentioned in section 217(1).

3.1.1 Fairness

Fairness as an abstract concept is difficult to define. In fact Baxter contends that ‘As a bare concept, fairness has no meaning, but the meaning accorded to fairness in any given situation will be a conception of fairness’⁶¹

However, in the legal context, since the law is confined in terms of geographical, cultural and social terms, a legal definition may be afforded to fairness. It is trite law therefore that fairness is often defined in terms of procedural fairness as well as substantive fairness.

It has been submitted that decisions taken by a public body as a result of a public procurement process constitutes administrative action. The South African Constitution has entrenched the right to just administrative action.⁶² Included in this concept of just administrative action is procedural fairness. In order to give effect to this right to just administrative action, the Promotion of Administrative Justice Act⁶³ (hereinafter referred to as ‘PAJA’) was enacted. Procedures in the public administration are often dictated by rigid sets of rules and procedures. Procedural fairness refers to the public body’s duty to act fairly

⁵⁹ P Bolton *The Law of Government Procurement in South Africa* (2007) 34.

⁶⁰ The Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 32 stated that the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus section 217 of the Constitution.

⁶¹ L.G Baxter ‘Fairness and Natural Justice in English and South African Law’ (1979) 96 *SALJ* 607, 633.

⁶² Section 33.

⁶³ Act 3 of 2000.

by ensuring adherence to such rules and procedures. Consequently PAJA sets out the elements of a procedurally fair administrative action.⁶⁴

The elements of procedural fairness contained in PAJA, largely reflect the well-known principles of natural justice.⁶⁵ However as Brynard points out ‘fairness is both contextual and relative’.⁶⁶ The relevant question is: does substantive fairness also apply to actions and decisions by the public administration? And therefore does reference to ‘fairness’ in section 217 of the Constitution also include substantive fairness?

While procedural fairness is concerned largely with procedural safeguards and adherence to rules, substantive fairness refers to the reasons for a decision. This means that the decision must be reasonable, taking into account the circumstances of the case. Brynard explains as follows:

‘to determine substantive fairness one must decide whether a decision or action was substantively fair or reasonable in the light of issues like the public interest, government policy and the effect on the individual. One will then have to enter into the merits of the decision to be able to determine whether the decision was right or wrong or substantively fair.’⁶⁷

Brynard also submits that ‘substantive fairness is something which should be important to the public administration.’⁶⁸ In terms of Brynard’s assertion therefore, if a public official’s decision complies with all the procedures applicable to the decision, but the decision is unreasonable, then such decision may be invalid due to its substantive unfairness. It is submitted that PAJA itself has recognised the flexibility required in determining fairness, and the duty to consider other issues as highlighted by Brynard above. This recognition is found in section 3(2)(a) which reads as follows:

‘A fair administrative procedure depends on the circumstances of each case.’

Bolton however submits that ‘two competing views of fairness are reflected in the Constitution, that of substantive fairness and/or procedural fairness.’⁶⁹ She is also of the view that since government procurement is of an administrative law nature, the word ‘fair’ in

⁶⁴ Section 3(2)(b)(a-e).

⁶⁵ Baxter (note 61 above) 608, sets out the twin principles of natural justice: *audi alteram partem principle* and *nemo iudex in causa sua*, that is, that one should hear the other side, and that no one should be a judge in his own cause.

⁶⁶ D J Brynard ‘The Duty to act Fairly: A Flexible Approach to Procedural Fairness in Public Administration’ (2010) 18 *Administratio Publica* 124, 126.

⁶⁷ Brynard (note 66 above) 134.

⁶⁸ *Ibid.*

⁶⁹ Bolton (note 59 above) 46.

section 217 of the Constitution can be said to refer to procedural fairness as opposed to substantive fairness.⁷⁰ It is respectfully submitted that this argument is not cogent. It is submitted that the principle of fairness as contained in section 217(1) of the Constitution may be interpreted to mean something more than only procedural fairness.

Transactions entered into by virtue of public procurement result in contracts. However such contracts are not entirely akin to contracts within the private sector, wherein contracting parties are bound and obligated only to one another, to the exclusion of non-contracting parties. A government is in a different position. Government, as the custodian of public funds, can be said to always have a fiduciary duty to the general public in all of its decisions, actions and/or conduct, including when it contracts for goods and services with the private sector. It is submitted that this fiduciary duty of government means fairness in the relationship between organs of state, fairness in relation to competing tenderers and fairness to the general public as well. In this sense, fairness to the general public and fairness to competing bidders may entail more than just procedural fairness to prospective bidders, including also considerations about whether the decision or action in question is substantively fair in light of the interests of the general public. Substantive fairness therefore clearly requires more than mere adherence to rules and procedures.

Support for this view may be found in the text of the Constitution itself. While section 33(1) of the Constitution states that ‘everyone has the right to administrative action that is lawful, reasonable and *procedurally* fair.’⁷¹, section 217(1) of the Constitution states that when government contracts for goods and services it must do so ‘in accordance with a system that is fair, equitable, transparent, competitive and cost-effective’. It is submitted that the exclusion of a reference to procedural fairness in section 217(1) is important in interpreting the meaning of ‘fair’ within the context of this section. Had the drafters of the Constitution intended to confine public procurement decisions to procedural fairness, it would have included the word ‘procedurally’ in section 217(1). The exclusion, it is submitted, is intended to allow an interpretation which would include substantive fairness. Substantive fairness is concerned not only with the manner in which a decision is taken, but whether the decision itself is fair or not. Seeing that procurement decisions of government have a significant impact not only on the contracting parties but also on the general public and seeing further that section 217(1) has allowed room for such an interpretation, it is submitted that fairness

⁷⁰ Ibid.

⁷¹ Own emphasis.

within the context of public procurement means both procedural as well as substantive fairness.

3.1.2 *Equity*

Kaplan argues that:

‘a large area of constitutional litigation can be regarded as a dialogue between those who would, in the name of equality, apply the same standards to all men, and those who, in the given case, would find that the application of formal equality bore so heavily upon the individual as to result in serious inequality.’⁷²

The above reasoning, it is submitted, is in line with the principle of equity as provided in section 217(1) of the Constitution. Particularly, within South Africa as discussed in chapter two, where a system of racial discrimination, resulted in a divided society segments of which were deprived to varying degrees of basic resources, services, facilities and opportunities, equity entails a broader notion of redress in order to curb or undo the effects of past discriminatory practices.

Bolton shares the above view, and argues that the constitutional notion of ‘equity’ refers to the equalling of disparate groups in South Africa.⁷³ She states that:

‘Equity is a measure that compares one group with another, for example black with white, rural with urban, rich with poor and women with men. Instead of treating all groups exactly the same, groups who face different levels of resources and development should receive different treatment...Areas with the most vulnerable populations and worst facilities should receive more resources than more affluent areas. Thus, equity can be said to be aimed at improving the position of vulnerable groups in South Africa.’⁷⁴

De la Harpe avers that in interpreting equity as contained in section 217(1) of the Constitution, the general tone and purpose of section 217 and the Constitution as a whole will be relevant.⁷⁵ In that regard, he states, the utilisation of public procurement to address the

⁷² J Kaplan ‘Equal Justice in an Unequal World: Equality for the Negro-The Problem with Special Treatment’ (1966) 61 *North Western University Law Review* July-August No. 3. 363.

⁷³ Bolton (note 59 above) 50-51.

⁷⁴ Ibid.

⁷⁵ S P L De La Harpe ‘*Public Procurement Law: A Comparative Analysis* (unpublished doctoral thesis, University of South Africa, 2009) 281.

legacies of apartheid by means of preferential treatment of previously disadvantaged South Africans can be equitable.⁷⁶

In the circumstances it is submitted that equity in terms of section 217(1) of the Constitution can be said to be aimed specifically at addressing the inequalities and unfair discriminatory practices of the past.⁷⁷ During the previous regime of apartheid, the procurement system in South Africa tended to favour 'larger and better established entrepreneurs and did not create a favourable environment for small, medium and micro enterprises, in particular those owned and controlled by previously disadvantaged persons.'⁷⁸

A vision of the current government, in transforming its public procurement system, was to 'realise the potential of public sector procurement as an instrument of policy in the socio-economic transformation process.' This is reflected in the Constitution clearly, where provision is made in section 217(2)(a) and (b) for categories of preference in the allocation of contracts, and the protection or advancement of persons disadvantaged by unfair discrimination. In this way public procurement is used as a vehicle in South Africa to effect socio-economic reform.

3.1.3 Transparency

In chapter one it was said that corruption within public procurement will typically involve individuals in positions of power who are well-placed to cover their tracks. Corruption is a crime that is carried out in secret and clandestine ways. Transparency is therefore universally recognised as indispensable in the fight against corruption.⁷⁹ This therefore makes the interpretation of the constitutional principle of transparency critical in any evaluation of laws aimed at combating corruption within the public procurement sector.

Volmink submits that one of the hallmarks of an open and democratic society is the free flow of information.⁸⁰ Apart from the context of section 217(1), the notion of transparency must also be interpreted in light of the right to access information as contained in section 32 of the

⁷⁶ Ibid.

⁷⁷ Bolton (note 59 above) 52.

⁷⁸ 'Green Paper on Public Sector Procurement Reform in South Africa: An initiative of the Ministry of Finance and the Ministry of Public Works' General Notice 691 of 1997.

⁷⁹ Organisation for Economic Cooperation and Development (2007) 'Bribery in Public Procurement, Methods, Actors and Counter Measures' available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf> accessed on 21 September 2014.

⁸⁰ P Volmink 'Enhancing Transparency Within Public Sector Procurement: The South African Experience'(2010) A paper presented at the 4th International Public Procurement Conference available at www.ippa.org/proceedings-paper18-11 accessed on 17 October 2015.

Constitution.⁸¹ It should also be seen in the context of section 33 of the Constitution which affords every person whose rights have been adversely affected the right to be given written reasons for administrative decisions.⁸² Finally transparency must take into account the secret and clandestine nature of procurement corruption. Vesterdorf submits, in respect of public procurement that:

‘transparency covers submission to “at least the four following principles: (1) the right to a statement of reasons for a decision, (2) the right to be heard before a decision is taken, (3) a statement of reasons for a decision, and (4) the public’s right to access to information.’⁸³

Writing on the principle of transparency in public procurement, Heitling submits that:

‘in combating corruption transparency is supposedly to make (financial) information regarding costs and benefits of corrupt behaviour readily available, thereby making it more visible, risky and therefore less attractive, which in the end then results in lower corruption.’⁸⁴

It is submitted that the right of access to information is broader than the right to be given written reasons for an administrative decision. In terms of the wording of section 32 of the Constitution, everyone has the right of access to information. In terms of section 32(1)(a) ‘information’ refers to ‘records’ of a public body.⁸⁵ In terms of section 33 it is only those whose rights are adversely affected who have the right to be given reasons for an administrative decision. It is submitted that this creates an anomaly for an unsuccessful tenderer. Under section 32, such tenderer would have a right to the documents before the tender committee without having to show a violation of any right. However should such tenderer require reasons for the tender committee’s decision, then the tenderer would have to

⁸¹ Section 32 reads as follows: (1) Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

⁸² Section 33 of the Constitution reads as follows: (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

⁸³B Vesterdorf ‘Transparency – Not Just a Vogue Word’ (1998-1999) 22 *Fordham Internal Law Journal* 902. 929.

⁸⁴ O Heitling ‘The Principle of Transparency in Public Procurement’ (2012) Maastricht University, Faculty of Law 2.

⁸⁵ Volmink (note 80 above) 5.

demonstrate a right which has been adversely affected before being entitled to the written reasons. The difficulty presented is that often an unsuccessful tenderer is unaware of which right, or the manner in which the right may have been adversely affected, unless he is provided with written reasons for the decision.

The issue of transparency and the duty of procuring entities to furnish information and reasons for decisions have been judicially interpreted, as have the other constitutional procurement principles. As will be seen in chapter five, which addresses the judicial approach to the interpretation of these constitutional principles, transparency ought to be interpreted broadly and generously and in a manner which will always give effect to an open and democratic society. Bolton asserts that:

‘the underlying aim or rationale for a transparent procurement system is to ensure that interested or affected parties, like the media, the legislature, potential contractors and the public, as taxpayers, are free to scrutinise the procedures followed.’⁸⁶

Furthermore, it is submitted that a transparent procurement system, in addition to ensuring that procedures are open to scrutiny, is to ensure that actual reasons and underlying principles in terms of which decisions are made are fair, lawful, rational and free of any venal intent.

3.1.4 *Competitiveness*

It is submitted that the Competition Act⁸⁷ is a useful starting point in understanding the contextual meaning and content of this constitutional principle. South Africa’s history of racial discrimination ensured that vast segments of society were excluded or prevented from participating in the mainstream economy. In South Africa therefore, competition, has a meaning which is broader than the purely commercial description of competition.

In essence competition from a commercial perspective can be defined as the rivalry which naturally exists in a market between those engaged in a similar economic activity whether the activity is the production, distribution, sale or purchase of goods or services.⁸⁸ The preamble to the Competition Act⁸⁹ further recognises that the past apartheid and other discriminatory

⁸⁶ Bolton (note 59 above) 54.

⁸⁷ 89 of 1998.

⁸⁸ Bolton (note 59 above) 41.

⁸⁹ The Preamble of the Competition Act reads as follows:

‘The People of South Africa recognise: that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans.

laws and practices resulted in excessive concentration of ownership and control within the national economy, weak enforcement of anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.

Government, as the largest buyer of goods and services in the country, is uniquely placed to promote and advance competition, in order to create a more robust economy from a commercial perspective as well as an economy that fosters full and free participation by all who wish to so participate. Public procurement must therefore seek to achieve competitiveness in terms of this dual perspective.

The commercial nature of competition implies that a wide range of suppliers ought to be given an opportunity to bid for government work, and government ought to then select the contractor which represents the best value-for-money option.⁹⁰ De la Harpe, points out though, that the concept ‘best value for money’ does not necessarily mean that the lowest priced tenderer ought, in all cases to be awarded the tender. He asserts that the best value outcome means that the most meritorious should succeed above the less meritorious.⁹¹ Merit therefore means that price should not be the only factor. A procurement system that follows this approach will encourage the production and rendering of quality goods and services by commercial entities in the market, as competitors will understand that it is not only a low price which will secure them a public contract. In this way public procurement advances competition which results in an economy in which consumers benefit from superior quality goods and services.

A procurement system which places primary focus on price, on the other hand, distorts the meaning of competition. While procedurally, the procurement system may have provided a wide range of suppliers an opportunity to compete against one another, where suppliers are aware of the decisive role played by price, quality of service and goods may be sacrificed in order to ensure that the lowest price is tendered. This will lead to an erosion of the value-for-

That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy. That an efficient, competitive economic environment balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans. In Order To- provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and freely select the quality and variety of goods and services they desire; create greater capability and an environment for South Africans to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.’

⁹⁰ De la Harpe (note 75 above) 287.

⁹¹ Ibid.

money principle, as a product of inferior quality will have been procured at the lowest price. The commercial nature of competition also entails that goods and services must be defined in such a manner and in such detail, for instance with regard to specifications and performance criteria, that the tender price can be directly compared.⁹²

With respect to redressing past apartheid and discriminatory laws and practices, it is submitted that competition will of necessity involve a structured system of preferential procurement. This is provided for within section 217(2) of the Constitution. With respect to public procurement, it is only through a system of preference that the ideals, as contained in the Competition Act, of creating an economy that is open to greater ownership by greater numbers of South Africans, can be achieved. As such public procurement in South Africa is subject to specific preferential procurement laws. These are discussed in chapter four.

It is therefore submitted that in order to satisfy the principle of competitiveness each procurement decision must be balanced in order to reflect the commercial nature of competition as well as the achievement of the ideals as outlined in the Competition Act.

3.1.5 Cost-Effectiveness

According to Bolton cost-effectiveness and competition are, to a large extent, interconnected and interrelated.⁹³ She asserts that both principles concern the attainment of value for money.⁹⁴ However she asserts that there may be instances wherein the most cost-effective solution, necessarily involves the curtailment of a competitive procurement method.⁹⁵ An example of such a situation may be as follows: floods have destroyed a large segment of an informal settlement, and the damage continues to pose life threatening dangers to the people of the settlement. In such a case time is of the essence in procuring the services of a contractor to stop the dangerous situations by clearing or rehabilitating the damage. The financial benefits obtained through a formal competitive procedure, may be outweighed by the inconvenience and risk posed to the people due to the delay involved. In such a case, the non-use of a formal competitive system, does not necessarily mean that no value for money was obtained. Had extensive and continued damage occurred due to the delay in utilising a competitive system, this may result in additional costs in the longer term.

⁹² De la Harpe (note 75 above) 288.

⁹³ Bolton (note 59 above) 40.

⁹⁴ Ibid.

⁹⁵ Ibid 44.

De la Harpe asserts that a cost-effective action can be described as being effective or productive in relation to its costs.⁹⁶ Therefore in the example used above, while the initial cost of not utilising a competitive system may be higher, the action itself may be more effective in that the prevention of delay may prevent further and more costly damage in the longer term. The danger, in public procurement though, lies in the abuse of such methods and the unjustified non-use of competitive methods in the guise of emergency situations which in reality ought to have been anticipated well in advance. This will constitute a negation of the principle of cost-effectiveness.

De la Harpe further asserts that a system is cost-effective when the system is standardised with sufficient flexibility to attain best-value outcomes in respect of quality, timing and price, and demands the least resources to effectively manage and control procurement processes.⁹⁷ In this respect cost-effectiveness is interconnected with competition in that the lowest tender might not always be the best option. A product with a longer lifespan or cheaper maintenance costs might be more cost-effective than its cheaper counterpart.

The principles of fairness, equity, transparency, competitiveness and cost-effectiveness as examined here, must underpin all public procurement actions. Legislation governing public procurement and the implementation thereof must therefore promote these principles. However seeing that certain principles overlap, or even limit one another, all five principles must be interpreted to reflect the system as a whole. This means that each principle cannot be interpreted individually and in isolation from one another, but rather in relation to one another. It is for this reason that section 217 refers to a ‘system’ which is fair, equitable, transparent, competitive and cost-effective. Bolton therefore asserts that in order for a court to determine whether the actions or decisions of an organ of state complied with the principles in section 217(1), it should take account of all the circumstances of the particular case and on that basis determine compliance.⁹⁸ She further asserts that one of the primary reasons for the express inclusion of the five principles in section 217(1) is to safeguard the integrity of the government procurement process.⁹⁹ The inclusion of the principles, Bolton

⁹⁶ De la Harpe (note 75 above) 289.

⁹⁷ De la Harpe (note 75 above) 290.

⁹⁸ Bolton (note 59 above) 56.

⁹⁹ *Ibid* 57.

suggests, in addition to ensuring the prudent use of public resources, is also aimed at preventing corruption.¹⁰⁰

4 CONCLUSION

International law plays an important role in legislative interpretation in South Africa. An understanding of both the anti-corruption international law framework as well as the constitutional procurement framework are important for the purpose this study. The international law and the constitutional frameworks, provide broad and universal principles upon which domestic public procurement processes ought to be based in order to reduce corruption within this sector. .

While South Africa is a party to various international and regional anti-corruption instruments, it is only the UNCAC which contains substantive provisions relating to corruption within the public procurement sector. However the other international instruments, while lacking specific provisions relating to public procurement, contain universal anti-corruption principles, which South Africa has a duty to adhere to. In the main these instruments highlight transparency, equity and efficiency in public processes. It appears that the five constitutional procurement principles enshrined in South Africa's Constitution accord with universal international principles.

The five public procurement principles are the primary yardsticks against which all procurement processes and decisions must be tested. A public procurement system in South Africa, in order to pass constitutional muster, must reflect these five principles. While it may be difficult for any one procurement decision to strictly reflect all principles, the public procurement system as a whole must be reflective of the principles.

Public procurement decisions must be procedurally and substantively fair and may be used a vehicle to effect socio-economic reform. The principle of equity is aimed at addressing the inequalities of the past in order to achieve balanced socio-economic reform. Public procurement processes must be transparent. Since most information about procurement processes is held by the public body, if public procurement corruption is to be stemmed, transparency must be interpreted broadly and generously. The Constitution also requires that public procurement processes be competitive and cost-effective. Once again, these principles must be interpreted broadly. The attainment of competitiveness is linked to the achievement

¹⁰⁰ Ibid.

of socio-economic goals by ensuring that a greater number of suppliers, including those historically excluded, are given an opportunity to compete for government work, while at the same time ensuring the best value-for-money solution.

The 2011 UNCITRAL Model Law is a useful tool which national governments may utilise during legal reform pertaining to public procurement. It purports to provide a template which may be customised to suit domestic circumstances, and contains comprehensive provisions on salient aspects of the public tendering process.

Due to the considerable judicial attention that the constitutional procurement principles have attracted, a discussion of such principles would be incomplete without reference to the relevant judicial jurisprudence. A discussion of the judicial approach to both the interpretation of the constitutional procurement principles, as well as the judicial approach to public tendering in South Africa will be undertaken further below. First however, an evaluation of the domestic legislative framework is necessary if meaningful legal reform has to be suggested. It is to that legislative framework that we now turn our attention.

CHAPTER FOUR: THE DOMESTIC LEGISLATIVE FRAMEWORK

1 INTRODUCTION

Chapter three has provided an overview of the international anti-corruption law framework and the constitutional public procurement framework. An understanding of South Africa's international obligations in terms of its anti-corruption efforts, as well as an understanding of South Africa's constitutional procurement principles are necessary. Such understanding will inform the evaluation undertaken in this chapter.

Accordingly in this chapter the legislative framework pertaining to public procurement, as well as relevant Treasury prescripts are evaluated. Salient provisions of the Prevention and Combating of Corrupt Activities Act¹ are also evaluated. The purpose of this evaluation is to ascertain areas for legal reform in order to reduce public procurement corruption.

In South Africa public procurement is extensively regulated.² There is no single legislation which is applicable to all aspects of public procurement. Rules pertaining to public procurement are found in a number of laws. This makes the separate analysis of each law inappropriate. A more suitable approach is therefore to analyse the legislative framework with a view to addressing specific issues. The key research questions outlined in chapter one, have been identified with the aim of focusing the legislative evaluation. The evaluation is therefore undertaken bearing in mind these key research questions.

The evaluation of laws involves, in the main, interpretation. Interpretation is therefore the method used as the evaluation tool. The interpretation of the laws is aided by the views of relevant scholars and leading international, regional and national organisations. The evaluation is also guided by the international law and constitutional law principles discussed in the foregoing chapter.

Public procurement in South Africa is implemented primarily through four mechanisms. These are petty cash purchases for contracts up to R2000, written or verbal quotations for contracts over R2000 but under R10 000, written price quotations for contracts over R10 000 but under R200 000 and competitive bidding for contracts over R200 000.³ Competitive

¹ 12 of 2004.

² P Bolton 'Disqualification for Non-Compliance with Public Tender Conditions' (2014) 17 *PELJ* 2314, 2319.

³ P Bolton 'Grounds for Dispensing with Public Tender Procedures in Government Contracting' (2006) 9 *PELJ* 1, 6.

bidding is also commonly known as tendering. As will be seen in chapter five, it is the tendering process which is mainly the subject of court disputes, where allegations of corruption and malfeasance emerge. The overview of the legislation as well as the evaluation thereof is therefore focused primarily on laws regulating the competitive bidding process. Other statutes such as the Construction Industry Development Board Act⁴ (hereinafter referred to as ‘CIBD Act’) and its Regulations,⁵ although applicable to public procurement, apply to a specific sector only. For instance the CIBD Act provides for the establishment of the Construction Industry Development Board and generally provides for the implementation of an integrated strategy for the reconstruction, growth and development of the construction industry. Such industry specific laws do not alter the public procurement competitive bidding process as provided for in public procurement legislation. Therefore such laws and laws regulating other methods of procurement will only be addressed in so far as they may be necessary for the primary evaluation.

In 2003, the South African Government also adopted an integrated supply chain management approach to public sector procurement and provisioning.⁶ An integrated supply chain management process refers to a system of procurement where value is added at every stage of the procurement process.⁷ The four phases of a procurement process are demand, acquisition, logistics and disposal.⁸ It is prudent to briefly discuss each phase of the procurement process, as the integrated supply chain management approach is a single national legislative framework to guide uniformity in procurement reform initiatives in the different spheres of government.⁹ Hence the public procurement legislative framework ought to apply to each phase and to accordingly have in place mechanisms to avoid corrupt practices during each phase.

⁴ 38 of 2000.

⁵ Regulations in terms of the Construction Industry Development Board Act, 2000 Government Notice 692 and various amendment regulations thereto.

⁶ Government of Republic of South Africa ‘Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government’ 23 September 2003 available at <http://www.treasury.gov.za/legislation/pfma/supplychain/Policy%20to%20Guide%20Uniformity%20in%20Procurement%20Reform%20Processes%20in%20Government.pdf> accessed on 08 January 2015.

⁷ The National Treasury ‘SCM: A Guide for Accounting Officers of Municipalities and Municipal Entities’ October 2005 available at http://mfma.treasury.gov.za/MFMA/Guidelines/Guide%20for%20Municipal%20Accounting%20Officers_1.pdf accessed on 08 January 2015.

⁸ Ibid.

⁹ Government of Republic of South Africa ‘Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government’ (Note 6 above).

Demand management is the first phase of supply chain management. It entails understanding the future needs of the organisation, and undertaking a thorough needs assessment which will include identifying critical delivery dates, the frequency of the need, linking the requirement to the budget, the determination of clear specifications as well as conducting relevant expenditure analyses.¹⁰ This practice places the supply chain practitioner closer to the end user, ensuring proper planning for procurement and hence value for money.¹¹ Any system of procurement which is triggered into motion as and when a need arises, introduces the risk of obtaining the good or service at a higher price or of obtaining goods or services of inferior or inappropriate quality. This aspect of an integrated supply chain management process seeks to avoid such risks.

Acquisition management is the second phase of supply chain management and refers to the management of the actual procurement. This phase involves the decisions on the manner in which the market will be approached (that is the type of procurement method to be used), ensuring that all bid documentation are complete, including evaluation criteria, the evaluation of bids in accordance with published criteria and ensuring that proper contract documents are signed.¹²

Logistics management is the third phase of supply chain management and refers to the management of the actual goods or services acquired. It includes the setting of inventory levels, receiving and distribution of material; stores, warehouse and transport management and the review of supplier performance.¹³

The final phase of supply chain management is disposal management. It refers to the process of determining the best method of disposing of a good once use is complete. This includes obsolescence planning, maintaining a database of all redundant material, the inspection of material for potential re-use and the execution of the physical disposal process.¹⁴

National legislation and subordinate legislation in the form of regulations have been enacted to respond to the constitutional principles as well as the integrated supply chain management

¹⁰ Ibid.

¹¹ Ibid.

¹² National Treasury 'SCM: A Guide for Accounting Officers of Municipalities and Municipal Entities' (note 7 above).

¹³ Ibid.

¹⁴ Government of Republic of South Africa 'Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government' (note 6 above).

process. Prior to undertaking the actual evaluation, this chapter provides a broad overview of the main public procurement legislation adopted in South Africa.

2 OVERVIEW OF LEGISLATION

2.1 Public Finance Management Act¹⁵

Prior to 1994, public procurement in South Africa was centralised. The State Tender Board Act¹⁶ provided for the central procurement of goods and services and established a central State Tender Board. In particular the State Tender Board had the powers to invite offers in any manner it deemed fit and to determine the conditions subject to which such offers had to be made¹⁷, and without giving reasons for its decisions, to accept or reject any offer for the conclusion of an agreement.¹⁸ Consequently user departments, specifically the heads of those departments, had no control over how procurement practices took place, and could thus not be held accountable for expenditure through procurement. Procurement reforms in South Africa began in 1995, which was largely a joint initiative by the Ministries of Public Works and Finance.¹⁹ Soon after the 1994 general elections in South Africa, government introduced budgetary and financial reforms.²⁰ The first phase of reforms began with the introduction of a new intergovernmental system, which required all three spheres of government to develop and adopt their own budgets.²¹ This decentralised budgeting model, also meant that heads of departments needed to have control over procurement expenditure if each sphere of government and each department within government were to be held accountable for their own budgets.

The Public Finance Management Act (hereinafter referred to as the ‘PFMA’) was adopted with the objective to modernise financial management and enhance accountability. A basic principle of this modernised financial model is that managers must be given the flexibility to manage, within a framework that satisfies the constitutional requirements of transparency and

¹⁵ 1 of 1999.

¹⁶ 86 of 1968.

¹⁷ Section 4(1)(b).

¹⁸ Section 4(1)(c).

¹⁹ K Raga & Derek J Taylor ‘Legislative and Administrative Directives governing procurement procedures: A Case Study for South Africa’ (2010) Referring to the Green Paper on Public Sector Procurement Reform in South Africa. A paper presented at the 4th International Public Procurement Conference available at <http://www.ippa.org/IPPC4/Proceedings/10LegalIssue%20inPublicProcurement/Paper10-7.pdf>, accessed on 08 January 2015.

²⁰ Republic of South Africa National Treasury ‘Guide for Accounting Officers Public Finance Management Act’ available at <http://www.treasury.gov.za> accessed on 08 January 2015.

²¹ Ibid.

accountability.²² This is the context within which the PFMA was drafted. The PFMA regulates financial management and is applicable to national and provincial government departments. It sets out procedures for efficient and effective management of all revenue, expenditure, assets and liabilities and establishes the duties and responsibilities of government officials in charge of finances.

Section 38 of the PFMA sets out the general responsibilities of accounting officers.²³ Subsection 38(1)(a)(i) and (iii) provides as follows:

‘The accounting officer for a department, trading entity or constitutional institution-

(a) must ensure that that department, trading entity or constitutional institution has and maintains-effective, efficient and transparent systems of financial and risk management and internal control;

((iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.’

Section 76 (4)(c) provides as follows:

‘The National Treasury must make regulations or issue instructions applicable to departments, concerning-

the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.’

The PFMA does not contain any more provisions directly related to the processes of public procurement. The PFMA is therefore not a statute dedicated solely to procurement or to supply chain management practices. It is rather an overarching statute regulating government finances at national and provincial level.

2.2 Local Government: Municipal Finance Management Act²⁴

The Municipal Finance Management Act (hereinafter referred to as the ‘MFMA’) is applicable to municipalities in the local sphere of government. The procurement provisions of the MFMA are similar to the provisions of the PFMA, but contain more detail regarding the

²² Ibid.

²³ Section 36 of the PFMA defines an accounting officer as the head of a department or the chief executive officer of a constitutional institution.

²⁴ 56 of 2003.

system.²⁵ As with the PFMA, the MFMA places responsibility for decisions in the hands of each accounting officer.²⁶ While the MFMA is also not a statute dedicated solely to procurement, Chapter 11 thereof is dedicated to supply chain management. It provides the legal framework for the implementation of an integrated supply chain management process in local government. Prior to this legislative enactment, procurement and provisioning arrangements in local government suffered from a number of limitations that needed to be addressed.²⁷

Section 112 of the MFMA prescribes that municipalities must adopt a supply chain management policy which is fair, equitable, transparent, competitive and cost-effective. This section also sets out certain minimum aspects which the supply chain management policy must cover.²⁸ It is submitted that this section is of vital importance to the manner in which

²⁵ R B Watermeyer 'Regulating Public Procurement in Southern Africa through International and National Standards' (2011) A paper presented at the Public Procurement Regulation in Africa Conference held in Stellenbosch 1, 3.

²⁶ In terms of section 1 read with section 60 of the MFMA, accounting officer is defined as the municipal manager of each municipality.

²⁷Republic of South Africa National Treasury 'SCM: A Guide for Accounting Officers of Municipalities and Municipal Entities' (note 7 above) Some of the limitations of the previous system were identified as follows: 1.The composition of tender committees gave rise to serious conflicts of interests. 2. The procurement and provisioning procedures were rule driven, and value for money was almost always equated with the lowest price tendered. 3. Procurement and provisioning activities often operated in isolation from other management activities, with little or no linkage to budgetary/strategic planning and integrated development plan objectives. 4. Asset management focused on inventory control rather than on ensuring a satisfactory return on the capital invested in inventories/assets. 5. There was a lack of uniformity in documentation that caused uncertainty and inefficiencies, both on the part of bidders and also procurement practitioners. 6. Consultants were not selected in a systematic and competitive manner. 7. The Preferential Procurement Policy Framework Act 5 of 2000 and its associated Regulations are complex and difficult to implement correctly, and procurement practitioners were not adequately trained in its application. 8. The costs and outcomes of the Preferential Procurement Policy Framework Act were not fully quantified; hence it was impossible to evaluate the merits of the system.

²⁸ Section 112 provides as follows: '(1) the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:(a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;(b) when a municipality or municipal entity may or must use a particular type of process;(c) procedures and mechanisms for each type of process;(d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;(e) open and transparent pre-qualification processes for tenders or other bids;(f) competitive bidding processes in which only pre-qualified persons may participate;(g) bid documentation, advertising of and invitations for contracts;(h) procedures and mechanisms for-(i) the opening, registering and recording of bids in the presence of interested persons;(ii) the evaluation of bids to ensure best value for money;(iii) negotiating the final terms of contracts; and(iv) the approval of bids; Screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;(k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;(l) the barring of persons from participating in tendering or other bidding processes, including persons-(i) who were convicted for fraud or corruption during the past five years;(ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or(iii) Whose tax matters are not cleared by South African Revenue Service;(m) measures for-(i) combating fraud, corruption, favouritism and unfair and irregular

municipalities carry out their supply chain functions. In essence all municipal supply chain functions must adhere to this section.

In terms of section 115 the accounting officer is responsible for the implementation of the supply chain management policy. The accounting officer must also take all reasonable steps to ensure that mechanisms are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices. The MFMA also contains provision which provides for contract administration post the tender award stage.²⁹

Section 168(1)(a) provides that the Minister of Finance may make regulations or guidelines applicable to municipalities regarding any matter that may be prescribed in terms of the Act. It is in terms of this section that the MFMA Regulations and Treasury prescripts pertaining to municipal supply chain management are issued.

2.3 Preferential Procurement Policy Framework Act³⁰

The purpose of the Preferential Procurement Policy Framework Act (hereinafter referred to as 'PPPFA') is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution. Section 217(2) of the Constitution is intended to use procurement as a policy tool. Prior to 1994 price was the overriding criterion for the procurement of goods and services by the government.³¹ Tenders were awarded strictly based on price and the tenderer who submitted the lowest tender (in terms of price) was overlooked when there was clear evidence that he did not have the necessary experience or capacity to undertake the work or was financially unsound.³² The Constitution has to a large extent changed this practice. Although price is still a very important criterion for the procurement of goods and services it

practices in municipal supply chain management; and(ii) promoting ethics of officials and other role players involved in municipal supply chain management;(n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by-(i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or(ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act;(o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;(p) contract management and dispute settling procedures; and(q) the delegation of municipal supply chain management powers and duties, including to officials.(2) The regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost-effective.'

²⁹ Section 116 of the MFMA.

³⁰ 5 of 2000.

³¹P Bolton 'Government Procurement as a Policy Tool in South Africa'. (2006) 6 *Journal of Public Procurement* 193, 201.

³² Ibid.

is no longer the decisive criterion. This has been illustrated during the discussion of cost-effectiveness in the previous chapter.

The Green Paper on Public Sector Procurement Reform described the practice of accepting the lowest tender in terms of price only as inflexible and restricts the attainment of the policy objectives as provided for in section 217(2) of the Constitution.³³ This Green Paper furthermore pointed out though that if one moves away from awarding contracts to the lowest tenderers in order to reward them for the socioeconomic components of their tenders, tender evaluation criteria must be clearly spelt out in the tender documents to enable tenderers to compete on an equitable basis and in a transparent manner.³⁴

The PPPFA therefore provides a framework for the recognition of socioeconomic components and the setting and evaluation of award criterion. The PPPFA does this by introducing a preference point system to be utilised in the evaluation of tenders.³⁵ In terms of this system, and depending on the Rand value of the contract, a maximum number of points may be allocated for specific goals, while the lowest tenderer in terms of Rand value will score a maximum of either 90 or 80 points depending on the Rand value of the contract. The successful tenderer will be the one which scores the highest number of points after the points for specific goals and the points for price have been added.³⁶

The PPPFA leaves it open to organs of state to decide what specific goals it wishes to award points for, but states that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.³⁷ Bolton submits that the aim of the PPPFA is to enhance the participation of historically disadvantaged individuals and small, medium and micro enterprises in the public sector procurement system.³⁸ The PPPFA itself states that specific goals may include ‘contracting with persons, or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability and implementing the programmes of the Reconstruction and Development Programme.’³⁹ The specific goals to which this statute refers will therefore be linked to the advancement of these categories of persons. The National Treasury has issued Regulations which provides a

³³ Republic of South Africa Ministry of Finance and Ministry of Public Works ‘Green Paper on Public Sector Procurement Reform’ General Notice 691 of 1997.

³⁴ *Ibid.*

³⁵ Section 2(1) of the PPPFA.

³⁶ Section 2(1)(f).

³⁷ Section 2(1)(e).

³⁸ P Bolton *The Law of Government Procurement in South Africa* (2007) 45.

³⁹ Section 2(1)(d).

formula to calculate how the points for price (either 80 or 90 points) are to be awarded to each tenderer. The provisions of the PPPFA are applicable to all levels of government.

2.4 Local Government: Municipal Systems Act⁴⁰

The Local Government: Municipal Systems Act (hereinafter referred to as the 'Municipal Systems Act') provides that municipalities may procure the services of private persons to provide or perform a municipal service.⁴¹ When procuring such services the Municipal Systems Act makes it incumbent on municipalities to employ a competitive bidding process which complies with the relevant provisions of the MFMA.⁴² Bolton submits that if a municipality contemplates using an external provider for the delivery of a municipal service, the following four step process must be followed:

'(1) an initial review must take place of the way in which the municipality provides the service; (2) a specific category of external provider must be chosen; (3) if the category chosen is a private party (that is not a municipal entity or other organ of state) a competitive procurement process must take place; and (4) once a service provider is selected a service delivery agreement must be concluded.'⁴³

Bolton further submits that when a municipality decides to provide a municipal service through an external service provider, certain risks such as the possibility of service price increases, poor quality of service and corruption, are high.⁴⁴ It is therefore important that the procurement process employed, in such an instance, is as competitive as possible.

Sections 80, 81, 83 and 84 of the Municipal Systems Act apply and set out specific criteria to be met, when a municipal service is provided through an external mechanism. For instance section 80(2) reads as follows:

'Before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media.'

⁴⁰ 32 of 2000.

⁴¹ Section 80(1)(b). A municipal service is defined in section 1 of the Systems Act as a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether such service is provided through an internal or external mechanism and irrespective also of whether fees, charges or tariffs are levied in respect of such a service or not.

⁴² Section 83 (1)(a).

⁴³ Bolton (note 38 above) 159.

⁴⁴ Ibid 159-160.

With regards to the competitive bidding method, section 83(1)(d) requires that the selection process must make the municipality accountable to the local community regarding progress with selection and reasons for any decisions. These criteria are in addition to the criteria required to be met in terms of the MFMA and the MFMA Regulations.

The provisions of the Municipal Systems Act are therefore directly applicable to public procurement when the good or service procured is required to fulfil a municipal service.

2.5 Promotion of Administrative Justice Act⁴⁵

It was mentioned in chapter one that the award of a contract in terms of the public procurement process constitutes administrative action. The provisions of the Promotion of Administrative Justice Act (hereinafter referred to as 'PAJA') and administrative law in general therefore apply to public sector procurement. Administrative law is that branch of public law which deals with the body of legal rules conferring on administrators clothed with state authority the competence to exercise public power or to perform public action.⁴⁶ In the past, the emphasis of administrative law, was reactive, relying heavily on judicial review to correct and control administrative action. The focus has now shifted to making the correct administrative decisions rather than relying so heavily on judicial review.⁴⁷ To a large extent administrative law has been codified by PAJA which sets the parameters within which correct administrative action must be taken.

In terms of section 3(1) of PAJA administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2)(b) of PAJA states as follows:

'In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.'

⁴⁵ 3 of 2000.

⁴⁶ C Lange & J Wessels *The Right to Know* (2004) 2-3.

⁴⁷ *Bel Porto School Governing Body & Others v Premier of Province, Western Cape & Another* 2002 (9) BCLR 891 para 6.

Section 7(1) of PAJA states as follows:

‘Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.’

Section 8 also provides for the types of remedies available after judicial review. It is submitted that the provisions of PAJA impact on the public tender process, and become particularly relevant when an aggrieved bidder opts to challenge a decision of an organ of state. If public procurement legislation does not contain satisfactory appeal or review mechanisms, then the aggrieved bidder will have no option but to resort to the use of PAJA.

2.6 PFMA Regulations⁴⁸

Regulation 16A of the PFMA Regulations is dedicated to supply chain management in national and provincial government and has been promulgated in terms of section 76(4)(c) of the PFMA. These regulations purport to provide a practical framework within which supply chain management practices are to take place.

With respect to the formulation of a supply chain management system, Regulation 16A3.1 provides as follows:

‘The accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for-

- (a) the acquisition of goods and services; and
- (b) the disposal and letting of state assets, including the disposal of goods no longer required.’

It is clear from the above provision therefore that each state department is expected to formulate and adopt its own supply chain management systems. In so far as providing guidance on the elements of such a system Regulation 16A3.2 provides as follows:

‘A supply chain management system referred to in paragraph 16A.3.1. must-

⁴⁸ Republic of South Africa National Treasury: Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities. Issued in terms of the PFMA. (2005) Government Gazette Number 27388.

- (a) be fair, equitable, transparent, competitive and cost-effective;
- (b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
- (c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
and
- (d) provide for at least the following:-
 - (i) demand management;
 - (ii) acquisition management;
 - (iii) logistics management;
 - (iv) disposal management;
 - (v) risk management; and
 - (vi) regular assessment of supply chain performance.'

Procurement is implemented through a three-bid committee structure, as envisaged in Regulation 16A6.2. These three bid committees are the bid specification committee, the bid evaluation committee and the bid adjudication committee. In terms of this Regulation, the establishment, composition and functioning of these committees, as well as the approval of recommendations from the bid evaluation or bid adjudication committees, are to be provided for in the supply chain management system of each department.

Competitive bidding requires the public advertisement of bids. This is provided for in Regulation 16A6.3, which also provides for, *inter alia*, the disclosure of evaluation and adjudication criteria in bid documentation, as well as direction on the method of advertisement. While the general rule for competitive bidding appears to require public advertisements of bids, Regulation 16A6.4 creates room for deviations from this standard practice, and provides as follows:

'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.'

With regards to the actual process of procurement of a good or service, the PFMA Regulations do not seem to offer much more instruction apart from what has been stated above. However the PFMA Regulations are to be read together with various National Treasury prescripts which are issued from time to time.

With respect to the avoidance of abuse of the supply chain management system, Regulation 16A9, obliges the accounting officer, *inter alia*, to investigate allegations of corruption or

other abuse of the supply chain management system by an official as well as to reject bids from bidders who commit fraudulent or corrupt acts.

2.7 MFMA: Municipal Supply Chain Management Regulations⁴⁹

The MFMA: Municipal Supply Chain Management Regulations (hereinafter referred to as the ‘MFMA Regulations’) provide essentially the same procedure for competitive bidding procurement, as do the PFMA Regulations. Regulation 26 of the MFMA Regulations provides for the three-bid committee system, comprising of a bid specification, a bid evaluation and a bid adjudication committee. As with the PFMA Regulations, the MFMA Regulations also provide for a procedure for deviations from the normal procurement procedures. This is provided for in Regulation 36.

Unlike the PMFA Regulations though, the MFMA Regulations are more comprehensive and make provision for aspects not provided for in the PFMA Regulations. For instance, the MFMA Regulations contain provision for the lodging of objections and complaints and the resolution thereof. This is contained in Regulations 49 and 50.

As with the PFMA Regulations, the MFMA Regulations mandate all municipalities to have and implement a supply chain management policy.⁵⁰ Chapter Two of the MFMA Regulations contains a more comprehensive framework which each supply chain management policy is to comply with. For instance, whereas the PFMA Regulations simply enumerate the elements which a supply chain management system is to comply with, the MFMA Regulations purport to provide more guidance on how each element is to be regulated in a supply chain management policy.⁵¹

2.8 Preferential Procurement Policy Framework Act Regulations⁵²

The Preferential Procurement Policy Framework Act Regulations (hereinafter referred to as the ‘PPPFA Regulations’), issued in terms of section 5(1) of the PPPFA, provide an operational framework for the preference point system envisaged in the PPPFA. These Regulations require organs of state to determine the appropriate preference point system to be

⁴⁹ Republic of South Africa National Treasury Local Government: Municipal Finance Management Act 56 of 2003: Municipal Supply Chain Management Regulations (2005) Government Gazette Number 27636.

⁵⁰ Regulation 2 of the MFMA Regulations.

⁵¹ See Regulations 10-42 of the MFMA Regulations.

⁵² Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2011. Government Gazette No. 34350. The 2011 Regulations have replaced the Preferential Procurement Regulations, 2001 as published in Government Gazette Number R 725.

utilised in any bidding process.⁵³ The current prescribed thresholds are as follows: the 80/20 preference point system is to be utilised for all bids with a Rand value to or above R 30 000 and up to a Rand value of R 1 000 000.⁵⁴ The 90/10 preference point system is to be utilised for all bids in respect of bids with a Rand value above R1 000 000.⁵⁵ This means that either 80 or 90 points will be allocated for price (the lowest tender in Rand value scoring either 80 or 90 points) and a maximum of either 10 or 20 points will be allocated for specified goals.

The PPPFA Regulations also introduces functionality as an evaluation criteria. It appears from Regulation 4 that the evaluation of functionality is to be conducted separately from the preference point system. Regulation 4(4) states as follows:

‘No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.’

Regulation 4(5) further states that:

‘Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point systems prescribed in regulations 5 and 6.’

The PPPFA recognises that not all bids may be subject to a functionality evaluation, but where such is the case, then the criteria to measure functionality clearly become important to the overall evaluation process. To this end, the PPPFA Regulations require that the evaluation criteria for measuring functionality, the weight of each criterion, applicable values, and minimum qualifying score for functionality must be clearly specified in the invitation to submit a tender. Regulation 13(1) obliges an organ of state to act against any tenderer who has claimed or obtained its B-BBEE⁵⁶ status level contribution in a fraudulent manner.

2.9 Various Treasury Prescripts

In addition to the above statutes and regulations a large number of Treasury prescripts apply to public procurement in South Africa⁵⁷. These Treasury prescripts are issued either in terms

⁵³ Regulation 3(b) of the PPPFA Regulations.

⁵⁴ Regulation 5(1) of the PPPFA Regulations.

⁵⁵ Regulation 6(1) of the PPPFA Regulations.

⁵⁶ Broad-based black economic empowerment.

⁵⁷ The following are examples of National Treasury prescripts applicable to national and provincial government: National Treasury Circular dated 23 February 2007: Supply Chain Management: Threshold Values for the Procurement of Goods and Services by Means of Petty Cash, Verbal/Written Price Quotations and Competitive Bids; National Treasury Circular dated 27 October 2004: Implementation of Supply Chain Management; National Treasury Circular dated 24 March 2006: Code of Conduct for Bid Adjudication Committees; National Treasury Instruction Note dated 3 September 2010: Amended Guidelines In Respect Of Bids that Include Functionality as a Criterion for Evaluation; National Treasury Practice Note dated 21 July 2010: Prohibition of

of section 76(c) of the PFMA or section 168 (1)(a) of the MFMA. It would be unreasonably cumbersome to provide a review of each and every Treasury prescript applicable to the procurement process.

2.10 Prevention and Combating of Corrupt Activities Act⁵⁸

The Prevention and Combating of Corrupt Activities Act (hereinafter referred to as the ‘PCCA’) is the chief anti-corruption statute in South Africa, but it is not solely applicable to public procurement corruption. As stated in chapter one the PCCA provides a general offence of corruption,⁵⁹ and creates offences in respect of corrupt activities relating to specific persons,⁶⁰ offences in respect of parties in an employment relationship,⁶¹ offences in respect of corrupt activities relating to specific matters,⁶² and miscellaneous offences relating to possible conflict of interest and other unacceptable conduct⁶³ as well as offences of accessory to or after an offence, attempt, conspiracy and inducing another person to commit an offence.⁶⁴

While there are other sections in the PCCA which could be applicable to corruption within public procurement, section 13 applies most directly to this form of corruption. Section 13 applies to corruption in respect of corrupt activities relating to the procuring and withdrawal

Restrictive Practices: Certificate of Independent Bid Determination: Standard Bidding Document (SBD 9). National Treasury Circular dated 10 May 2005: Supply Chain Management: Evaluation of Bids, Calculation of Points and Timeous Payments of Accounts; National Treasury Practice Note 6 of 2007/2008: Procurement of Goods and Services by Means other than through the Invitation of Competitive Bids; National Treasury Practice Note Number SCM 3 of 2003: Appointment of Consultants. All available at www.nationaltreasury.gov.za accessed on 18 September 2014. The following are examples of Treasury prescripts applicable to municipalities: MFMA Circular No 2-Supply Chain Management-21 July 2004; MFMA Circular No 16-Supply Chain Management Training-20 April 2005; MFMA Circular No 22(note 197 above); MFMA Circular No. 25-Supply Chain Management Guide and Bid Documents-3 October 2005; MFMA Circular No 29- Supply Chain Management Issues-31 January 2006; MFMA Circular No 33-Supply Chain Management Issues-27 March 2006; MFMA Circular No 34-Supply Chain Management Issues-28 June 2006; MFMA Circular No 40-Supply Chain Management Implementation Checklist-20 October 2006; MFMA Circular No 46-Supply Chain Management: Checking the prohibition status of recommended bidders-17 March 2008; MFMA Circular No 52-Supply Chain Management-Prohibition of Restrictive Practices-30 July 2010; MFMA Circular No 53-Supply Chain Management-Amended Guidelines on Functionality for Evaluation of Bids-3 September 2010; MFMA Circular No 62- SCM Enhancing compliance and accountability-20 August 2012; MFMA Circular No 69- SCM on Local Production and Content-22 May 2013. All available at www.nationaltreasury.gov.za accessed on 18 September 2014.

⁵⁸ Prevention and Combating of Corrupt Activities Act (note 1 above).

⁵⁹ Section 3.

⁶⁰ Sections 4-9 create offences in respect of corrupt activities relating to public officers, foreign public officials, agents, members of legislative authority, judicial officer and members of the prosecuting authority respectively.

⁶¹ Section 10.

⁶² Sections 11-16 create offences relating to witnesses and evidential material during certain proceedings, offences relating to contracts, offences relating to procuring and withdrawal of tenders, offences relating to auctions, offences relating to sporting events, and offences relating to gambling or games of chance.

⁶³ Sections 17-19

⁶⁴ Sections 20-21.

of tenders. Section 3 creates the general offence of corruption. Sections 24 and 25 create certain statutory presumptions and defences.

Sections 29-33 of the PCCA applies to the register for tender defaulters. The PCCA provides for the establishment of a national register of tender defaulters within the Office of the National Treasury.⁶⁵

Not all sections of the PCCA are analysed in detail. In the following analysis, sections 13, 3, 24, 25 of the PCCA and its sections applicable to the endorsement of tender defaulters and the duty to report, are addressed.

3 EVALUATION OF LEGISLATIVE FRAMEWORK

3.1 A Plethora of Laws: Implications

3.1.1. Ambiguities and Inconsistencies

It was highlighted in chapter one that a large number of procurement laws may provide fertile ground for procurement related litigation, and further that laws may be selectively applied in order to disguise possible corrupt intentions. A large number of rules may also result in ambiguities and inconsistencies between conflicting provisions in different laws. As will be seen in the following chapter case law shows that large number of laws which prescribe technical formalities may also have the effect of promoting corruption.

As discussed earlier, public procurement in South Africa is regulated by a system of integrated supply chain management. This system is intended to be an integral part of financial management and to promote uniformity in supply chain management processes.⁶⁶ This being the case, it would be expected that the framework in terms of which the supply chain management system is to be implemented would be found in clear and consistent legislative provisions. This however does not appear to be the case.

As seen above section 38 of the PFMA simply requires departments to have in place an appropriate procurement and provisioning system which is fair, equitable, transparent,

⁶⁵ Section 29.

⁶⁶ Republic of South Africa National Treasury 'Guide for Accounting Officers Public Finance Management Act' (note 20 above).

competitive and cost-effective.⁶⁷ The PFMA echoes the provisions of the Constitution, but unfortunately does not offer any further guidance on the development of such a system. This means that every state department must develop its own procurement system. De la Harpe asserts that the one distinct disadvantage presented by this is that there can ‘in theory be as many procurement systems as there are departments.’⁶⁸ This can create difficulties in ascertaining the different policies and distinguishing the detail of the different policies. Section 76(4)(c) of the PFMA however provides that the National Treasury may issue regulations for the determination of a framework for such a system. One would therefore expect the PFMA Regulations to offer more consistent and mandatory instructions on the elements of a supply chain management system.

Regulation 16A of the PFMA Regulations is dedicated to supply chain management. However it is submitted that the problem asserted by De la Harpe above is not adequately cured by Regulation 16A. Regulation 16A3.2 once again refers to the constitutional principles of public procurement, and only goes so far as referring to key empowerment legislation and the key phases of supply chain management. The PFMA Regulations offer little more than this. It is submitted that the PFMA Regulations offer little guidance in terms of content and substance of an effective and efficient supply chain management system.

In light of this lacunae one is then directed to the Supply Chain Management Guide for Accounting Officers/ Authorities issued by the National Treasury.⁶⁹ It is important to note at this point that this Guide is ‘not deemed to be law, is not a substitute for legislation and should not be used for legal interpretation.’⁷⁰ The reality therefore is that in the absence of either primary or subordinate legislation offering meaningful guidance on the adoption of an effective and efficient supply chain management system, accounting officers at national and provincial level are left with a mere guide upon which to base their supply chain management systems. It is submitted however that this Guide provides much more insight and guidance in terms of what ought to be contained in an effective and efficient supply chain management system than either the PFMA or the PFMA Regulations. Unfortunately not having the force of law, departments are free to either heed or ignore the advises contained therein.

⁶⁷ It is assumed that the term ‘procurement and provisioning system’ refers to a supply chain management system.

⁶⁸ S P L De la Harpe *Public Procurement Law: A Comparative Analysis* (unpublished doctoral thesis. UNISA 2009) 300-301.

⁶⁹ Republic of South Africa National Treasury ‘SCM Guide for Accounting Officers /Authorities’ (note 20 above).

⁷⁰ *Ibid* 3.

The Guide provides guidance on a supply chain management model which encompasses each phase of supply chain management. For instance with respect to demand management, the Guide suggests that departments undertake a needs assessment to ensure that goods or services are acquired in order to deliver the agreed service.⁷¹ It is submitted that such planning, if mandatory and implemented uniformly throughout all departments, will have the effect of reducing the room for corruption. Where proper planning results in a well-structured listing of all goods and services actually required, the possibility of creating a demand not actually needed in order to execute a corrupt intention will be minimised. Lewis submits that ‘irregularities in public spending leads to corruption.’⁷² It is submitted that poor or a lack of management of the goods and services actually needed will lead to irregular government spending.⁷³

The legislative framework applicable to public procurement in South Africa also includes a number of Treasury prescripts. These prescripts are termed Circulars, Practice Notes, Instructions or Guidelines. The differing terminology creates difficulty in ascertaining the authoritative value of the prescripts. Section 76(4) of the PFMA states that that National Treasury must make *regulations*⁷⁴ or issue *instructions*⁷⁵ concerning, inter alia, the determination of a framework for an appropriate procurement and provisioning system. This section does not mention the issuing of circulars, practice notes or guidelines. It is submitted therefore that the legislative authority of a Treasury Circular, Practice Note or Guide is uncertain. Nevertheless the National Treasury issued a circular on the guidelines on the implementation of demand management applicable to all national and provincial departments.⁷⁶

It is submitted that this circular purports to appreciate the role that proper demand management plays in an efficient and effective supply chain management system. The circular highlights steps which should be implemented for demand management beginning

⁷¹ Republic of South Africa National Treasury ‘SCM Guide for Accounting Officers/Authorities’ (note 20 above) 10.

⁷² M Lewis ‘Governance and Corruption in Public Health Care Systems’ available at http://www1.worldbank.org/publicsector/anticorrupt/Corruption%20WP_78.pdf accessed on 18 September 2014.

⁷³ The International Fund for Agricultural Development, a specialised agency of the United Nations submits that one of the leading causes of corruption is unevenly provided and poor quality public services. Available at <http://www.ifad.org> accessed on 14 September 2014. It is submitted that poor demand management results in uneven and poor quality of services.

⁷⁴ Own emphasis.

⁷⁵ Own emphasis.

⁷⁶ National Treasury Circular dated 29 July 2011 available at www.nationaltreasury.gov.za accessed on 18 September 2014.

with the identification of resources during strategic planning processes,⁷⁷ development of procurement plans,⁷⁸ analysis of goods, works or services,⁷⁹ a plan to obtain those goods, works or services⁸⁰ and compilation of a bid register.⁸¹ However since the legislative authority of this circular is unclear and uncertain, it is doubtful whether government departments are mandated to abide thereby. Interestingly also there appears to be no National Treasury prescript about the other phases of the supply chain management system.

Currently the bulk of the procurement guidelines as issued by National Treasury relate to the acquisition management phase of supply chain management.⁸² However poor management at every phase of the supply chain management process can lead to or promote corruption. For instance logistics management requires the review of vendor performance.⁸³ There is no legislative prescript mandating procuring entities to undertake a review of vendor performance. In such circumstances, it is possible for a vendor who performed poorly to be awarded subsequent contracts, through corrupt means. It is therefore inadequate for Regulation 16A3.2(d)(iii) of the PFMA Regulations to require departments to make provision for logistics management in their supply chain systems, without, for instance, mandating the review of vendor performance. While Regulation 16A9.2(iii) does go so far as to state that the accounting officer may⁸⁴ disregard the bid of any bidder if that bidder, or any of its directors have failed to perform on any previous contract, it is submitted that in a system which does not mandate the review of vendor performance, this Regulation will be difficult to implement. Although section 5(2)(e) of the CIDB Act mandates the Construction Industry Development Board to establish and maintain a best practice contractor recognition scheme

⁷⁷ Clause 4.1.

⁷⁸ Clause 4.2.

⁷⁹ Clause 4.3.

⁸⁰ Clause 4.4.

⁸¹ Clause 4.5.

⁸² As examples see: National Treasury Circular dated 23 February 2007: Supply Chain Management: Threshold Values for the Procurement of Goods and Services by Means of Petty Cash, Verbal/Written Price Quotations and Competitive Bids; National Treasury Circular dated 27 October 2004: Implementation of Supply Chain Management; National Treasury Circular dated 24 March 2006: Code of Conduct for Bid Adjudication Committees; National Treasury Instruction Note dated 3 September 2010: Amended Guidelines In Respect Of Bids that Include Functionality as a Criterion for Evaluation; National Treasury Practice Note dated 21 July 2010: Prohibition of Restrictive Practices: Certificate of Independent Bid Determination: Standard Bidding Document (SBD 9). National Treasury Circular dated 10 May 2005: Supply Chain Management: Evaluation of Bids, Calculation of Points and Timeous Payments of Accounts; National Treasury Practice Note 6 of 2007/2008: Procurement of Goods and Services by Means other than through the Invitation of Competitive Bids; National Treasury Practice Note Number SCM 3 of 2003: Appointment of Consultants. All available at www.nationaltreasury.gov.za accessed on 18 September 2014.

⁸³ National Treasury SCM Guide for Accounting Officers/Authorities (note 20 above) 11.

⁸⁴ The fact that the word 'may' is used implies a discretion which in itself is problematic, and which may promote corruption in that corrupt accounting officers may use this discretion to not disregard bids falling within this situation in order to further a corrupt intent.

which promotes contractor development and monitors contractor performance, it is submitted that this can hardly be interpreted as placing a duty on procuring entities to review vendor performance as a rule of general application in public procurement. The CIDB Act is an industry specific statute, and furthermore the duty to establish such a scheme is placed on the Construction Industry Development Board and not on procuring entities.

However the National Treasury issued a circular on the Implementation of Supply Chain Management.⁸⁵ This circular addresses the issues of accountability,⁸⁶ unsolicited bids,⁸⁷ payments of accounts,⁸⁸ appointment of bid committees,⁸⁹ late bids,⁹⁰ publication of awards,⁹¹ delegations,⁹² participation of advisors⁹³ and training.⁹⁴ While the suggestions offered in this circular are all relevant to supply chain management, as the title indicates, it is meant to guide *implementation* of a system, which Treasury assumes departments have already established.

In the circumstances therefore there appears to be no document at national or provincial level with certain and clear legislative authority which provides meaningful legislative instruction on how a supply chain management system must be established and what minimum legislative elements ought to be included therein, specifically with a view to preventing corruption. Thai points out that ‘public procurement is a system that is composed of many elements.’⁹⁵ It appears though that while South Africa adopted the supply chain management system applicable to all government procurement, there appears to be no single statute (at least at national and provincial government level) dedicated to the regulation thereof. Instead guidance is obtained from a number of related regulations and policies⁹⁶ and prescripts. Ambe and Badenhorst-Weiss submit that compliance with these policies and regulations is a problem.⁹⁷ In the absence of an authoritative legislative prescript on the establishment of supply chain management systems within departments, the submission made by De la

⁸⁵ National Treasury Circular dated 27 October 2004 available at www.nationaltreasury.gov.za accessed on 18 September 2014.

⁸⁶ Clause 1.

⁸⁷ Clause 2.

⁸⁸ Clause 3.

⁸⁹ Clause 4.

⁹⁰ Clause 5.

⁹¹ Clause 6.

⁹² Clause 7.

⁹³ Clause 8.

⁹⁴ Clause 9.

⁹⁵ K V Thai ‘Public Procurement Re-Examined’ (2001) 1 *Journal of Public Procurement* 9, 11.

⁹⁶ It is submitted that the contents of the National Treasury SCM Guide for Accounting Officers/Authorities (note 20 above) sets out Treasury’s policy with respect to supply chain management practices.

⁹⁷ I M Ambe & J A Badenhorst-Weiss ‘Procurement Challenges in the South African Public Sector’ (2012) *Journal of Transport and Supply Chain Management* 242, 250.

Harpe⁹⁸ alluded to above, is credible. This will lead to uncertainties and lack of uniformity in public procurement systems by government as a whole.

With respect to local government, however, section 112 of the MFMA, offers much more legislative direction and provides certain minimum legislative requirements which each supply chain management policy must contain. It is submitted that these legislative directives ensure a greater degree of consistency among supply chain management policies of different municipalities. The fact that minimum requirements are stipulated in primary legislation (as opposed to guides or circulars) means that municipalities do not have discretion in ensuring that their policies comply with the legislative prescripts. It is uncertain why the PFMA does not follow the same route as the MFMA in this respect.

There are certain minimum requirements mentioned in section 112 of the MMFA which are worthy of praise, in their potential to reduce or prevent corruption. For instance section 112(1)(i) requires that municipal supply chain management policies provide for screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value. This entails a proactive approach. In such a situation, notwithstanding that a corrupt contractor may not have disclosed any conflict of interest, municipalities may be able to detect it during a diligent screening process. Later it will be shown how this compares favourably against national and provincial law in this respect.

Notwithstanding that the MFMA offers a greater degree of legislative guidance in the adoption of a municipal supply chain management policy, it is submitted that inconsistencies among the policies of various municipalities are still very possible and real. The MFMA Regulations are issued in terms of section 168(1)(a) of the MFMA. In this respect the provisions of the MFMA Regulations are binding on all municipalities. In many respects municipalities have resolved to simply adopt the MFMA Regulations (with necessary customisation to make it applicable to each municipality) as their municipal supply chain management policies.⁹⁹

⁹⁸ S P L De la Harpe *Public Procurement Law: A Comparative Analysis* (note 68 above).

⁹⁹ In this respect see the following municipal supply chain management policies: eThekweni Municipality Supply Chain Management Policy (adopted on 22 September 2005) where sections 1-52 are by and large mirror images of the Municipal Supply Chain Management Regulations; Msunduzi Municipality Supply Chain Management Policy (3rd Review December 2011) where sections 1-52 are by and large mirror images of the Municipal Supply Chain Management Regulations; Hibiscus Coast Local Municipality Supply Chain Management Policy (January 2012) where sections 1-52 are by and large mirror images of Regulations 1-52 of the Municipal Supply Chain Management Regulations; Mbizana Local Municipality does not seem to have

However upon a close construction of certain municipal supply chain management policies certain material deviations may be detected. For instance section 28(1)(a)(ii) of the eThekweni Municipality Supply Chain Management Policy¹⁰⁰ provides that the bid evaluation committee must evaluate bids in accordance with the point system set out in terms of paragraph 27(2)(f) of the Policy. The corresponding Regulation in the MFMA Regulations provide that the bid evaluation committee must evaluate bids in accordance with the point system as must be set out in the supply chain management policy of the municipality in terms of Regulation 27(2)(f) *and as prescribed in terms of the Preferential Procurement Policy Framework Act*.¹⁰¹ It is submitted that the eThekweni Policy has materially altered the prescript of the MFMA Regulation, by omitting reference to the PPPFA. In theory therefore the eThekweni Policy may therefore deviate from the prescripts of the PPPFA and substitute its own point system. This will in turn affect the manner in which eThekweni Municipality evaluates bids, as such evaluation will not be strictly in accordance with the MFMA Regulations. This in turn raises the question whether a municipality's supply chain management policy takes precedence in application over and above the MFMA Regulations.

A further example of a material deviation from the MFMA Regulations may be found in the Supply Chain Management Policy of the Ugu District Municipality.¹⁰² Regulation 2(3)(d) of the MFMA Regulations, provides that no municipality may act otherwise than in accordance with its supply chain management policy when selecting external mechanisms referred to in section 80(1)(b) of the Municipal Systems Act for the provision of municipal services in circumstances contemplated in section 83 of that Act. The Ugu District Municipality Supply Chain Management Policy omits reference to this Regulation, in its section 5(2). Section 80(1)(b) of the Municipal Systems Act provides that in the event a municipality wishes to provide a municipal service through an external mechanism, then the municipality must follow a competitive bidding process, envisaged in section 83 of that Act. By omitting reference to Regulation 2(3)(d) of the MFMA Regulations, in its Policy, it can be assumed

adopted its own Supply Chain Management Policy but relies entirely on the Municipal Supply Chain Regulations.

¹⁰⁰ eThekweni Municipality Supply Chain Management Policy (ibid). eThekweni is a city in the province of Kwa-Zulu Natal in South Africa. Its municipality is a metropolitan municipality. A metropolitan municipality is a municipality that has exclusive executive and legislative authority in its area, and which is described in section 155(1) of the Constitution as a Category A municipality.

¹⁰¹ Own emphasis.

¹⁰² Ugu District Municipality Supply Chain Management Policy dated 25 April 2014). The Ugu region is situated on the south coast of the Kwa-Zulu Natal province in South Africa. Its municipality is a district municipality. A district municipality means that municipality that has municipal executive and legislative authority in an area that has more than one municipality, and which is described in section 155(1) of the Constitution as a category C municipality.

that the Ugu District Municipality does not intend to apply the competitive bidding process envisaged in section 83 of the Municipal Systems Act. It is therefore possible for this municipality to circumvent the evaluation process by the committee system in Regulation 26 of the MFMA Regulations or any other process envisaged in its supply chain management policy for competitive bids, in the awarding of contracts envisaged by section 83 of the Municipal Systems Act.

It is submitted that the above situation is untenable especially taking into account the fact that section 83(1)(c) of the Municipal Systems Act places an onus on municipalities to minimise the possibility of fraud and corruption in the awarding of contracts which fall within its section 83. If it is possible for a municipality to circumvent the evaluation process of its own supply chain management policy for certain competitive bids, the potential for corruption is significant. Such situations, it is submitted do not bode well for the fight against corruption. An unsuccessful bidder attempting to challenge the validity of an evaluation process may be faced with conflicting legal prescripts, such as individual supply chain policies of the procuring entity or the MFMA Regulations and the provisions of the Municipal Systems Act. Furthermore, public officials desirous of furthering a corrupt intent, may elect to either apply the MFMA Regulations or the municipal policy. The tragedy lies in the fact that lay persons may not necessarily be aware of the existence of the MFMA Regulations, as members of the public requesting further information on evaluation processes followed, may simply be referred to an entity's supply chain management policy only.

One further finds that each municipality is free to amend their supply chain management policy based on its experience in implementation thereof. An example is found in the policy of the City of Tshwane.¹⁰³ In terms of Regulation 36 of the MFMA Regulations, municipalities may deviate from the prescribed procurement processes in certain limited circumstances, one of which is in an exceptional case where it is impractical or impossible to follow the official procurement processes. The City of Tshwane Municipality found that there was an abuse of this Regulation, in that certain departments within the Municipality were unduly relying on this situation, as a reason to circumvent the official processes in cases where through poor planning, the time taken to complete an official procurement process, would render it impossible to secure the required procurement.¹⁰⁴ The Municipality found,

¹⁰³ SCM Policy Amendment Report (24 February 2011) Resolution of Council of City of Tshwane. Tshwane is a city in the Province of Gauteng in South Africa. Its municipality is a metropolitan municipality.

¹⁰⁴ Ibid.

and rightly so it is submitted, that poor planning and poor demand management, cannot justify a deviation in terms of Regulation 36. This Municipality then added substantive provisions, to its supply chain management policy, governing the circumstances under which it may resort to deviate from the official procurement processes. For instance, the Municipality requires each deviation to be approved by the bid specification committee, that a deviation report be submitted to the Municipality's legal services and supply chain management units for verification and checking. It is submitted that these additions are helpful in the fight against corruption. However they are not mandatory legislative prescripts applying to all government departments. These measures apply only to the City of Tshwane Municipality or any other municipality which may have elected to adopt such measures.

It is submitted that a supply chain management system or policy is the primary source which ought to dictate how every function within a procurement process is to be carried out. In this sense it ought to be clear and consistent and integrated throughout all government entities. Clarity and consistency are achieved only if each and every organ of state is mandated to have certain minimum rules. Presently it is abundantly clear that there is no single set of rules which can be taken to apply to every procurement process at any government entity. The rules pertaining to supply chain management appear to be specific to each government department or municipality depending on the contents of their own policies.

This situation can be compared to the 2011 UNCITRAL Model Law¹⁰⁵ on public procurement. As explained in chapter three this Model Law serves as a template for national governments to utilise during their procurement reform initiatives. Its provisions contain guidance on various aspects of public procurement such as, *inter alia*, rules pertaining to communications in procurement, procedures for soliciting tenders, invitations to tender, evaluation criteria, methods of procurement, contents of solicitation documents, opening of tenders, examination of tenders and challenge proceedings. All these provisions are contained in a single comprehensive codification. This promotes accessibility of the law.

Traditionally, procurement reform and anti-corruption initiatives have followed separate tracks, although they share a common purpose: a sound government, supported by a robust and politically legitimate procurement system.¹⁰⁶ While corruption can be prosecuted after

¹⁰⁵ 2011 UNCITRAL Model Law on Public Procurement: UN General Assembly Resolution 66/95 of 2011.

¹⁰⁶ United Nations Office on Drugs and Crime 'Guidebook on anti-corruption in public procurement and the management of public finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption' available at

the fact, first and foremost it requires prevention. Prevention begins with the formulation of an appropriate supply chain management system, which has built into it not only sound procurement related principles, but also effective anti-corruption initiatives. It is submitted that the policy amendments of the City of Tshwane explained above, are not only sound procurement principles, but also effective anti-corruption initiatives. The shortcoming is that the systems applicable to *all* government departments and municipalities are not necessarily reflective of this. The fact that the law pertaining to the implementation of supply chain management and procurement in South Africa is, to be found in a myriad different policies relating to departments and governments as well as legislation and a number of Treasury prescripts, does little to create consistency and certainty.

It is submitted that South Africa's legislative environment is so lacking in providing clear legislative direction on a consistent and uniform supply chain management system that it may be credibly argued that South Africa does not meet the requirements of Articles of 9 of the UNCAC¹⁰⁷. There is no doubt that South Africa has adopted a constitutional stance of committing itself to a procurement system that reflects the universal principles as enunciated in the UNCAC. However South Africa lacks in the formulation of such a system which operationalizes all such principles in a uniform manner. An inconsistent system and a system where rules are found in a plethora of laws may promote ambiguities in conflicting provisions and the selective application of laws in order to disguise corrupt intentions. For the reasons explained below it is submitted that there is justification to conclude that this assertion is true for South Africa. A plethora of laws negates the principle of transparency.

Regulation 16A6.2 of the PFMA Regulations requires the establishment of a supply chain management system which provides for a three-committee bidding structure. Therefore in order for any person to fully understand the procedure followed by a specific department such person would then have to access the specific supply chain management policy of such department, which must provide for a bid specification committee, a bid evaluation committee and a bid adjudication committee. This committee system is the central structure through which the competitive bidding process is undertaken. Its composition and functioning is therefore of critical importance.

http://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf accessed on 19 September 2014.

¹⁰⁷ Article 9 is discussed in chapter three. It requires each state party to establish appropriate systems of procurement.

The PFMA Regulations themselves do not stipulate how bid committees must be established, what their functions are or how members must be selected. These stipulations are found in National Treasury Circular dated 27 October 2004.¹⁰⁸ With respect to the bid specification committee this Circular provides as follows:

‘This is the committee responsible for the compiling of bid specifications. The specifications should be written in an unbiased manner to allow all potential bidders to offer their goods and or services. The specification committee may be composed of officials of a department (i.e the procurement department or the department requiring the goods or services), a committee appointed by the accounting officer/authority or his/her delegate, one or more qualified officials or an external consultant under the direction of the officials concerned. It is recommended that specifications should be approved by the accounting officer/authority or his/her delegate(s), e.g. the adjudication committee, prior to advertisement of bid(s) as bids may only be evaluated according to the criteria stipulated in the bid documentation.’¹⁰⁹

As pointed out above though, departments are expected, in terms of Regulation 16A6.2 to establish their own supply chain management systems, which provide for a three-committee bid system. Anomalies may arise, where the provisions of the individual supply chain management policies of departments, do not correspond to the above Treasury Circular. An example would be as follows: the Circular above indicates it is *recommended*¹¹⁰ that specifications should be approved by the accounting officer. It is submitted that the use of the word ‘recommended’ renders this advice non-obligatory. A department is therefore, at least in theory, free to exclude approval by the accounting officer prior to advertisement of specifications of a tender. A person challenging the award of a tender on the grounds that specifications were not properly or appropriately drafted will be faced with anomalous rules applicable to the adoption of specifications. It is submitted that this anomaly is regrettable taking into account that the drafting of specifications is central to ensuring the integrity of any tender process.

The specification is a most important section of the invitation to tender documentation, both for the purchasing organisation and for potential suppliers, since it is the specification which sets out precisely what characteristics are required of the products or services sought.¹¹¹

¹⁰⁸ National Treasury Circular dated 27 October 2004 (note 57 above).

¹⁰⁹ Ibid clause 4.1(a).

¹¹⁰ Own emphasis.

¹¹¹ Chartered Institute of Purchasing and Supply ‘How to Prepare and Evaluate Tenders’ available at <http://www.cips.org/Documents/Knowledge/Procurement-Topics-and-Skills/9-Supplier-Bid-Tender-Evaluation/Tendering/How to Prepare and Evaluate Tenders-Knowledge How To.pdf> accessed on 19 September 2014.

Corruption Watch submits that ambiguous, misleading or incomplete specifications as well as specifications which are too narrow or broad may lead to the deliberate exclusion of qualified bidders.¹¹² It is rather unfortunate that legislation is not clear in this respect whether approval by an accounting officer is mandatory or not. Where the rules are ambiguous or conflicting in respect of such a crucial aspect of the tendering process, the scope for corruption is increased.

A further anomaly between the above Treasury Circular and the PFMA Regulations may be found in clause 4.1(b) of the Circular and Regulation 16A6.3(b). Clause 4.1(b) of the Circular refers to the bid evaluation committee, and states, *inter alia*, that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a bid. Regulation 16A6.3(b) states simply that the accounting officer must ensure that bid documentation includes evaluation and adjudication criteria. In terms of Regulation 16A6.3(b) it is submitted that government departments may have a discretion in disclosing to potential bidders the degree of detail of the evaluation and adjudication criteria while it appears that the Treasury Circular intends a greater degree of disclosure with a listing of every goal of such criteria which will attract a scoring.

Regulation 16A6.3(d) and Clause 6.1.2 of Treasury Circular dated 27 October 2004 presents another dangerous anomaly. Regulation 16A6.3(d) states that the accounting officer *must*¹¹³ ensure that awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised. The use of the word ‘must’ implies that this is a mandatory duty of the accounting office and that no discretion exists. Clause 6.1.2 of the Circular however states as follows:

‘The following information on the successful bids should be made available on the institution’s website and, *if so decided by the Accounting Officer*¹¹⁴, also in the media where the bid was originally advertised:

- (i) Contract number and description;
- (ii) Name(s) of the successful bidder(s), the contract price(s), brands, delivery basis and, where applicable, preferences claimed.’

It is submitted that the mandatory duty of the accounting officer is negated by Clause 6.1.2 by the words ‘if so decided by the Accounting Officer’. Once again, officials may elect to apply

¹¹² Corruption Watch ‘Signs of corruption in Public Procurement’ available at <http://www.corruptionwatch.org.za> accessed on 19 September 2014.

¹¹³ Own emphasis.

¹¹⁴ Own emphasis.

one or other prescript, and choose whether or not to advertise awards in the media in which the tender advert appeared. This choice may very well depend on whether or not there is an intention to conceal any corrupt awards made, as far as possible.

Fortunately the above anomaly has been cured by National Treasury Instruction Note dated 31 May 2011.¹¹⁵ Clause 3.7.1 thereof emphasises the mandatory duty imposed on accounting officers in Regulation 16A6.3(d) and re-emphasises this duty in Clause 3.7.2. The problem which arises though is as follows: this Instruction Note does not specifically state that Clause 6.1.2 of Treasury Circular dated 27 October 2004 is thereby amended in order to provide clarity. Further it is highly probable that the prescript of this Instruction Note, may not be known by all departments. While National Treasury posts all circulars, instruction notes and guidelines on its website, this is not a certain and sure manner of ensuring the dissemination of information. There is even less possibility that members of the public will know of this mandatory duty of accounting officers, unless they keep acutely abreast of Treasury updates and amendments.

Anomalies and conflicting rules are also found in the law as it relates to local government. A glaring anomaly is in respect of section 80(2) of the Municipal Systems Act and the fact that neither the MFMA nor the MFMA Regulations refer to the additional competitive bidding requirements as envisaged in this section. Section 80(2) of the Municipal Systems Act provides as follows:

‘Before a municipality decides to enter into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external ‘service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media.’

It is submitted that the requirements of community consultation are additional to the competitive bidding requirements as envisaged in the MFMA Regulations. It has been shown above how municipalities may circumvent the requirements of this section when electing to provide a municipal service through an external service provider.

Where there is a plethora of laws governing a specific issue, the presence of ambiguities, conflicts and uncertainties is expected. The constitutional principle of transparency requires

¹¹⁵ National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management dated 31 May 2011 available at www.nationaltreasury.gov.za accessed on 18 September 2014.

more than merely ensuring that tenders are issued, evaluated and awarded in an open and public fashion. It was submitted in chapter three and will be demonstrated through case law in chapter five that the underlying aim or rationale for a transparent procurement system is to ensure that interested or affected parties are free to scrutinise the procedures followed. Procedures must be based on laws and regulations. The logical conclusion therefore is that if affected or interested parties are entitled to scrutinise a tender procedure, such parties must first and foremost be in a position to access and understand the laws, rules and regulations underpinning such procedure. If this is not possible due to a plethora of laws, or rules and regulations which are found in conflicting provisions, then the conclusion is that the principle of transparency is compromised.

The submission is not that every interested or affected person ought to have the legal ability to interpret and apply such prescripts, as such capabilities will always fall solely within the domain of legally qualified individuals. However, since public procurement is a function which affects the rights of the public, as well as the rights of competing tenderers, it is submitted that the legislative regime governing public procurement ought to be one which is easily accessible and crafted in a manner which enables one to understand the standards a government department is expected to meet. Where the duties and obligations of procuring entities are hidden in convoluted or conflicting laws and regulations, it would be easier for corrupt officials to conceal non-compliance. This will erode the principle of transparency.

3.1.2. Technical Formalities

It is also true that a number of technical formalities which have little or no substantive value will also facilitate corruption. As explained in chapter one, auto-corruption occurs when a public official wrongly secures for himself or an associate privileges rightly belonging to the public. In such instances, the exchange of bribes or other forms of undue influence from private sector players to public officials may not always be present. A form of auto-corruption may be present in instances wherein public officials or those very closely related to them, attempt to do business with the State. For instance, a public official may be a director of a company which has tendered for a government contract. While this is not prohibited outright in terms of the law, as such an official may obtain permission from his/her employer to engage in remunerative work outside of his public employment,¹¹⁶ if such

¹¹⁶ Sections 30 and 31 of Chapter VII of the Public Service Act 103 of 1994 stipulates that no employee shall perform or engage himself or herself to perform remunerative work outside of his or her employment in the

situations are not effectively identified and monitored the opportunity for corruption is significant. Such situations pose conflict of interest problems, as the public official may be able to use his/her influence or inside knowledge of a particular tender, in order to advantage his/her company.

National Treasury Practice Note Number 7 of 2009/2010¹¹⁷ was issued with a view to providing guidance on how to regulate the environment within which bids¹¹⁸ should be considered when such bids are submitted by persons employed by the State or by persons connected with or related to persons employed by the State. As a result of Practice Note 1 of 2003¹¹⁹ all bidding documents were to include a standard bidding document 4, known as SBD 4. This form is a declaration of interest form wherein bidders or their authorised representatives declare their position in relation to any person employed by the principle institution. This was intended to counter corruption or any allegation of favouritism, should the resulting bid or part thereof, be awarded to persons employed by the department, or to persons connected with or related to them.¹²⁰

The SBD 4 issued in terms of Practice Note 1 of 2003 contained certain shortcomings. Firstly it applied only to competitive bids. Therefore in instances wherein quotations were requested, or companies simply applied to be on a department's supplier database or any other form of procurement was utilised, the duty to disclose any conflict of interest did not arise. Secondly the SBD 4 did not require a bidding entity to disclose if any of its directors, shareholders, trustees or members, or any of their spouses were employed by any other government department other than the one which invited the bid to which the SBD 4 relates.

Practice Note 7 of 2009/2010 therefore issued a revised SBD 4 which cured the above shortcomings. This Practice Note goes further to state that accounting officers should

relevant department, except with the written permission of the executive authority of the department. Section 3(1) of the Western Cape Procurement Act 8 of 2010 prohibits any employee to have a business interest in an entity conducting business with the Provincial Government if the employee directly or indirectly owns or controls more than 5% of the shares, stock, membership or other interest of that entity. This restriction is subject to certain exceptions as contained in that Act. See also the Public Administration Management Act 11 of 2004 where in terms of section 8 an employee may not conduct business with the State and in terms of section 9 where employees have a duty to disclose all financial interests including financial interests of their spouses.

¹¹⁷ National Treasury Practice Note Number 7 of 2009/2010 'Supply Chain Management: Declaration of Interest: Amendment and Augmentation of Standard Bidding Document (SBD4) available at www.nationaltreasury.gov.za accessed on 18 September 2014.

¹¹⁸ In terms of this Practice Note bids include price quotations, advertised competitive bids, limited bids and proposals.

¹¹⁹ National Treasury Practice Note SCM 1 of 2003 'General Conditions of Contract (GCC) and Standardised Bidding Documents (SBDs) available at www.nationaltreasury.gov.za accessed on 18 September 2014.

¹²⁰ Clause 2.4 of National Treasury Practice Note Number 7 of 2009/2010 (note 117 above).

implement and actively monitor the systems of control to manage the performance of other remunerative work by employees.¹²¹ It is submitted that while the revised SBD 4 is a helpful tool in assisting to curb corrupt practices by self-serving public officials, the effectiveness of this can only be realised if government departments are required by law to have and implement the systems of control mentioned above.

National Treasury Instruction Note dated 31 May 2011¹²² appears to provide the system of control alluded to above. Clause 3.3.2 of this Instruction Note provides that accounting officers are required to verify the identity numbers of the directors/trustees/shareholders of the preferred bidder(s) against the department's staff establishment in order to determine whether or not any of the directors/trustees/shareholders are in the service of the state or officials employed by the specific department. This clause goes further to require that such verification must take place during the bid evaluation process. It is submitted that this directive creates a pro-active duty on departments to conduct this verification exercise regardless of whether or not any bidder has disclosed any conflict of interest on the SBD 4. This is helpful, in that it is possible that certain bidders may attempt to conceal any conflicts of interest by not truthfully completing the SBD 4.

However on the 28 September 2011, National Treasury issued a circular postponing the above directive in terms of Instruction Note dated 31 May 2011. In the circumstances it is submitted that although the revised SBD 4 is intended to alert departments to possible conflict of interest situations, departments are not compelled to undertake the crucial verification exercises envisaged in Instruction Note dated 31 May 2011.

The MFMA, however, can be compared favourably against the above situation. As explained earlier, section 112(1)(i) of the MFMA requires proactive screening processes regardless of any disclosures made by a bidder. With regards to the position relating to national and provincial government therefore, it appears that the requirement to disclose any conflict of interest is merely a technical formality, which in the absence of any proactive duty on the department to verify and confirm the absence of conflicts, is a technical formality which lacks substance. Such a technical formality serves to promote corruption rather than prevent it. Since government departments are under no duty to proactively verify the non-existence of problematic conflicts of interest, unscrupulous bidders may be inclined to complete the SBD

¹²¹ Clause 4.5.2.

¹²² National Treasury Instruction Note dated 31 May 2011 (note 115 above).

4 dishonestly comforted by the knowledge that the procuring entity will not necessarily take proactive steps to verify the information submitted. As stated in chapter two, since corruption may be seen as a crime of greed and opportunity, in instances where legislation does not provide means to prevent greedy and venal officials from misusing their official positions, corruption will be promoted.

The provision of an original and valid tax clearance certificate as a condition of tender has been the subject of much controversy.¹²³ This is highlighted in case law in the following chapter. The provision of this certificate is also a technical formality which may present room for corruption. According to the definition of ‘acceptable tender’ as defined in the PPPFA, an acceptable tender must comply in all respects with the specification and conditions of tender. The requirement to submit a valid and original tax clearance certificate can be found in the following legal provisions:

Regulation 16 of the (now repealed) 2001 PPPFA Regulations stated as follows:

‘No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from SARS certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS.’¹²⁴

Regulation 14 of the current 2011 PPPFA Regulations state as follows:

‘No tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order.’¹²⁵

It is unclear from a reading of the above Regulations, why the 2011 PPPFA Regulations do not specifically require the submission of an original and valid tax clearance certificate. Similarly Regulation 16A9.1(d) of the PFMA Regulations provides as follows:

‘The accounting officer or accounting authority must reject any bid from a supplier who fails to provide written proof from the South African Revenue Service that that supplier either has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations.’

Further Regulations 43(1) and (2) of the MFMA Regulations provide as follows:

- (1) ‘The supply chain management of a municipality or municipal entity must, irrespective of the procurement process followed, state that the municipality or municipal entity may not make any

¹²³ Bolton (note 2 above) 2331.

¹²⁴ 2001 PPPFA Regulations (note 52 above).

¹²⁵ 2011 PPPFA Regulations (note 52 above).

award above R15 000 to a person whose tax matters have not been declared by the South African Revenue Service to be in order.

- (2) Before making an award to a person, a municipality or municipal entity must first check with SARS whether that person's tax matters are in order.'

Although it appears from the wording of the 2011 PPPFA Regulations, the PFMA Regulations as well as the MFMA Regulations, that the submission of an original tax clearance certificate is not strictly required, the following government prescripts entrenches this practice of requiring a valid original tax clearance certificate in order for a bid to meet the requirement of an 'acceptable tender' as defined in the PPPFA.

National Treasury Circular dated 10 May 2005 (applicable to national and provincial departments) states as follows:

'A bid is regarded as acceptable if:

The bidder submitted the required original tax clearance certificate and other clearance/registration forms as prescribed by various acts and/or in the bid documentation.'¹²⁶

MFMA Circular Number 29 states as follows:

'The tax clearance certificate requirements should be applicable to all transactions exceeding a value of R30 000 (thirty thousand rand, including VAT).'¹²⁷

The Municipal Bid Document 9 (MBD 9) issued in terms of the above MFMA Circular further states as follows:

'The original Tax Clearance Certificate must be submitted together with the bid. Failure to submit the original and valid Tax Clearance Certificate will result in the invalidation of the bid. Certified copies of the Tax Clearance Certificate will not be acceptable.'¹²⁸

In light of the above Treasury prescripts the standard practice is that bids must contain an original and valid tax clearance certificate in order to be considered acceptable. It is submitted that the requirement to ensure that bidders do not owe any money to the national fiscus, is a sound and necessary requirement.

¹²⁶ National Treasury Supply Chain Management Circular dated 10 May 2005 available at www.nationaltreasury.gov.za accessed on 18 September 2014..

¹²⁷ National Treasury Circular Supply Chain Management Issues Number 29 dated 31 January 2006 available at www.nationaltreasury.gov.za accessed on 18 September 2014.

¹²⁸ Paragraph 3 of MBD 9 issued in terms of MFMA Circular 29 (note 57 above).

However it is submitted that the formal submission of an original tax clearance certificate is a technical formality which can lead to or promote corrupt practices. The following example will serve to illustrate this assertion: where an unscrupulous official has intentions to favour a particular bidder, he or she may, before the evaluation of bids, remove the original tax clearance certificate from the bid of a competitor, or simply replace the original certificate with a photocopy of same. In either case, due to the National Treasury Prescripts mentioned above, the bid of the competitor which has been tampered with will be considered non-compliant and therefore unacceptable. This may be the case notwithstanding the fact that the 'non-compliant' bidder may have been the most meritorious in terms of price and other relevant criteria.

The more technical and formal requirements there are to render a bid 'acceptable' the more room there will be for venal officials to manipulate competing bids in order to render them non-compliant. For instance the National Treasury Circular dated 10 May 2005 referred to above, makes reference not only to tax clearance certificates but to other registration forms which may be required by bid documents or various acts. Therefore, for instance, a bid may be declared invalid, if a bidder has neglected to attach a company registration form. Once again such forms may be easily removed by corrupt individuals in order to favour a particular bid. Once a bid is declared non-compliant or invalid, it will not proceed to the next phase of evaluation, no matter how meritorious the bid may be in other relevant aspects. In this way, corrupt officials would have achieved their aim. It is submitted that such technical formalities are unnecessary. This is so especially taking into account that, with respect to tax clearance certificates, the legislation quoted above makes room for procuring entities to verify the tax standing of bidders prior to award.¹²⁹

Another example of a technical formality may be found in National Treasury Instruction Note dated 21 July 2010.¹³⁰ This instruction note is intended to deter any form of bid rigging or collusive bidding.¹³¹ To this end the Instruction Note requires all bidders to sign a Certificate of Independent Bid Determination. As with the SBD 4, referred to earlier, the onus is on of

¹²⁹ See Regulation 43(2) of the MFMA Regulations (note 49 above); Section 32.3 of the General Conditions of Contract, 2010 states as follows: 'No contract shall be concluded with any bidder whose tax matters are not in order. Prior to the award of a bid SARS must have certified that the tax matters of the preferred bidder are in order.'

¹³⁰ National Treasury Instruction Note dated 21 July 2010 (note 57 above).

¹³¹ According to this Instruction Note bid rigging or collusive bidding occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods and/or services for purchases who wish to acquire goods and/or services through a bidding process. Bid rigging is therefore an agreement between competitors not to compete.

the bidder to disclose information which may sensitise a government department of a possible unscrupulous practice. The logical question flowing from this approach is: can a bidder who is intent on obtaining a tender through corrupt means, be expected to complete such forms and certificates honestly? The fact that a bidder has complied with the technical formality of signing the certificate of independent bid determination, cannot itself provide the assurance that no bid rigging took place. Once again it is submitted that legislation ought to provide for certain proactive tasks to be undertaken by procuring entities in order to prevent or readily detect such practices, without relying solely on what is disclosed by bidders.

It is known that bid rigging is more common and prevalent in markets where there are a small number of competitors.¹³² Relevant proactive tasks may include, inter alia, procurement laws which require departments to carefully assess the relevant market prior to embarking on a procurement path, and in cases where the market appears susceptible to bid rigging, to take special precautions in designing public procurement procedures.¹³³

Where procuring entities routinely conduct such verifications prior to award, without relying solely on the documentation supplied by bidders as evidence of a particular issue, technical formalities such as the non-submission of original tax clearance certificates or other registration documents would not necessarily render a bid invalid. Corrupt officials would therefore not be able to use this as an avenue to further corrupt practices.

Perhaps the preoccupation with technical formalities may be as a result of the manner in which ‘acceptable tender’ is defined in the PPPFA. This definition may be compared to the definition of responsive tender as contained in the 2011 UNCITRAL Model Law on Public Procurement. Article 43 of the 2011 UNCITRAL Model law provides as follows:

‘1. (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law.

(b).The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.’

¹³² Organisation for Economic Co-operation and Development ‘Designing Tenders to Reduce Bid Rigging’ available at <http://www.oecd.org> accessed on 20 September 2014.

¹³³ Ibid.

Bolton submits as follows with respect to the differences in definitions between the South African PPPFA definition and the UNCITRAL definition:

‘What is immediately clear from the definition of an “acceptable tender” in South African procurement law is that it differs remarkably from the definition used in the UNCITRAL Model Law on Public Procurement...As noted above, the latter regimes provides (only) for “material or “substantial” compliance with tender conditions. South African procurement law, however, provides for compliance with tender conditions “in all respects”. Provision is also not made in the PPPFA for the waiver of “minor informalities” or minor deviations” as is done in the international instruments. On a literal interpretation of the definition of an “acceptable tender” in the PPPFA, therefore, it would appear that procuring entities in South Africa “must” exclude tenders that fail to comply with the exact requirements of the tender conditions. The legislature does not appear to afford procuring entities any discretion in the matter.’¹³⁴

Reliance on a number of technical formalities may promote corruption. In light of the above discussion, it can be seen that while South Africa has adopted an integrated supply chain management system, individual government departments and municipalities may implement such a system in differing ways. This leads to inconsistencies and a lack of certainty. A large number of technical formalities, as well as a large number of different laws, regulations and other government prescripts pertaining to public procurement, may provide room for corruption by affording corrupt persons an opportunity to selectively apply laws, manipulate tender processes. It also makes the legislative environment hostile and unfamiliar to lay persons.

3.2 Challenge Processes in terms of the Legislative Framework

An effective challenge process, through appeal or review, will ensure that tenders awarded through corrupt means are not allowed to be executed and implemented prior to the completion of an appeal process. Regulation 49 of the MFMA Regulations states as follows:

‘The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.’

In addition to the above Regulation, section 62(1) of the Municipal Systems Act, states as follows:

¹³⁴ Bolton (note 2 above) 2321.

‘A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.’

The anomalous time periods between these two prescripts is obvious. It is uncertain how this anomaly as well as the differences in meaning between ‘objection/complaint’ as contained in the MFMA Regulations, and ‘appeal’ as contained in the Municipal Systems Act are to be interpreted.

Bolton however submits that there are fundamental differences between Regulation 49 of the MFMA Regulations and section 62 of the Municipal Systems Act.¹³⁵ Firstly she submits that section 62 is a general appeal provision and not specific to procurement decisions, whereas the Regulations apply within the context of supply chain management and tender processes.¹³⁶ She further submits that section 62 qualifies as an internal remedy for the purposes of section 7(2) of PAJA¹³⁷, whereas Regulation 49 does not give rise to an internal remedy as referred to in section 7(2) of PAJA.¹³⁸ Bolton submits that Regulation 49 is not an appeal procedure as there was no intention on the part of the Legislature for the independent and impartial third party to have remedial powers.¹³⁹ She also submits that a right to appeal in terms of section 62 is unavailable to or impractical for an unsuccessful tenderer in certain situations.¹⁴⁰ She avers that due to the wording of section 62, an unsuccessful tenderer would not be able to rely on section 62 in instances wherein the municipal manager is not exercising a delegated power but was acting in terms of an original power.¹⁴¹

This is so, she argues, because section 62(1) clearly envisages an appeal against a decision that was taken pursuant to a delegation of authority. In addition she states that where rights had already accrued to the successful bidder, then although an appeal under section 62(1) was possible, section 62(3)¹⁴² rendered such appeal nugatory.¹⁴³ If one is to accept the

¹³⁵ P Bolton ‘Municipal Tender Awards and Internal Appeals by Unsuccessful Bidders’ (2010) 13 *PELJ* 56, 56.

¹³⁶ *Ibid* 73.

¹³⁷ Section 7(2) of PAJA provides that there shall be no review of an administrative decision unless any internal remedy provided for in any other law has first been exhausted.

¹³⁸ Bolton (note 135 above) 73.

¹³⁹ *Ibid*.

¹⁴⁰ Bolton (note 135 above) 74.

¹⁴¹ *Ibid*.

¹⁴² Section 62(3) of the Municipal Systems Act reads as follows: ‘The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but so such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.’

interpretation of Bolton therefore, the conclusion to be arrived at is that despite Regulation 49 of the MFMA Regulations or section 62 of the Municipal Systems Act, there may be situations, at local government level, wherein an aggrieved bidder has no specific appeal provision available to it and may therefore have only the provisions of PAJA to rely on.¹⁴⁴

The PFMA Regulations do not have a similar provision providing for the lodging of objections or complaints as do the MFMA Regulations. In the absence of specific legislation providing for the lodging of complaints, objections or appeals, one is to assume that reliance must be placed on the provisions of PAJA. As shown in chapter one, procurement decisions by organs of state constitute administrative action. Judicial review of procurement decisions are therefore subject to judicial review in terms of PAJA. In terms of section 7 of PAJA any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date (assuming no internal remedies were applicable) on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

Therefore notwithstanding the confusion with respect to Regulation 49 of the MFMA Regulations and 62 of the Municipal Systems Act, and notwithstanding that national procurement legislation does not appear to provide for any objection or appeal process for national and provincial entities, it appears that the maximum period which aggrieved bidders may have to lodge proceedings to review a procurement decision, is 180 days as provided for in PAJA. It is submitted though that the actual time period, in number of days, to appeal or review a procurement decision, is not necessarily the most problematic issue. Rather the pertinent issue is whether, despite even the most generous time period allowed for such challenges, legislation ensures that this challenge period is respected by the procuring entity in ensuring that awards and decisions are not readily acted upon thereby rendering any challenge a moot exercise.

Case law in the following chapter will highlight how in many instances administrative review of procurement decisions become a mere academic exercise leaving the wronged tenderer without effective remedy. This situation is untenable most especially in the fight against

¹⁴³ Bolton (note 135 above) 74.

¹⁴⁴The approach of the courts on this issue, explored in chapter four, however has shed more light on this conclusion, and does not support the interpretation of Bolton that section 62 is not applicable to aggrieved bidders in a tender process.

public sector corruption. Often once an unsuccessful bidder is aware that a specific contract has reached finality, such bidder will be discouraged from pursuing the matter further even if he or she had credible suspicions of corruption having played a role in the award of the contract. If a corrupt act is allowed to continue to conclusion, before any judicial or other review or appeal is completed, then corrupt persons will be more inclined to commit acts of corruption secure in the knowledge that their venal conduct may never be revealed and punished.

Although it is arguable whether municipal legislation provides aggrieved bidders with an actual appeal procedure, it is submitted that aggrieved bidders may, nonetheless lodge complaints or objections in terms of Regulation 49 of the MFMA Regulations. Regulation 50 thereof sets out the procedure for the resolution of disputes, objections, complaints or queries received. The process outlined in Regulation 50 is clearly an internal dispute resolution mechanism whereby the accounting officer is to appoint an independent and impartial person to assist in the resolution of the dispute. Regulation 50(2)(4)(a) provides that such person must strive to resolve the dispute promptly, without providing for any time period within which the dispute must be resolved, save to provide that should the dispute remain unresolved within sixty days then such dispute may be referred to the relevant provincial treasury. Further section 62 of the Municipal Systems Act does not place any duty on the appeal authority to resolve an appeal within a certain time period, save to state in section 62(5) that an appeal must commence within six weeks and must be decided within a reasonable period.

None of the appeal or review processes, including those provided for in PAJA, provide a duty on the procuring entity to suspend the implementation of the contract award pending finalisation of the appeal or review process. The result is that it is often left to the unsuccessful tenderer to launch interim interdict proceedings against the procuring entity in order to suspend the implementation of the contract pending the finalisation of any appeal or review proceedings. It is submitted that interdict proceedings are onerous. There are burdensome elements which an applicant needs to first prove,¹⁴⁵ such applications may be

¹⁴⁵ In this respect see *W J Building & Civil Engineering CC v Umhlatuze Municipality and Another* (unreported judgement of the Kwa-Zulu Natal High Court under case number 4139/2013); *Matlafalang Training CC and Another v MEC: Free State, Department of Public Works and Another* [2008] ZAFSHC (11 December 2008) 136, wherein it was held that the requirements for an interim interdict are: a clear right or a right *prima facie* established though open to some doubt, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, a balance of convenience in favour of the granting of the interim relief and the absence of any other satisfactory remedy for the applicant.

costly and may be beset with time delay issues which often renders the entire application redundant. The result may be, in instances where interdict proceedings are not launched or where such are unsuccessful, that impugned decisions may be executed to finality prior to the conclusion of any appeal or review. In order to promote the fight against public sector corruption pertaining to procurement, it is important that corrupt decisions are not executed before the finalisation of any appeal or review process. If this is allowed to happen it simply means that the appeal process is wholly ineffective.

Further with respect to municipal laws, the fact that Regulation 49 provides for an internal dispute resolution mechanism may actually compound the problem. It is unreasonable to expect lay persons to appreciate that Regulation 49 is actually not an appeal process. In such situations where municipalities advise unsuccessful bidders that appeals may be lodged within 14 days as envisaged in Regulation 49, municipalities may successfully avert any appeals received outside of this time period by simply informing the aggrieved bidder that its 'appeal' was received out of time. An unsuccessful bidder unaware of other legislative provisions which may afford it an avenue to appeal or review, may accept its alleged fault in the late notification of its 'appeal' and not take the matter any further. Case law reviewed in chapter five points to the real possibility of the above scenario eventuating.

Due to the secret and clandestine nature in which corruption takes place, it is imperative that any activity which is susceptible to corruption, be safeguarded by clear, open and easily accessible procedures allowing for the independent and impartial interrogation of processes followed. This is the purpose and aim of appeals and reviews. In the fight against corruption within public procurement, it is submitted that the laws regulating appeals and reviews be clear, unambiguous and easily accessible.

In addition appeal or objection provisions must ensure that impugned decisions are not acted upon prior to the finalisation of a challenge process. It has been found that certain procuring entities elect to provide in their respective procurement policies, that no award will be made until any objection or appeal period has lapsed or until any objection or appeal has been disposed.¹⁴⁶ However this practice is not consistent across all procuring entities.

¹⁴⁶ This was the case in *Total Computer Solutions (Pty) Ltd v Municipal Manager: Potchefstroom Local Municipality* 2008 (4) SA 346, where the municipality's draft procurement policy provided as such. See para 28 of the judgement.

3.3 Detection of Corrupt Acts Prior to Award of Tender

Procuring entities are enjoined by Regulation 13 of the 2011 PPPFA Regulations to act against any tenderer or person to whom a contract has been awarded where such person or tenderer has fraudulently obtained empowerment points or not fulfilled any conditions of the contract. It is unfortunate that this duty upon procuring entities seems to become applicable only *after* an award has been made. The following Chapter addresses the interpretation of this section in greater detail with reference to case law. However it is submitted that Regulation 16A9 of the PFMA Regulations appears to create such an onus on procuring entities throughout the supply chain management process. In terms of Regulations 16A9.1 the accounting officer has a duty to take all reasonable steps to prevent abuse of the supply chain management process and to investigate any allegations of abuse of the supply chain process against an official or other role player. Where corrupt or fraudulent acts are found to have occurred the accounting officer may, depending on the stage at which the acts were detected, reject any bidders proposal or cancel any contract awarded. Regulation 16A9 must be read with Regulation 16A8 which provides for compliance with ethical standards and duties imposed on supply chain practitioners. In order to assist procuring entities to comply with its duty in terms of Regulation 16A9.1(c) which requires accounting to check the National Treasury database prior to an award to ensure that no recommended bidder is prohibited from doing business with the state, the National Treasury issued Circular dated 24 March 2006 which established the List of Restricted Suppliers.

Chapter one showed that irregularities during the tender process and deviations from standard procedures are strongly indicative of corruption. The duty imposed by Regulation 13 mentioned above therefore ought to be applicable to procuring entities not only after an award has been made but throughout the procurement process as does Regulation 16A9 of the PFMA Regulations. Corruption occurs in many ways and at various stages of the procurement process. In order to fulfil the duties imposed by Regulation 16A9 of the PFMA Regulations it is submitted that a sound legislative framework is needed which has effective checks and balances in place, at every stage of the supply chain management process, to ensure that the opportunities for corruption are minimised and that the detection of corrupt acts is made easier. Chapter three has identified risks which may be inherent during the pre-tender, tender and post-tender stages.

Having identified risks within the tendering process which may lead to or be indicative of corruption, it is necessary to investigate whether the current legislative framework governing public procurement in South Africa, has sufficient means to detect corruption, whether it has sufficient checks and balances to prevent corruption and that corrupt acts are not acted upon prior to the finalisation of the procurement process.

Regulation 16A3.22(v) of the PFMA Regulations mandates all national and provincial departments to have a supply chain management system which, *inter alia*, provides for risk management. Regulation 41(1) of the MFMA Regulations mandates all municipalities to have a supply chain management policy which provides for an effective system of risk management for the identification, consideration and avoidance of potential risks in the supply chain management system. It was shown in chapter three that international law also calls for appropriate risk management and internal control in the management of public finances.¹⁴⁷ It is fair to state therefore that any supply chain management system or policy which fails to identify, detect, manage and respond to the risks mentioned above, falls foul of these regulations, and possibly also of international law obligations. The failure of legislation to prescribe minimum elements for a supply chain management policy or system, has been discussed above. Ideally every supply chain management policy of government ought to have such risk management mechanisms provided for therein. In South Africa, however, it is necessary to analyse the various laws and treasury prescripts in order to ascertain whether any risk management mechanisms are contained therein.

3.3.1 *The Pre-tendering Stage*

As stated above most of the legislative focus is on the acquisition phase of supply chain management. That is the tendering stage. The pre-tendering stage may also be called the demand phase. At national and provincial government level, it appears that the only document which may guide departments with respect to the undertaking of needs analysis is National Treasury Circular dated 29 July 2011.¹⁴⁸ Clause 2.1 of this Circular states that :

‘the objective of this guide is to assist institutions with the planning for the procurement of goods, works or services in a proactive manner and to move away from merely reacting to purchasing requests.’

¹⁴⁷ In this respect see Article 9(2)(d) of the UNCAC.

¹⁴⁸ National Treasury Circular dated 29 July 2011 (note 76 above).

It is submitted that this objective indicates an understanding of the purpose of a needs analysis or demand management.¹⁴⁹ Clause 3.2 of the above Circular states that a ‘total needs analysis must be included as part of the strategic planning process of the institution.’ Clause 4 then provides steps to be implemented for demand management. Included in these steps is the requirement for government departments to link budgets to the needs, and for departments to know early in the strategic planning phase, what the estimated costs of the required resources will be.¹⁵⁰ It is submitted that this signals an appreciation that failure to conduct appropriate market research may lead to negative consequences such as collusion by competitors in a particular industry. Lack of appropriate needs analysis may result in last-minute and unnecessary purchases by an unscrupulous official. The provisions of this Circular attempt to avoid this by providing that demand management be conducted in consultation with end-users.¹⁵¹

The above Circular further states that the outcome of this activity should be a detailed planning document, and that procurement planning should take place during the beginning of the financial year when the institution’s strategic plan and budget have been approved.¹⁵² It is submitted that these are sound guidelines, as they seek to ensure that the goods or services procured are actually needed by the end-users, and the need is not simply unnecessarily created in order to execute a corrupt intention. It also ensures that planning for the procurement is done timeously, thereby avoiding last-minute expenditure, where higher prices are unavoidable.

While the above Circular seems to appreciate the necessity for proper demand management and procurement planning, it is unfortunate that it does not place any legal duty on government departments to submit their procurement plans to the National Treasury, which may be in a position to monitor compliance therewith, as well as the monitoring of any deviations therefrom. Section 40(4) of the PFMA however, requires the accounting officer of every department to submit annually to the relevant treasury, before the beginning of a financial year, a breakdown per month of the anticipated revenue and expenditure of that department. It is submitted that the procurement plan of a department will be a significant

¹⁴⁹ The terms ‘needs analysis’ and ‘demand management’ may be used interchangeably in this context as the purpose of both is the same, that is to ensure that goods, works or services are delivered to the right place, in the right quantity, with the right quality, at the right cost and at the right time.

¹⁵⁰ Clause 4.1.1. of National Treasury Circular dated 29 July 2011 (note 76 above).

¹⁵¹ Clause 4.1.2. of National Treasury Circular dated 29 July 2011 (note 76 above).

¹⁵² Clauses 4.1.2. and 4.2.1. of National Treasury Circular dated 29 July 2011 (note 76 above).

document in assessing expenditure. However, since the section does not specifically mandate the accounting officer to submit the procurement plan, while the relevant treasury may be aware of the overall projected expenditure of a particular department, it would be difficult for the treasury to monitor that expenditure occurs in terms of the procurement plan. This deficiency in the law creates room for corruption or at the very least does little to prevent it. While the Treasury seems to encourage the formulation of procurement plans stemming from detailed needs analysis, it appears that the law does not provide for the implementation and effective monitoring of such plans. The law therefore seemingly does not create sufficient mechanisms for the risks associated with poor or lack of implementation of the procurement plan to be detected and acted against.¹⁵³

With respect to the drafting of tender specifications, the law as it pertains to national, provincial and local government requires that specifications be approved by a bid specification committee. Regulation 27 of the MFMA Regulations offers more detailed directives, than do the PFMA Regulations, as to how specifications are to be drafted. Regulation 27(2)(a-g) of the MFMA Regulations provides instruction on the following:

‘elimination of bias, the use of accepted standards such as those issued by Standards South Africa, that where possible specifications must be described in terms of performance required, specifications must not create trade barriers, the non-reference to particular trademarks or other branding, the indication of each specific goal for which points may be awarded, and that the accounting officer must approve all specifications prior to publication.’

It is submitted that the above directives are intended to ensure that specifications are formulated objectively, in order to meet a real need and without any bias or undue preference to any specific supplier. These are important to discourage corruption. In contrast, though, the PFMA Regulations do not contain similar directives. The only directives on the formulation of tender specifications at national and provincial government, are to be found in National Treasury Circular 27 October 2004.¹⁵⁴ With the exception of indicating that specifications should be written in an unbiased manner to allow all potential bidders to offer their goods and or services, this Circular offers no other directive on the manner in which specifications must

¹⁵³ This applies also to the law as it relates to municipalities as well. National Treasury MFMA Circular dated 03 July 2013, simply provides that accounting officers of municipalities may, upon request, make available to the relevant treasury a procurement plan containing all planned procurement for the financial year, in respect of goods, services or infrastructure projects which exceed R200 000 per case as described in the Supply Chain Management: Guide for Accounting Officers. It is submitted that this does not create a legislative duty to submit procurement plans annually, irrespective of whether the Treasury has requested same or not.

¹⁵⁴ National Treasury Circular dated 27 October 2004 (note 85 above).

be drafted. Further as opposed to imposing a mandatory duty on the accounting officer to approve all specifications, as is the case with the MFMA Regulations, this Circular, creates confusion and ambiguity as to whether or not approval by the accounting officer is necessary prior to publication thereof. This confusion or ambiguity has been addressed earlier. As explained above also, mandatory approval by the accounting officer may prove to be a useful tool to manage the risk of specifications being drafted by the corrupt motives of self-serving officials.

It appears therefore that in this respect at least, municipal procurement regulations, have better mechanisms to detect possible corrupt acts, than do the national regulations. However the composition of the bid specification committee both in terms of national and local government laws, presents cause for serious concern. The MFMA Regulations¹⁵⁵ as well as National Treasury Circular dated 27 October 2004 require that the bid specification committee may be composed of a single official only. It is submitted that the danger inherent in such a situation is obvious and real. At local government this danger is ameliorated to a certain extent, by requiring mandatory approval of the specifications by the accounting officer. However at national level, the danger inherent in a single person committee is aggravated by the apparent lack of mandatory approval by the accounting officer.

Notwithstanding the above, it appears that different provincial treasuries have adopted different requirements with respect to the composition of bid specification committees. For instance the Provincial Treasury of Limpopo Province¹⁵⁶ appears to require the approval of all specifications by the accounting officer.¹⁵⁷ This province also requires that the bid specification committees must be comprised of at least three officials.¹⁵⁸ It also provides that a bid specification committee is not permanent and new appointments must be made as and when there is a need.¹⁵⁹ The Eastern Cape Provincial Treasury appears to require that the bid specification committee must consist of at least two permanent members.¹⁶⁰ The Kwa-Zulu Natal Provincial Treasury, on the other hand, appears to simply follow the prescripts of the

¹⁵⁵ Regulation 27(3).

¹⁵⁶ In terms of section 103 of the Constitution South Africa has the following provinces: Eastern Cape, Free State, Gauteng, Kwa-Zulu Natal, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape.

¹⁵⁷ Section 8.1.1.(a) of Provincial Treasury: Limpopo Provincial Government 'Policy on Bid Committee' (2007).

¹⁵⁸ Ibid Section 8.1.2(a).

¹⁵⁹ Section 8.1.1.(a) of Provincial Treasury: Limpopo Provincial Government 'Policy on Bid Committee' (2007).

¹⁶⁰ Section 2.1.2. of Provincial Treasury: Province of Eastern Cape 'Procedure Manual Compilation, Evaluation and Adjudication of Quotations and Bids' (2008).

National Treasury Circular, and allows for a single person bid specification committee.¹⁶¹ The fact that such divergence of rules is possible creates uncertainty in the law. This lends further credence to the submission made above that the law relating to public procurement in South Africa is plagued by uncertainty, ambiguities and inconsistencies.

Further, unlike the MFMA Regulations, which provide that members of all bid committees must be appointed by the accounting officer, the National Treasury Circular dated 27 October 2004, creates room for appointments by officials other than the accounting officer. Indeed this is found in the Province of Limpopo, where its Provincial Treasury requires appointment of bid specification members to be made by the Head of the Supply Chain Management Unit.¹⁶² A possible risk inherent in such a practice is that certain officials may be co-opted into a committee due to their preference for a certain supplier. Because such committees do not necessarily require final approval by the accounting officer, or other structure within the institution, the risk may pass undetected.

It is submitted that in the circumstances, it appears that municipal regulations offer more certainty with respect to the drafting of tender specifications as well as the appointment of committee members, as opposed to the national law. Lack of certainty and the ability to decide how and when to apply either national prescripts or provincial prescripts, will create room for corruption. It is submitted that the manner of specifications formulation and certainty in the composition of bid committees is critical in ensuring that real risks are effectively managed, or at the very least in creating a process which is not easily susceptible to corruption. Uncertainties, inconsistencies and ambiguities in the law are the antithesis of clear checks and balances which are required to detect corrupt acts. It is therefore fair to submit that the legislative risk management mechanisms in the pre-tender stage are insufficient to readily enable detection and action against corrupt practices.

3.3.2 *The Tender Stage*

The tender stage is also known as the acquisition stage. Advertising the intended procurement is one of the cornerstone elements of an appropriate procurement system.¹⁶³ A public notice which fails to give all bidders the same information, will not ensure a level competitive field

¹⁶¹ Section 3.1 of Kwa-Zulu Natal Provincial Treasury Practice Note Number: SCM-03 of 2006.

¹⁶² Section 8.1.1.(a) of Provincial Treasury: Limpopo Provincial Government 'Policy on Bid Committee' (2007).

¹⁶³ United Nations Office on Drugs and Crime 'Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practice in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption (note 106 above).

and may thereby advantage a particular bidder over others. The duty to advertise tenders stems from Regulation 16A6.3(c) of the PFMA Regulations, and Regulation 20(b) and Regulation 22 of the MFMA Regulations.

Regulation 16A6.3(c) of the PFMA Regulations provides as follows:

‘The accounting officer or accounting authority must ensure that bids are advertised in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine.’

Regulations 20(b) of the MFMA Regulations provides as follows:

‘20. A supply chain management policy must provide procedures for a competitive bidding process for each of the following stages:

(a)...

(b). the public invitation of bids;’

Regulation 22 then provides directives on the procedures alluded to in Regulation 20 above. Such directives include, *inter alia*, method of publication of invitation to bid, closure date of bids and a statement that bids may only be submitted on the bid documentation provided by the municipality.

Both the national and municipal regulations provide that bids must be advertised publically, which at the very least includes the *Government Tender Bulletin*, and that the closure date of the tender must be stipulated. Both sets of Regulations also stipulate minimum time periods for which bids must be advertised. Further in terms of Regulation 24 of the CIDB Regulations organs of state are required to publish invitations to tender, for works which exceed a certain prescribed minimum value, on the Construction Industry Development Board website.

The PFMA regulations must be read together with Treasury Instructions, such as Clause 4.1(B) of National Treasury Circular dated 27 October 2004, which states that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a bid. Regulation 22 of the MFMA Regulations must be read together with Regulation 21 thereof which provides directives on the information to be contained in bid documentation.

While the PFMA Regulations do not contain an express statement that bids must only be submitted on the bid documentation provided, it is submitted that, in practice, the bid documentation is provided to potential bidders on which to submit their bids. This submission is made in light of Regulation 16A6.3(a-b) of the PFMA Regulations, which sets out the detail to be included in bid documentation, and the stipulation in Clause 4.1(a) of National Treasury Circular dated 27 October 2004 that bids may only be evaluated according to the criteria stipulated in the bid documentation.

From a review of Treasury prescripts it is clear that bid documents must contain sufficient information to enable all bidders to bid, and that each prospective bidder must be provided the same information. For instance paragraph 4.8.1 of the National Treasury Supply Chain Management Guide for Accounting Officers/Authorities contains certain prescripts regarding the contents of bid documents. Such prescripts include, *inter alia*, that documents must be prepared in English, and specifications as to nature of work, location, warranties, minimum performance requirements, price, factors to be taken into account in evaluating bids and quantification must be clearly and precisely stated. The purpose of such requirements is stated in paragraph 4.8.1, that:

‘Each prospective bidder should be provided the same information and should be assured of an equal opportunity to obtain additional information on a timely basis.’

Further Clause 1.1. of National Treasury MFMA Circular No. 25, states that:

‘To ensure that uniformity exists in the bidding processes, accounting officers are requested to base bid invitations on the General Conditions of Contract (GCC)¹⁶⁴ issued by the National Treasury’

It is clear from the above, that the intention of government in South Africa, is to ensure that all bidders are provided with adequate, relevant and consistent information prior to bidders submitting their bids. As stated earlier, this is important to eliminate bias, favouritism and other unfair or corrupt actions. However it is submitted that these prescripts pertain to what must be contained in the bid documentation, and not necessarily in the actual public advertisement itself. The minimum which the PFMA Regulations and the MFMA Regulations provide for is that the closure date must be stipulated in the advert (and in the case of municipal tenders, that all bids must be submitted on the bid documentation provided). In practice tender advertisements advise potential bidders to purchase the relevant

¹⁶⁴ The General Conditions of Contract (July 2010) have been prepared in consultation with the State Attorney, for use by all spheres of government.

bid documents, and bidders are advised about the price, time and place for the purchase of such documents.

The practical difficulty presented is that potential bidders will not be aware of crucial information, unless they purchase the bid documentation. It is therefore possible for the actual public advertisement to be worded so scantily, ambiguously or misleadingly that a potential bidder may be deceived into believing that the bid is not appropriate to it, or that in all likelihood it would not qualify. Such a person may not see the value in taking the next step to purchase the bid document. In this way competition may be eroded, and corrupt intentions may be allowed to flourish. In the circumstances it is submitted that the Regulations ought to provide an increased number of minimum elements which must be contained in the actual tender advertisement. Such information may be pertaining to evaluation criteria, such as the preference point method employed in terms of the PPPFA¹⁶⁵, a description of the works or services to be carried out or provided, and any other factors which will be taken into account when evaluating the bid, in addition to price, such as expertise, locality, size of the enterprise or black economic empowerment status.

However notwithstanding that the Regulations do not currently prescribe such detail to be included in the actual advertisement, it is fair to state that, in practice, most government departments and municipalities, do, in any event, include the above information in the public advertisement.¹⁶⁶

It is submitted that a more problematic practice in the tender stage pertains to the process related to requests for more information or clarity by potential bidders. It often happens, especially in large complex projects, that bidders may request additional information for purposes of clarity. It is submitted that if this process is not managed appropriately, it is possible that corrupt persons may use this as an opportunity to furnish insider information to the requesting bidder, or other information which may be relevant to all other bidders as well, thereby granting the requesting bidder and undue advantage. It will also be shown in the case review in chapter five, that poor rules regulating request for information poses problems for the procuring entity, and puts into question the integrity of the process.

¹⁶⁵ This would give bidders, at the very least, an indication whether the bid is one which is below or above a million rands.

¹⁶⁶ A review of tender advertisements appearing in newspapers, government department websites and the Government Tender Bulletin confirms this.

The United Nations Office on Drugs and Crime (hereinafter referred to as ‘UNODC’) submits that clarifications of each solicitation should typically be provided in writing, and should be circulated to each company which was originally provided with the tender documents so as to ensure equal treatment.¹⁶⁷ Article 15 of the 2011 UNCITRAL Model Law provides a similar requirement. Unfortunately both the PFMA Regulations and the MFMA Regulations are silent on this aspect. Furthermore there does not appear to be any Treasury prescript with respect to this aspect. Regulation 16A8.3(b) of the PFMA Regulations states that a supply chain management official or other role player must treat all suppliers and potential suppliers equitably.¹⁶⁸ Unfortunately this obligation will be eroded, in instances, wherein unscrupulous individuals are able to use the request for information process as a means to unduly advantage themselves in a competitive process.

Poor management of the tender opening session also promotes corrupt practices. This will also be illustrated in the case review in chapter five. Ideally a tender opening session ought to be managed according to clear rules regarding the opening and recording of bids, the calling out of prices and other relevant information, the recording of such information as well as the keeping of a register of those present. Once again the PMFA Regulations and the MFMA Regulations are silent on this aspect. There also does not appear to be any Treasury prescript which pronounces on this issue, save for the National Treasury Supply Chain Management Guide for Accounting Officers/Authorities, which states as follows at paragraph 4.10:

‘If requested by any bidder, the name of the bidders and if practical the total amount of each bid and of any alternative bids, should be read aloud. The names of the bidders and their individual total prices should be recorded when bids are opened.’¹⁶⁹

It is submitted that the above does not place a well-grounded legal duty on organs of state to call out and record, in writing or by other verifiable means, the salient details of all bidders. This is unfortunate, especially since such an exercise presents a relatively simple way of ensuring that bid prices are not later altered and in instances where such does happen, detection thereof would be made easier.

¹⁶⁷ United Nations Office on Drugs and Crime ‘Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practice in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption (note 106 above).

¹⁶⁸ The municipal equivalent is found in Regulation 46(2)(a) of the MFMA Regulations.

¹⁶⁹ National Treasury SCM Guide for Accounting Officers/Authorities (note 20 above).

During the tender stage the actual manner of the evaluation of tender is important in ensuring that evaluation is conducted strictly in terms of the advertised award criteria and that such evaluation is conducted, not by a single individual but by a committee with the relevant technical and economic expertise. The evaluation stage is also important in ensuring that unscrupulous officials do not attempt to use their positions to secure government contracts for themselves, as well as to readily identify elements of corruption within bidding documents.

Both the PFMA Regulations and the MFMA Regulations make provision for the establishment of bid evaluation and bid adjudication committees which are responsible for the evaluation of bids.¹⁷⁰ According to Regulation 28(2)(a-b) of the MFMA Regulations and Clause 4.1(b) of National Treasury Circular dated 27 October 2004, the bid evaluation committees throughout government must be composed of officials from the user department and must have at least one supply chain management practitioner. According to Regulation 29(2) of the MFMA Regulations, and Clause 4.1.(c) of the National Treasury Circular dated 27 October 2004, all bid adjudication committees throughout government must be composed of at least four members, one of whom must be a supply chain management practitioner and the chief financial officer must chair the committee. Further members of the evaluation committee are prohibited from being members of the bid adjudication committee.¹⁷¹

In essence the bid evaluation committees are responsible for assessing bids according to pre-determined criteria, such as bid specifications, the applicable point systems utilised in terms of the PPPFA, the capability of the bidder to execute the contract, the validity of the tax clearance certificate and checking whether the bidder's municipal rates and taxes are not in arrears.¹⁷² The bid evaluation committee then submits a report to the bid adjudication committee with recommendations pertaining to award of the bid or other related matters.¹⁷³ The bid adjudication committee considers the report of the bid evaluation committee and depending on the delegation granted to it by the accounting officer,¹⁷⁴ it may make a final award or make recommendations to the accounting officer for final award. There is therefore

¹⁷⁰ Regulation 16A6.2(a-e) of the PFMA Regulations and Regulations 28-29 of the MFMA Regulations.

¹⁷¹ Regulation 29(4) of the MFMA Regulations and Clause 4.1(c) of National Treasury Circular dated 27 October 2004 (note 85 above).

¹⁷² See Regulations 28(1)(a)(i-ii) of the MFMA Regulations and Clause 4.1(b) of National Treasury Circular dated 27 October 2004 (note 85 above).

¹⁷³ See Regulation 28(1)(d) of the MFMA Regulations and Clause 4.1(b) of National Treasury Circular dated 27 October 2004 (note 85 above).

¹⁷⁴ For instance in terms of Regulation 5(2) of the MFMA Regulations, an accounting officer cannot grant a bid adjudication committee the delegation to make an award in instances involving awards above R10 million.

a clear intention that the evaluation and adjudication processes be undertaken by independent committees.

Notwithstanding this intention, it is submitted that the process of evaluation and adjudication lacks sufficient mechanisms to detect corrupt practices, and that further the Regulations do not go far enough in prescribing the procedures for evaluation and adjudication in order to eliminate or minimise corruption. National Treasury has placed a proactive duty on municipalities to verify the identity numbers of all directors/trustees or shareholders of the preferred bidder(s) against the municipality's staff establishment in order to determine whether or not any of the directors/trustees or shareholders are employees of the municipality.¹⁷⁵ However compliance with this prescript may pose a challenge. Further both the PFMA Regulations as well as the MFMA Regulations permit deviations from the competitive bidding process under certain strictly defined circumstances.¹⁷⁶ Bolton submits that:

“it should be cautioned that emergency procurement should not be used to evade the use of standard procurement procedures; as a consequence of insufficient stock-levels for items that are used on a daily basis; as a result of working programmes not adequately planned for; or as a result of no or insufficient communication between warehouses and buying offices.”¹⁷⁷

This therefore presents a situation wherein effective checks and verification methods must be in place in order to detect possible abuse of the provisions. Dishonest individuals may attempt to circumvent a competitive process in order to further a corrupt intent. It is submitted that these exercises ought logically to be undertaken by the bid evaluation committee. However there appears to be no mechanism in place to oversee whether the bid evaluation committee has discharged this duty. Ideally it should fall to the bid adjudication committee to verify this as a matter of due process. The MFMA Regulations, although they specifically enumerate the criteria against which bids must be evaluated, fail to include the above verifications as a duty of the bid evaluation committee. The Regulations also fail to place a duty on the bid adjudication committee to oversee that the bid evaluation committee has in fact discharged its evaluation function strictly in terms of the required criteria.¹⁷⁸

¹⁷⁵ National Treasury MFMA Circular Number 62 available at www.nationaltreasury.gov.za accessed on 18 September 2014.

¹⁷⁶ Regulation 16A6.4 of the PFMA Regulations and Regulation 36 of the MFMA Regulations.

¹⁷⁷ Bolton (note 38 above) 169.

¹⁷⁸ At least in terms of clause 2.5 of National Treasury Circular dated 24 March 2006 bid adjudication committees at national and provincial government are required to ensure that all necessary bid documents have

A further shortcoming is that the law is silent on the taking of minutes at bid committee meetings and the recordings thereof. It is submitted that this shortcoming is fatal to the integrity of the tender process. As discussed earlier, the award of a contract in the public procurement process amounts to administrative action. It was argued in chapter three that persons adversely affected by administrative decisions are entitled to written reasons for such decisions, which reasons must be sufficiently comprehensive so that the rationale for the decision can be ascertained. This is also illustrated through case law in the following chapter.

The reasons for tender awards can only be contained in the discussions and deliberations of the bid evaluation and bid adjudication committee meetings. It is therefore submitted, that in order to comply with the constitutional provision of transparency as interpreted earlier, the law ought to provide for the recording of the actual discussions and deliberations undertaken at such meetings, preferably in mechanical format in addition to manual minute taking. In the absence of such a legal requirement, it is possible for minutes of meetings to be manipulated or that only portions of discussions are recorded. For instance, only the ultimate recommendation of the committee may be recorded, without there being a recording of the views and considerations of each member of the committee. In this way legitimate and relevant dissenting recommendations of any specific member may never come to light and be known.

Notwithstanding the above criticisms evidence can be found of attempts within legislation, (albeit inadequate attempts) to curb corrupt practices. An example would be found in National Treasury MFMA Circular Number 62 which requires municipalities to publish the names and other salient details of all bidders, such as bid price, black economic empowerment status, description of the bid and other details. These details are to be published on the municipality's website, in respect of all bids above the threshold value of two hundred thousand rands. It is submitted that this practice promotes transparency. However, in the absence of clear rules regarding the process to be followed and the manner in which information is to be recorded at the bid opening sessions, this publishing requirement may mean little, as information published may already have been subject to distortion or change after the closing date.

been submitted, disqualifications are justified and that valid and accountable reasons/motivations were furnished for passing over of bids, scoring has been fair, consistent and correctly calculated and applied, and that bidders' declarations of interest have been taken cognizance of.

Another anti-corruption mechanism found in the MFMA Circular Number 62 relates to the discretion placed on accounting officers to specifically request the internal audit function to carry out audit procedures, during competitive bidding and adjudication processes or before the award of a contract, and to provide an opinion on compliance of the bidding process with the MFMA Regulations. Once again however, it is submitted that the effectiveness of this is thwarted, in an environment wherein it would be difficult for the internal auditors themselves to readily identify or detect corrupt elements. Where there are inadequate checks and verification techniques as alluded to above, it would be increasingly difficult for an internal auditor to confirm or deny, whether due process was indeed followed or whether certain processes were circumvented due to corrupt motives.

In the circumstances it is submitted that as with the pre-tender stage, the tender stage also lacks sufficient legislative mechanisms to detect corrupt acts. This is unfortunate, since as pointed out in chapter one, it is imperative that corrupt acts are detected and acted upon prior to the finalisation of an award. It is submitted that room exists in both the pre-tender and tender stages for appropriate checks and balances to be put in place in order to reduce the possibility of corruption. The post-tender stage is discussed in the following section.

3.4 Post Tender Anti-Corruption Mechanisms

One of the key research questions identified in chapter one is whether the legislative framework contains adequate mechanisms to detect and prevent corrupt acts after a procurement award has been made. Corruption may motivate many actions taken after a decision to procure a particular good or service. This is the post-tender stage. The legislative focus regarding procurement rules and regulations seems to be mainly on the actual procurement process until an award is made. Not much attention is devoted to the processes which unfold after a procurement award has been made. Bolton submits that the tender procurement process consists primarily of six key events: (1) the solicitation of tenders; (2) the submission of tenders; (3) the receipt and evaluation of tenders; (4) the award of a tender; (5) the conclusion of a contract and (6) the maintenance and administration of the concluded contract.¹⁷⁹ However corrupt intentions may dictate the manner in which a particular contract is implemented. Contracts may be unduly and or illegally extended or renewed, or works may be allocated to service providers contrary to such service providers' award conditions.

¹⁷⁹ Bolton (note 38 above) at pages 13-14.

Original contract prices may also be varied by substantial amounts with little or no oversight in order to ensure legality.

In such situations although the actual award process may have been untainted by corrupt or other irregular acts, the subsequent administration of the contract may be subjected to corruption. The following scenario serves as an example: a procuring entity may call for proposals from prospective service providers with respect to a number of categories of service. Different service providers may be awarded contracts with respect to the different categories of service. During implementation it may occur that a service provider which was awarded a contract for a particular class of service is also awarded work falling under a different category for which such service provider was not awarded a contract. In such cases while the actual procurement process used to award contracts to various service providers may have been valid, the actual implementation of such contracts may be administered in a corrupt manner. It is therefore necessary and important for legislation to place focus on the monitoring of the implementation of contracts post the tender award stage, particularly with a view to minimising or preventing the commission of any corrupt acts.¹⁸⁰

It is submitted that this would entail that the terms and conditions of contracts entered into reflect the specifications of the particular tender, and also that there are sufficient legislative safeguards to ensure that the contracts are administered strictly according to such terms and conditions.¹⁸¹ Unfortunately neither the PFMA Regulations nor the MFMA Regulations contain any such provisions.¹⁸²

However the MFMA, contains a section on contracts and contract management. This is found in section 116. Neither the PFMA nor the PFMA Regulations contain an equivalent

¹⁸⁰ Bolton (note 38 above) 32, submits that the law that applies to government procurement in South Africa is determined by the stage or period of the procurement process. Generally the pre-award and award stage are regarded as being governed by administrative law. While the conclusion of a contract and the administration of such contract is regarded as being governed by the private law of contract. In this respect see *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 ALL SA 608 (C) 616e where the Court pointed out that a distinction must be drawn between the process of considering tenders and the making of recommendations on the one hand, and the conclusion of a contract after the acceptance of a tender, on the other hand. According to the Court, the former constitutes administrative action and not the latter. Therefore since the private law of contract applies to the contract administration stage of a tender process, it would be inappropriate for legislation to contain strict and specific prescripts pertaining to terms and conditions of contract, as this would be contrary to the principle of freedom of contract. However legislation ought to provide certain safeguards to ensure that corruption does not creep into the contract administration phase.

¹⁸¹ This would minimise or prevent the situation wherein service providers are allocated works in violation of their original award conditions.

¹⁸² The Municipal Supply Chain Management Regulations, in terms of Regulation 41(2)(e), only go so far as requiring that the municipality must have a system of risk management which, inter alia, includes the assignment of relative risks to the contracting parties through clear and unambiguous contract documentation.

provision. Section 116 of the MFMA provides a framework for the management of contracts concluded as a result of the supply chain management system.¹⁸³ It is therefore directly applicable to procurement contracts. In terms of this section such contracts must be in writing. In terms of section 116(1)(b), provisions regarding termination due to under-performance, dispute resolution and periodic review of long-term contracts¹⁸⁴ are mandatory. In terms of section 116(2)(c) the municipal manager must establish capacity within the municipality to ensure that contracts are properly enforced and monthly reviews of contractor performance is undertaken. Section 116(3) provides for the amendment of terms of contracts, which may be undertaken only after such amendments have been tabled in the council of the municipality and after local community consultations have taken place.

It is submitted that the above rules are useful in that they may prevent problematic and corrupt situations from occurring. It is unfortunate and inexplicable why neither, the PFMA nor its Regulations contain a similar provision. However, notwithstanding the importance of section 116, as Bolton asserts, the effectiveness of a government procurement system is not ensured merely by the existence of appropriate rules; adequate measures must be in place to ensure the application and enforcement of such rules.¹⁸⁵

Regulations, passed in terms of superior legislation,¹⁸⁶ should provide the framework within which the prescripts of superior legislation are to be applied and enforced. Section 116 of the MFMA cannot be effectively applied unless the MFMA Regulations contain clear directives on the mechanisms to be put in place to ensure its application. For instance, section 116(2)(b) requires the monthly monitoring of contractor performance. The logical question flowing from this is: how can such monitoring take place in the absence of a dedicated structure established to ensure such monitoring?

It appears though that the Treasury has recognised the potential for corrupt activities to occur during the contract execution stage.¹⁸⁷ To this end, National Treasury requires contracts

¹⁸³ Section 116(1).

¹⁸⁴ Contracts longer than three years

¹⁸⁵ Bolton (note 38 above) 309.

¹⁸⁶ Superior legislation refers to acts of Parliament, while subordinate legislation refers to Regulations passed in terms of superior legislation.

¹⁸⁷ According to the definition of corrupt practice as contained in the General Conditions of Contract used by all levels of government (General Conditions of Contract issued in terms of National Treasury Practice Note Number SCM 1 of 2003 for national and provincial government, and General Conditions of Contract issued in terms of National Treasury MFMA Circular Number 25 for local government), a corrupt practice means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or *in contract execution*. (own emphasis).

entered into by all levels of government to be subjected to legal vetting, and that such contracts or agreements must be actively managed in order to ensure that both the institutions and the contractors meet their respective obligations.¹⁸⁸

Further National Treasury has issued instructions on the management of expansions or variation of orders against the original contract.¹⁸⁹ In terms of these Treasury prescripts, a threshold for the expansion or variation of orders against the original contract was introduced. As a result of these prescripts, contracts at all levels of government may be expanded or varied by not more than 20% for construction related goods, services and or infrastructure projects and 15% for all other goods and or services of the original value of the contract.

It is submitted, though, that these Treasury prescripts are inadequate to ensure proper and corrupt-free execution of contracts. The requirement to have all contracts legally vetted is a necessary one. However it is important that the persons responsible for the legal vetting have intimate knowledge of the tender specifications giving rise to the specific contract. While section 116(1)(b)(i-iv) of the MFMA prescribes certain mandatory terms and conditions which all contracts must contain, it is submitted that a further mandatory requirement which ought to have been included in this section is that the terms and conditions of the contract must accurately reflect the specifications of the tender. This will eliminate the situation wherein, a twelve month tender is later extended (by virtue of a built-in contractual provision) to three years, in order to unduly favour the service provider and to avoid the contract going back out on tender once the initial twelve month contract period has elapsed.

The Treasury prescript to have contracts legally vetted, also does not adequately address the MFMA requirement to ensure proper enforcement of the contract or for the accounting officer to undertake monthly performance assessments of the service providers. It is submitted that, in light of these legislative requirements, National Treasury, in terms of the PFMA and the MFMA Regulations, ought to provide mandatory mechanisms to ensure that contracts are administered in accordance with tender specifications and that corruption is avoided during this phase of supply chain management.

¹⁸⁸ This is provided for in National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management dated 31 May 2011 for national and provincial government, and National Treasury MFMA Circular Number 62 for local government.

¹⁸⁹ See National Treasury MFMA Circular Number 62 (note 175 above) of local government, and National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management dated 31 May 2011 (note 115 above) for national and provincial government.

With respect to National Treasury prescripts pertaining to expansions and variation of orders against the original contracts, it is submitted that these prescripts create more room for corruption, rather than enhance compliance monitoring, transparency and accountability. It is submitted that these prescripts conflict with the provisions of the MFMA, and create ambiguities in respect thereof. In terms of section 116(3) of the MFMA a contract may only be amended after certain conditions have been met. These conditions pertain to municipal council approval and the receipt of community representations.

By introducing the threshold for contract value expansion or variation, and by the wording of the prescript itself, National Treasury has made it possible for accounting officers to unilaterally amend the value of a contract by up to 15% or 20% depending on the nature of the contract. As an example, a contract with an original value of R50 million may be unilaterally expanded by R10 million by the accounting officer.¹⁹⁰ The wording of the Treasury Circular seems to make the conditions set out in section 116(3) of the MFMA unnecessary in such situations, as it states that ‘anything beyond the abovementioned thresholds must be reported to council’. By implication therefore, any variation equal to or less than the threshold need not be reported to the council, nor is it necessary to inform the community of such amendment. The result therefore is that an accounting officer, as a single individual may, through corrupt intent, expand a contract value by a significantly large amount, without any other approval or consultation. This interpretation is further supported by the fact that the Treasury prescript goes further to confirm that ‘any expansion or variation in excess of these thresholds must be dealt with in terms of the provisions of section 116(3) of the MFMA which will be regarded as an amendment to the contract’. Section 116(3) is therefore specifically excluded in cases wherein the expansion is within the prescribed thresholds, notwithstanding that the percentages prescribed as the thresholds may in reality translate into significantly large sums of money.¹⁹¹

The same interpretation may be applied to the national and provincial government prescript, in that clause 3.9.4 of National Treasury Instruction Note dated 31 May 2011¹⁹² states that ‘any deviation in excess of these thresholds will only be allowed subject to the prior written approval of the relevant treasury.’

¹⁹⁰ If one applies a 20% expansion.

¹⁹¹ At national and provincial government level, it appears that these expansion thresholds are capped at either R20 million or R15 million depending on the nature of the contract, as the percentages are linked to these actual monetary values. See clause 3.9.3 of National Treasury Instruction Note dated 31 May 2011 (note 115 above). It is submitted that these capped amounts are still nonetheless significantly large amounts.

¹⁹² National Treasury Instruction Note dated 31 May 2011 (note 115 above).

In the circumstances it is submitted that the above Treasury prescripts create opportunities for corrupt acts. The Legislature has clearly recognised that in exceptional cases, an accounting officer may deem it necessary to expand or vary orders against the original contract. To this end it has provided for such amendments in section 116(3) of the MFMA.¹⁹³ It is submitted that the above Treasury prescripts negate the provisions of the MFMA as they are in clear contradiction thereof. In this respect the above Treasury prescripts ought to be interpreted as being invalid.

It is submitted that the law pertaining to public procurement does little to ensure that corruption does not take place post a tender award. The current measures provided for within the legislative framework provide inadequate checks and balances to ensure that contract implementation does not occur corruptly. In fact the provisions of the Treasury prescripts mentioned above may have the effect of promoting corruption, rather than curbing it.

3.5 The Prevention and Combating of Corrupt Activities Act

Aspects of the PCCA which are worthy of further review, relate largely to its ability to assist courts to admit evidence of alleged corruption, in cases involving the judicial review or appeal of a tender process, provisions relating to the appropriateness of the definitions of corruption, as well as provisions relating to the endorsement of persons convicted of corruption and the duty to report corrupt transactions.

3.5.1 *The issue of evidence*

The following chapter will show that although a large body of case law is being built pertaining to irregularities in tender processes, actual findings of corruption in such cases are rare. This is the case, notwithstanding, as shown in Chapter One that a credible school of thought exists to suggest that deviations from tender procedures and other irregularities within tender processes may be strongly suggestive of corruption. The following chapter will also show that a major impediment in linking such irregularities and deviations to corruption is the difficulties courts have with admitting evidence of alleged corruption, in cases involving tender irregularities. This difficulty arises from the fact that the evidence sought to be produced at such hearings often do not meet the strict general requirements for the admission of evidence. This assertion is justified since evidence of alleged corruption often comes to the fore late in the day, and due to the secret nature of corruption, such evidence

¹⁹³ Once again it is unclear and inexplicable why national legislation does not contain a similar provision.

will in many instances not stand up to the strict legal requirements for the admissibility of evidence.

Yet, the reality is that, often allegations or suspicions of alleged corruption are raised for the first time at the hearing of a tender appeal or review. Since corruption attacks the integrity of any tender process, it would be fatal to the fight against procurement corruption if courts consider themselves impotent to admit evidence on the basis that such evidence does not meet the strict requirements for the admissibility of evidence. The first enquiry therefore would be to investigate whether rules of evidence may be justifiably relaxed in certain deserving situations, in order to afford courts greater flexibility in admitting evidence. The second enquiry is whether instances of public procurement are so deserving. The third enquiry would be to ascertain if the PCCA may be amended to be of assistance in order to facilitate the admissibility of evidence, and the value of legislative presumptions and other evidentiary assistive techniques. It must be stated here that it is beyond the scope of this study to evaluate the laws of evidence *in toto*. The discussions which follow are pertinent in so far as they are necessary to further the enquiry relating to admissibility and evaluation of evidence of corruption in public procurement matters.

3.5.1.1 *The relaxation of strict rules of evidence*

It is trite law that the rules of natural justice are designed to ensure that whenever a persons' rights, property or legitimate expectations are affected by a decision, then such decision-making process must have certain inherent qualities, such as the right to a fair hearing, the right to no bias on the part of the decision-maker and the no evidence rule which means that the decision eventually made must be based on logical evidence.¹⁹⁴ The South African Constitution has recognised these principles of natural justice. Evidence of this can be found in section 34 of the Constitution, which prescribes that:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

¹⁹⁴ In this regard see Department of Education and Children's Services 'What is meant by Principles of Natural Justice and Procedural Fairness' available at www.decd.gov.za accessed on 21 November 2014.

Courts and fora which execute a quasi-judicial function are therefore obliged to ensure that such disputes¹⁹⁵ are resolved through the application of rules of procedure which would not violate the natural laws of justice. Therefore, rules of evidence, are designed to assist in the preservation of the laws of natural justice. Rules pertaining to the admissibility of evidence are formulated to ensure that unlawfully or unconstitutionally obtained evidence is not capable of being used against a party, that evidence is not produced so late in proceedings so as to deprive the party against whom it is adduced a reasonable opportunity to respond thereto, or that certain exclusionary rules are appropriately applied so that certain types of evidence, such as hear-say evidence¹⁹⁶, does not unfairly prejudice the party against whom it is adduced. Be that as it may this does not mean that rules of evidence are cast in stone. On the contrary, it is submitted, that rules of evidence are subjected to frequent change in their application depending on the nature of the dispute.

Examples of deviations from conventional rules of evidence are seen frequently in cases involving terrorism. For instance in Israel, the Incarceration Combatants Law states as follows:

‘It shall be permissible to depart from the laws of evidence in proceedings under this Law, for reasons to be recorded; the court may admit evidence, even in the absence of the prisoner or his legal representative, or not disclose such evidence to the aforesaid if, after having reviewed the evidence or heard the submissions, even in the absence of the prisoner or his legal representative, it is convinced that disclosure of the evidence to the prisoner or his legal representative is likely to harm State security or public security; this provision shall not derogate from any right not to give evidence under Chapter Three of the Evidence Ordinance [New Version], 5731-1971’¹⁹⁷

Newton submits, referring to the above law, that:

‘The nature of administrative detention for security reasons requires use to be made of evidence that does not satisfy the admissibility of the rules of evidence and that therefore may not be brought in a normal criminal trial.’¹⁹⁸

¹⁹⁵ It is submitted that the word ‘dispute’ can be said to include criminal matters as essentially a criminal matter is a dispute between the State and the accused, as to the guilt of the accused.

¹⁹⁶ Hoffman & Zeffert state that an exact formulation of the rule against hearsay has never been attempted by the courts, and there is no agreement among text-book writers. However they assert, quoting Phipson in *Evidence* 12 ed (1976), that the rule may be stated thus: Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matters stated. See L H Hoffman & D T Zeffert *The South African Law of Evidence* (1988) 623.

¹⁹⁷ Section 5(e) of the Incarceration of Unlawful Combatants Law, 5762-2002.

¹⁹⁸ M A Newton ‘Terrorism: International Case Law Reporter 2008’ (2010) 1 *Oxford University Press* 39.

It may be argued though that acts of terrorism are often treated as crimes of war, and therefore subject to a different set of procedural rules. As Litt and Bennet submit:

‘Military commissions can try enemy combatants for violations of the laws of war, and the procedures in those tribunals need not comply with ordinary evidentiary or even constitutional rules, so long as those procedural deviations are properly authorized and comport with the law of war’s minimal standards.’¹⁹⁹

However deviations from conventional rules of evidence are not limited to crimes of war. For instance in international arbitration, rules governing the arbitration process afford wide authority to arbitrators regarding the consideration of evidence. Article 27(4) of the UNCITRAL Arbitration Rules provides that ‘the arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered’.²⁰⁰

Pilkov points out that the American Association International Arbitration Rules provides that the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party.²⁰¹ Pilkov further notes that article 22.1(f) of the London Court of International Arbitration Rules empowers the tribunal to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by any party on any matter of fact or expert opinion.²⁰² Rule 16.2 of the Singapore International Arbitration Centre Rules provides that:

‘The Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law.’²⁰³

It is clear therefore, that certain kinds of matters require the trier of fact to possess a degree of flexibility when considering the admissibility of evidence. This discretion may even result in the admission of evidence which would strictly be considered inadmissible in law.

In South Africa also deviations from strict rules of evidence are found. Section 13 of the Civil Proceedings Evidence Act²⁰⁴ provides as follows:

¹⁹⁹ R S Litt & Wells C Bennett ‘ Better Rules for Terrorism Trials: A Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Centre and the Hoover Institution’ available at http://www.brookings.edu/~media/research/files/papers/2009/5/08%20terrorism%20litt%20bennett/0508_terrorism_litt_bennett.pdf access on 18 November 2014.

²⁰⁰ United Nations Commission on International Trade Law: UNCITRAL Arbitration Rules (as revised in 2010).

²⁰¹ K Pilkov ‘Evidence in International Arbitration:Criteria for Admission’ available at <http://arbitration-blog.eu/evidence-international-arbitration-criteria-admission/> accessed on 18 November 2014.

²⁰² Ibid.

²⁰³ Singapore International Arbitration Centre Rules 5th Edition (2013).

‘Notwithstanding anything contained in any legal provisions in terms of which a witness shall not be compellable or permitted to give evidence in respect of certain matters on grounds of public policy or from regard to public interest, it shall be competent for any person in any civil proceedings to adduce evidence of any communication alleging the commission of an offence, if the making of that communication *prima facie* constitutes an offence, and it shall be competent for the person presiding at such proceedings to determine whether the making of such communication *prima facie* does or does not constitute an offence, and such determination shall, for the purpose of those proceedings, be final.’

It is submitted that the above provision could, in certain circumstances be interpreted as referring to hearsay evidence. In terms of this section a person in a civil proceeding may produce any communication, presumably even a recording of a conversation between two people who are not present at court to confirm or deny the veracity of such communication, and the court is then empowered with a discretion in deciding whether such communication does indeed constitute an offence. Section 3(1)(c) of the South African Law of Evidence Amendment Act²⁰⁵ provides for a similar discretion bestowed upon the court, as follows:

‘Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- the court, having regard to

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.’

It is submitted that the above provisions indicate that the nature of the proceedings is important in determining whether evidence, which would otherwise be deemed to be inadmissible, such as hearsay evidence, may be admitted. Having established that departures from the strict rules of evidence are justified in certain situations, the enquiry turns to whether instances of public procurement corruption deserve to fall within this category.

3.5.1.2 *Rules of Evidence and Public Procurement Cases*

²⁰⁴ 25 of 1965.

²⁰⁵ 45 of 1988.

In public procurement cases evidence of corruption is often unearthed by an unsuccessful bidder who later takes a procurement decision on appeal or review. It is trite law that the primary criterion for the admissibility of evidence is the relevance thereof. In proceedings involving the administrative review or appeal of a public tender process, the relevance of evidence alleging a criminal offence, which has been produced late in the proceedings or is hearsay in nature, is often questioned. Yet it is submitted that judicial jettisoning of such evidence, purely on this basis, is most dangerous to the fight against public procurement corruption.

Corruption Watch has pointed out that ‘evidence of corruption typically only comes to the fore late in the day and will almost always not live up to the highest standards for the admissions of evidence.’²⁰⁶ Further de Speville asserts that:

‘Those who have any experience of fighting corruption know how difficult it is to discover what is going on, how difficult it is to get evidence of specific wrongdoing by any particular person and how difficult it is to prove in a court of law that that person has committed a corruption offence. It was a famous and highly experienced Hong Kong judge who many years ago said: “Bribery is probably the most difficult of all offences to detect and prosecute successfully in the courts. Any law-enforcement agency entrusted with this difficult job deserves all the assistance the Legislature feels it can reasonably give.”’²⁰⁷

In addition Jayawickrama, Pope and Stolpe submit that:

‘unlike most other crime, the offence of corruption has no obvious victim who would complain. Everyone involved in its commission is a beneficiary and has an interest in preserving secrecy. As it is exceptionally difficult to obtain clear evidence of the actual payment of a bribe, corrupt practices frequently remain unpunished.’²⁰⁸

Man-wai adds to this collective view on the difficulty of obtaining evidence of corruption and further of obtaining it in due time. He states as follows:

‘Corruption is regarded as one of the most difficult crimes to investigate. There is often no scene of the crime, no fingerprint, no eye-witness to follow up. It is by nature a very secretive crime and can involve just two satisfied parties, so there is no incentive to divulge the truth. Even if there are witnesses, they are often parties to the corruption themselves, hence tainted with doubtful credibility

²⁰⁶ Corruption Watch is a non-profit organisation which acted as *amicus curiae* in *AllPay Consolidated Investments Holdings (Pty) Ltd and Others v CEO of South African Social Security Agency and Others* 2014 (1)SA 604 CC. See para 48 of its written submissions in this case.

²⁰⁷ B de Speville ‘Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms’ available at <http://www.8iacc.org/papers/despeville.html> accessed on 13 November 2014.

²⁰⁸ N Jayawickrama, J Pope & O Stolpe ‘Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof’ (2002) 2 *Forum on Crime and Society* 23.

when they become prosecution witnesses in court. The offenders can be equally as professional as the investigators and know how to cover their trails. The offenders can also be very powerful and ruthless in enforcing a code of silence amongst related persons through intimidation and violence to abort any investigation.²⁰⁹

In the circumstances, it is submitted, that if corruption is to be successfully detected and punished, certain concessions regarding admissibility of evidence will of necessity have to be made. The sentiment of the Hong Kong judge, as quoted above by de Speville²¹⁰ is correct that assistance from the Legislature is needed. This assistance needs to be contained in the PCCA, which should include guidance on how courts may treat evidence of corruption, particularly those courts tasked with adjudicating tender appeals or reviews. Since the primary criterion for the admissibility of evidence is relevance, perhaps this is where the focus of the discussion should be. Section 210 of the Criminal Procedure Act²¹¹ states that:

‘no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce or prove or disprove any point or fact in issue in criminal proceedings.’

It is accepted that were courts to admit all evidence, which might even in the slightest degree have some relevance to an issue, cases could proceed for inordinately long periods of time, with perhaps no end in sight. The law therefore has to draw a line between sufficiently relevant facts and those which are remote. In the case of *Hollingham v Head* the Court stated thus:

‘It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins: but we are bound to lay down the rule to the best of our ability.’²¹²

Hoffman and Zeffert assert therefore that in law when evidence is said to be irrelevant, it means either that ‘as a matter of common sense it is totally irrelevant, or that for the purpose of the trial it is not sufficiently relevant.’²¹³ The question here is that when a court is faced with the task of adjudicating the integrity of a public tender process, can evidence which points to alleged corruption in the process ever be regarded as irrelevant, either as a matter of common sense, or for the purpose of the trial? The answer to this question has to be in the

²⁰⁹ T K Man-wai ‘Investigation of Corruption Cases’ (2008) Eleventh International Training Course on the Criminal Justice Response to Corruption *United Nations, Asia and Far East Institute, Resource Materials Series No. 79*, 140.

²¹⁰ de Speville (note 207 above).

²¹¹ 51 of 1977.

²¹² *Hollingham v Head* (1858) 4 CB (NS) 388, 391.

²¹³ Hoffman & Zeffert (note 196 above) 23.

negative. The presence of corruption would strike at the heart of the integrity of the process. At this point the following words of Lord Hardwicke ring with an acute note of applicability:

‘The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.’²¹⁴

In light of the above pronouncement it is important to look more broadly at what would constitute the best evidence. In general terms, the best evidence rule means evidence will be accepted if nothing better exists or can be produced. For instance, a copy of a document will generally not be accepted as evidence if the original does exist and can be readily produced.²¹⁵ Further Wysluch submits, with respect to corruption matters that:

‘despite the broad impact of the presumption of innocence, there can often be constellations of evidence that enable a “suspicion” to be sufficient for a guilty verdict without concrete evidence.’²¹⁶

It is clear therefore, taking into account the nature of procurement corruption offences that the best evidence available may be something far less than is normally accepted as admissible evidence. Evidence of corruption in public procurement cases, must always be viewed as relevant, as corruption will strike at the heart of the integrity of the process. This is the essence of what a court of law is tasked to ascertain when reviewing a tender process.

3.5.1.3 *The PCCA and Evidentiary Matters pertaining to Public Procurement Corruption*

While it is not the aim of this study to re-evaluate the law of evidence in general, it is submitted that taking into account the submissions made above, the evidentiary provisions of the PCCA may need to be reviewed in order to ascertain their appropriateness to public procurement corruption.

Section 13 of the PCCA is of specific reference to corrupt activities relating to the procurement and withdrawal of tenders.²¹⁷ This section is not confined to public tenders, as

²¹⁴ *Omychund v Barker* (1745) 1 Atk 21, 49.

²¹⁵ Hoffman & Zeffert (note 196 above) 114.

²¹⁶ B Wysluch ‘The UN Convention against Corruption and Development Cooperation-Corruption Prevention by more Efficient Law Enforcement?’ available at <http://www2.gtz.de/dokumente/bib/07-0876.pdf> accessed on 13 November 2014.

²¹⁷Section 13 reads as follows: (1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as-(a) as an inducement to, personally or by influencing any other person so to act-(i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or (ii) upon invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or (iii) withdraw a tender made by him or her for such contract; or (b) a reward for acting as contemplated in paragraph (a)(i), (ii) or (iii), is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders. (2)

no such limitation is found in the wording of the section itself. The key evidence required to prove an offence in terms of this section would be evidence proving the acceptance, giving, agreement or offer to accept or give a gratification, as well as a link between such acceptance, giving, agreement or offer to accept or give, and the act for which the gratification was accepted or given, agreed or offered to be accepted or given. The elements of the general offence of corruption created in section 3 of the PCCA is generally the same as section 13, with the exception that section 3 has a broader range of prohibited acts for which gratification may be offered or accepted. However the requirement to link the acceptance or offer of a gratification to a prohibited act remains intact in both sections. Because of the broad range of prohibited acts contained in section 3, procurement corruption may easily fit into the general definition of corruption.

It is submitted that because of the difficulty in unearthing and producing evidence of corruption, persons alleging an offence, whether it be a prosecutor in a criminal trial or a private person in a matter involving a tender appeal or review, will be faced with difficulty in presenting the key evidence as required by sections 3 and 13. Relying on the submissions made above it is suggested, that in the first instance, the PCCA ought to grant courts, particularly courts tasked with reviewing a public tender process, a discretion in admitting evidence which may not strictly meet the normal requirements for admissibility. There is currently no such provision in the PCCA.

However the PCCA does provide a measure of assistance to those alleging an offence. This assistance may be found in sections 24 and 25. Section 25 refers to defences and provides assistance by precluding accused persons from asserting that he or she did not have the power, right or authority to perform the unlawful act for which the gratification was offered, given or accepted, or that he or she never intended to or failed to execute such unlawful act.

Any person who, directly or indirectly-(a) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that person or the benefit of another person, as (i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or(ii) a reward for acting as contemplated in subparagraph (i); or (b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person, as (i) an inducement to withdraw the tender; or (ii) a reward for withdrawing or having withdrawn the tender, is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

Section 24 creates a legislative presumption. In terms of this presumption proof of the gratification having been accepted, offered or given, will be deemed to be sufficient evidence to link such acceptance, offer or giving to an unlawful act, if the State has shown that despite having taken reasonable steps it was unable to link such gratification to a lawful authority, and in the absence of any evidence to the contrary which raises reasonable doubt. In other words, the State need do no more than show that it did all that it reasonably could to link the gratification to a lawful authority but failed to find such lawful authority. The State does not even have to prove *prima facie* case which shows the link between the gratification and an unlawful authority. The onus of proof will seemingly then shift to the accused to prove that the gratification can be linked to a lawful authority.²¹⁸

It is submitted that the Legislature ought to be applauded for incorporating this presumption into the PCCA, as it eases the burden on the prosecution. Jayawickrama et al submit that easing the evidential burden of the proof in respect of corruption offences appears to be both necessary and desirable in order to deter potential offenders as well as to facilitate the investigation and successful prosecution of such offences.²¹⁹

Regrettably section 24 does not apply to corrupt activities relating to the procuring and withdrawal of tenders.²²⁰ With respect to section 13 offences therefore, the prosecution would have to prove beyond reasonable doubt that the gratification was given, offered or accepted for the exercise of an unlawful authority linked to the award or withdrawal of a tender. The prosecution would have to discharge this onus without the assistance of any presumption. De Speville asserts that:

²¹⁸ At this point it may be prudent to briefly explain what is meant by an onus of proof, the evidentiary burden of proof and a reverse onus clause. The burden or onus of proof refers to the duty which one or other parties has of finally satisfying the court that he is entitled to succeed on his claim or defence (in this respect see Hoffman & Zeffert (note 196 above, 495). In criminal cases this duty placed on the prosecutor who initiates or alleges a particular charge, is to prove the allegations against the accused beyond a reasonable doubt. In other words, after hearing all the evidence adduced by the prosecution, if the court is left with a reasonable doubt as to the guilt of the accused, the accused will be entitled to an acquittal. In civil proceedings this duty placed on the plaintiff (the person who initiates a claim) is on a balance of probabilities. In other words, after the court has heard the evidence of both the plaintiff and the defendant, the court must decide in favour of that party who has produced sufficient evidence which tips the scales in favour of its claim or defence. The civil standard of proof is much lower than the criminal standard, as in civil proceedings even in the presence of reasonable doubt, a party may still succeed in its claim. The evidentiary burden of proof broadly refers to the burden of an opposing party to adduce sufficient evidence to rebut a *prima facie* case made out by the party who alleged. In terms of the presumption contained in section 24 therefore, it is not simply an evidentiary burden which is placed on an accused, but rather an entire onus. In such cases, it is insufficient for an accused to simply raise a reasonable doubt linking the gratification to an unlawful authority. The actual onus actually rests on the accused to prove that the gratification can be linked to a lawful authority. This is referred to as a reverse onus clause.

²¹⁹ Jayawickrama, Pope & Stolpe (note 208 above).

²²⁰ Section 24(1) specifically refers only to offences contained in Part 1 or 2 or section 21 of Chapter 2 of the PCCA. Corrupt activities relating to procuring and withdrawal of tenders is contained in Part 4 of Chapter 2.

‘the existence of lawful authority or reasonable excuse to act as he did will be within the knowledge of the defendant, probably within his exclusive knowledge. It would not be unreasonable to require him to bear the onus, at least the evidential onus, of showing that he has lawful authority or reasonable excuse for doing what he did. On the other hand it would place a wholly disproportionate burden on the prosecution to try to disprove a defence which may not even be raised.’²²¹

In the circumstances it is submitted that, it is a rather tall order placed on the prosecution to discharge such an onus without the assistance of legislative presumptions. As has been discussed earlier, evidence of corruption related to public tenders, often only comes to light by an unsuccessful bidder who later challenges a tender award. Such party then seeks to introduce evidence of corruption at a civil trial. Unfortunately this is a reality with respect to public procurement corruption and legislation therefore needs to come to the assistance of a civil court in such respects. Apart from clothing presiding officers with a discretion to admit evidence of alleged corruption, which may not meet the strict and conventional requirements for admissibility, it is submitted, that since the presence of corruption affects the integrity of a tender process, civil courts tasked with adjudicating a tender process, need to be empowered to make a finding, on what is essentially a criminal offence, albeit for the limited purpose of assessing the integrity of the tender process.²²²

It is submitted that a civil court can only do this by assessing evidence on a balance of probabilities. This in turn means that evidence of a criminal offence will be assessed on a balance of probabilities. It is submitted, that taking into account the purpose of the court in such review or appeal proceedings, a deviation in the standard of proof is justified.

It is not a new or untested concept for legislation to come to the assistance of those who allege a particular offence based on the nature of the offence. For instance Lewis submits that, in the United States of America, the Maryland General Assembly passed a law which provided for the lowering of the standard of proof in matters involving domestic violence.²²³ Where the standard in such cases was a ‘clear and convincing’ standard, after taking into account the nature of the offences and the fact that this standard may leave many real victims unprotected, the lawmakers lowered the evidentiary standard to the normal civil standard, which is a preponderance of evidence.

²²¹ De Speville (note 207 above).

²²² As opposed to making a finding of guilt or otherwise of an accused person, which will always fall within the exclusive domain of a criminal court..

²²³ A M Lewis ‘ Evidentiary Standard lowered for protection orders in Maryland’ available at <http://www.aleclewislaw.com/blog/2014/06/evidentiary-standard-lowered-for-protection-orders-in-maryland> accessed on 18 November 2014.

A further useful technique to ease the evidentiary burden in cases of corruption, particularly procurement corruption, is the creation of an illicit enrichment presumption in the PCCA. The fact that procurement corruption, as well as other forms of corruption, generally entail the giving or acceptance of some undue gratification, in exchange for the unlawful exercise of power or authority, means that public officials may accumulate excessive wealth or assets through corrupt means. In recognition of this, both the UN Convention Against Corruption as well as the AU Convention on Preventing and Combating Corruption, provide for the creation of a criminal offence known as illicit enrichment. Article 20 of the UN Convention Against Corruption provides as follows:

‘Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.’

Article 8(1) and (2) of the AU Convention on Preventing and Combating Corruption provide as follows:

‘Subject to the provisions of their domestic law, State Parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment.

‘For State Parties that have established illicit enrichment as an offence under their domestic law, such offence shall be considered an act of corruption or a related offence for the purposes of this Convention.’

Although South Africa is a party to both these international instruments, the PCCA does not create an offence of illicit enrichment. In terms of section 23 of the PCCA the law only goes so far as to empower the National Director of Public Prosecutions to apply to a judge in chambers for the issuing of an investigation directive in circumstances where a person is in possession of property disproportionate to such person’s present or past known sources of income. Given the difficulties faced in the gathering of evidence pertaining to corruption, it is submitted that the creation of an offence of illicit enrichment would assist the prosecution in successfully prosecuting a greater number of corruption cases. In support of this submission, Meskele asserts as follows:

‘The clandestine nature of corruption crimes creates difficulties in gathering evidence for prosecution and effective implementation of the law. To overcome such problems, some indicators of corruption

such as possession of property that far exceeds legitimate sources of income need to be criminalised.²²⁴

Similarly Wysluch submits that Article 20 of UNCAC

‘addresses the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where the enrichment is so disproportionate to the lawful income that a *prima facie* case of corruption can be made.’²²⁵

Jayawickrama, Pope and Stolpe submit that

‘criminalising the possession of such wealth, which is described in some jurisdictions as “illicit enrichment” or possession of “unexplained wealth”, has now become an accepted measure in the fight against corruption.’²²⁶

However failure by State Parties to provide for criminalisation of illicit enrichment does not automatically mean a violation of international law instruments. Wysluch submits that while certain provisions of UNCAC are mandatory, others do not necessarily require direct commitment to implementation.²²⁷ She does submit, however, that at the very least State Parties have a duty to consider appropriate implementation.²²⁸ This submission is in line with the actual wording of the Article itself. With regards to the AU Convention on Preventing and Combating Corruption, it may be reasonably argued, that the wording of Article 8(1), creates a more binding duty on State Parties to adopt measures to establish an offence of illicit enrichment. This is notwithstanding that this obligation, is subject to the domestic laws of each State Party.

It is beyond the scope of this study to critically evaluate whether the creation of an offence of illicit enrichment, infringes on an accused person’s right to be presumed innocent, or to remain silent until the prosecution has proved that the illicit wealth is as a result of corrupt activities,²²⁹ or any other right which accused persons are generally afforded.²³⁰ It is also

²²⁴ M T Meskele ‘Criminalising and Prosecuting Illicit Enrichment in Corruption Cases’ available at https://www.academia.edu/6518504/Criminalising_and_Prosecuting_Illicit_Enrichment_in_Corruption_Cases accessed on 14 November 2014.

²²⁵ Wysluch (note 216above)

²²⁶ Jayawickrama et al (note 208 above).

²²⁷ Wysluch (note 216 above).

²²⁸ *ibid.*

²²⁹ The right to be presumed innocent, to remain silent and not to testify in the proceedings are constitutional rights enshrined in section 35(1)(h) of the Constitution.

²³⁰ These considerations will necessarily arise, as the creation of the offence of illicit enrichment will entail an easing of the burden of proof on the prosecution. Meskele (note 224 above) submits that in ‘prosecuting illicit enrichment as a crime of corruption, the prosecutor should prove beyond a reasonable doubt the disproportionate assets in the hands of the accused in relation to his legitimate income. In this respect, the

beyond the scope of this study to undertake a constitutional evaluation of whether such infringements may be justifiable limitations on accused persons' rights. However it is within the scope of this study, to provide credible justification, that at the very least, the South African legislature, ought to consider the creation of such an offence within the PCCA, specifically with respect to public procurement.

In South Africa it is doubtful whether, one would succeed in an argument that the domestic laws or the Constitution, prevent the creation of such an offence. The prevalence of procurement corruption in South Africa has been established. The difficulties faced in the gathering of evidence have been demonstrated. Furthermore South Africa has given constitutional status to the principles of public procurement. This recognition entrenches the government's desire to ensure that public procurement occurs as far as possible within a corrupt-free environment. For instance, the principle of transparency, which as motivated earlier, is deserving of a broad and generous interpretation, requires that public officials disclose and explain the sources of their income and wealth. This interpretation may therefore support a position where an accused public official is called upon to explain the acquisition of his or her wealth, in instances wherein the prosecution is expected to prove merely the possession of a disproportionate income, wealth or assets to that of the accused's past or present official and lawful income.

It is submitted that the creation of an illicit enrichment offence may be particularly efficacious in curbing public procurement corruption, because the salaries and remunerations of public officials are generally prescribed by law.²³¹ Specific authority would have to be obtained if a public official intended undertaking remunerative work outside of his or her official state employment.²³² Public service Codes of Conduct also require public officials to disclose their financial interests outside of their state employment.²³³ Therefore in instances wherein a public official is called upon to explain wealth in his or her possession which is seemingly disproportionate to his or her lawful salary, such official should, in the absence of corruption, be able to readily offer a legitimate explanation. On the contrary, it is submitted, that it may place an unduly difficult burden on the prosecution, taking into account the

prosecutor is not required to prove the fact that the accused has received a bribe or committed any other form of corruption. Wealth that is not proportionate to the legitimate income of a public official is presumed to have originated from corruption unless the contrary is proved.' The creation of such presumptions almost always raises constitutional criminal law principles and need to be carefully considered.

²³¹ In this respect see Remuneration of Public Bearers Act 20 of 1998 and Public Service Act 103 of 1994.

²³² See section 30(b) of Public Service Act (ibid).

²³³ Example see section 5A of Schedule 2 of the Municipal Systems Act.

clandestine and secretive nature of corruption, to prove beyond a reasonable doubt that such excessive wealth in the possession of the accused public official is indeed the proceeds of corrupt activities.

Taking into account the nature of public procurement corruption, the encouragement by anti-corruption international instruments for State Parties to criminalise illicit enrichment and the constitutional status afforded to public procurement in South Africa, a cogent case exists for the South African legislature to consider the creation of such an offence in the PCCA, particularly with respect to public procurement.

While it is beyond the scope of this study, to conduct an evaluation of the law of evidence *in toto*, it is submitted that considerable justification exists to at least, assert here, that in the cases of public procurement corruption, the following would be significantly useful:

- that courts, especially courts tasked with adjudicating the correctness of public tender procedures, be granted a discretion to admit evidence of alleged corruption which may not necessarily meet the strict and conventional requirements for admissibility;
- that civil courts be empowered to assess such evidence according the civil standard of proof in order to reach a finding on the existence or otherwise of corruption in the process;²³⁴and
- that the creation of an offence of illicit enrichment may be a useful technique to ease the evidentiary burden in cases of procurement corruption.

3.5.2 *The Definition of Corruption*

It is submitted for reasons set out below, that the definition of corruption, both in terms of the general offence of corruption created in section 3 of the PCCA, as well as the specific offence of corruption in respect of corrupt activities relating to procurement and withdrawal of tenders in section 13 of the PCCA, is not broad enough to encompass all forms of procurement corruption. In terms of the PCCA the central elements of a corruption offence appears to be the giving and receiving of some gratification in exchange for the unlawful abuse of power. Corruption Watch asserts that the elements of corruption in terms of the PCCA are:

²³⁴ The actual manner in which such legislative prescripts may be formulated is best left to appropriate experts on the law of evidence and related matters.

‘Someone giving (or offering to give)/someone receiving (or agreeing to receive); someone in a position of power; using power illegally or unfairly; gratification.’²³⁵

Corruption Watch asserts that all corrupt acts have the above elements in common.²³⁶ Section 1 of PCCA affords a wide and broad definition to the term ‘gratification’ and includes any benefit other than money. Furthermore in terms of the PCCA, the mere offer to either give or receive a gratification for an unlawful purpose to have been made, without the actual giving or acceptance to have been carried out, is sufficient offence to be created. This means that even the planning of the acceptance or giving of a gratification is sufficient to create the offence, provided that such planning is done with an unlawful intent.²³⁷

Further specifically in terms of section 13 of PCCA, a corrupt activity includes activities occurring between private parties, and not strictly between a private party and a public official. Sections 13(1)(a)(ii) and (iii), and section 13(2)(b) for instance may include the acceptance or giving of a gratification between co-tenderers, wherein one tenderer induces another tenderer, to either withdraw its tender or to submit a tender. Such practices may be common among cartels which agree to collude in the manner in which each member of the cartel tenders, such that one member is assured the award of the tender. Indeed the entire text of section 13 is not limited to tenders in the public sector, but may be applicable to tenders in the private sector as well. This is true of the general offence of corruption as well. In essence therefore the PCCA is not limited to corruption in the public sector.

The broad application of the PCCA is commendable. However it is submitted that by requiring the central element of the exchange of some gratification in return for the exercise of some unlawful power to be present in order to create a corrupt offence, the PCCA has not taken full cognisance of the nature of procurement corruption specifically. Williams and Quinot submit that procurement corruption can take the form of public, private or auto-corruption.²³⁸ They define each form as follows:

‘Public corruption moves from the supplier to the public official responsible for taking procurement decisions. This frequently takes the form of bribes or other non-monetary inducements given to the

²³⁵ Corruption Watch ‘Corruption and the Law in South Africa – Part Two’ available at <http://www.corruptionwatch.org.za/content/corruption-and-law-south-africa-part-two> accessed on 3 December 2014.

²³⁶ Ibid.

²³⁷ It is submitted that the word ‘inducement’ in section 13(1)(a) and section 13(2)(a)(i), read with the definition of ‘induce’ in section 1 of PCCA is indicative of the unlawful intent required.

²³⁸ S. Williams & G Quinot ‘Public Procurement and Corruption: The South African Response’ (2007) 124 *SALJ* 339, 341.

public official in order to influence the exercise of his discretion...Private corruption takes the shape of collusion, price-fixing, maintenance of cartels or other uncompetitive practices engaged in by suppliers to the detriment of the government...Thirdly auto-corruption occurs when a public official wrongly secures for himself or an associate privileges rightly belonging to the public, by by-passing or manipulating the formal procedures necessary for the award of these privileges.²³⁹

Procurement corruption, therefore does not necessarily always take the form of an offer or acceptance of gratifications. Corrupt officials may manipulate tender regulations in order to benefit themselves or tenderers in which they may have a financial stake. This is described above by Williams and Quinot as auto-corruption. In such instances the exchange of a gratification may not necessarily be present.

In other instances a corrupt tenderer may submit false or misleading information in order to secure itself a tender. In such instances also, there may be no exchange of any gratification between parties. It may be argued that such actions may constitute other offences such as fraud, and not necessarily corruption as defined in the PCCA. However, in terms of the public procurement setting, the fact that such actions have the potential to unlawfully abuse public funds, it is suggested that the definition of corruption, particularly with respect to corrupt activities in terms of section 13 of the PCCA, ought to be extended to include such practices. Furthermore such practices unlawfully prevent honest bidders from participating in a fair procurement process. This erodes the constitutional public procurement principle of fairness. This then destroys the integrity of the entire public procurement process.

Chapter two provided an explanation of what corruption is, and focused largely on those authorities which defined corruption in relation to the abuse of public power for private gain. This is the most commonly accepted general definition of corruption. The limitation of the above definition is that it implies abuse of power by a public official. Yet public power may be manipulated and abused even in the absence of wrongdoing on the part of any public official. The reality is that corruption and its various permutations are very difficult to define and limit with precise certainty.

The UN has pointed the following definition of corruption asserted by Klitgaard, MacLean-Abaroa and Parris:

²³⁹ *ibid.*

‘Corruption means the misuse of office for private gain. The office is a position of trust, where one receives authority in order to act on behalf of an institution, be it private, public, or non-profit.’²⁴⁰

It is clear that the above definition is not limited to corruption by public officials. The UN asserts that all forms of corruption are based on the potential conflict between the individual’s professional and personal interests.²⁴¹ The United Nations goes further to include fraud as a form of corruption, which is essentially the use of misleading information to induce someone to take some action or inaction to their prejudice.²⁴² The various forms of corruption, as highlighted by the UN, such as bribery, embezzlement, theft, fraud, extortion, abuse of discretion, favouritism, nepotism, clientelism and improper political contributions, do not necessarily all involve the exchange of gratifications.²⁴³ Hyslop on the other hand asserts as follows:

‘...the salient feature would seem to be that corruption necessarily involves illegal or unprocedural activity...Corruption must involve the breach of laws or administrative rules governing the allocation of public resources for purposes of political or economic gain, or in order to gain coercive power over individuals or groups. Corruption is probably best defined in a legal positivist manner. An action is corrupt in so far as it transgresses particular laws or regulations.’²⁴⁴

It is clear therefore that the PCCA’s central element of the exchange of a gratification is myopic, as it has the potential to exclude a cluster of activities which may be aimed at manipulating a public power. With regards to corruption in the public sector, and particularly in the public procurement sector, corruption does not always entail the exchange of gratifications between private sector players and public officials. Auto-corruption by public officials does not involve the exchange of any gratifications, and private corruption as well may occur without the exchange of any gratifications in order to manipulate a public decision. In such situations, notwithstanding the absence of the exchange of gratifications, the outcome is the same: the manipulation of a public procurement process for undue rewards. This supports the assertion made in chapter two that corruption is a crime of opportunity. Corruption in whatever form, may occur, where opportunity presents itself.

²⁴⁰ United Nations ‘Urban Governance Toolkit Series: Transparency and Corruption’ available at <http://ww2.unhabitat.org/cdrom/TRANSPARENCY/html/transpc.html> accessed on 10 December 2014.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ United Nations ‘Urban Governance Toolkit Series: Transparency and Corruption’ (note 241 above).

²⁴⁴ J Hyslop “Political Corruption: Before and After Apartheid” (2005) 31 *Journal of Southern African Studies* 3.

It is beyond the scope of this study to analyse the elements of the various corrupt activities created by the PCCA. With regards to the offence of corrupt activities relating to procuring and withdrawal of tenders, however, it is submitted that the elements of the offence do not provide for forms of corruption which do not involve the offer or acceptance of an undue gratification. ,

3.5.3 *The Issue of Endorsements*

Section 28(1) of the PCCA provides for the endorsement of those convicted of corruption. The result of such endorsement is the exclusion of such contractors from public contracts.²⁴⁵ Interestingly this section provides for such endorsement only in respect of persons convicted of an offence contemplated in section 12 or 13 of the PCCA. These are procurement related sections of the PCCA. The implication is that persons convicted of corruption in a non-procurement context, will not be subject to endorsement. Williams and Quinot submit that:

‘The narrowness of the range of offences covered might result in the exclusions not being wholly effective in combating public corruption, as they will only affect persons who have been convicted of procurement related corruption and who are government contractors. This also raises the issue of the possible unfairness of the measures, as it means that government contractors convicted of procurement corruption receive a more severe sanction than government contractors and other persons convicted of non-procurement corruption.’²⁴⁶

The submissions of Williams and Quinot are relevant. While the Legislature may have intended to highlight and elevate the seriousness of procurement corruption, the result is that a person convicted of corruption in a non-procurement context will not be excluded from contracting with the government. It is submitted that this does little to reduce corruption in public procurement.²⁴⁷

The endorsement mentioned above is entered into a Register of Tender Defaulters as provided for in section 29 of the PCCA. However the PCCA provides no mechanism to ensure enforcement of this section. It could be argued though that a failure to consult the Register of Tender Defaulters would mean that accounting officers fall foul of their duties in terms of sections 38 and 112 of the PFMA and the MFMA respectively. These sections make

²⁴⁵ Williams & Quinot (note 238 above) 341.

²⁴⁶ Ibid.

²⁴⁷ With respect to local government though, section 112(1)(l)(i) of the MFMA, provides that the supply chain management policy of a municipality must provide for the barring of persons who were convicted for fraud and corruption during the past five years. At least with respect to municipalities therefore, it is not only persons convicted of offences in terms of section 12 and 13 of the PCCA who will be barred from any tendering or other procurement processes with government.

accounting officers responsible for the maintenance of an appropriate procurement system and compliance with all commitments required by legislation. However the problem of a non-enforcement provision, whether in procurement legislation or in the PCCA persists.

Problems may arise, particularly within a public procurement setting, when there are delays between the time when an endorsement is ordered by a court and the time when the National Treasury actually places the endorsement on the Register. This is provided for in section 28(2) of the PCCA. In terms of this subsection, once a court has issued an order for endorsement as envisaged in subsection 28(1), the registrar or clerk of the court must forthwith forward that court order to the Registrar of the Register for Tender Defaulters (hereinafter referred to as the “Register”), whose duty it is to place the actual endorsement on the Register after having determined the period of time for which such endorsement is to remain on the Register.²⁴⁸

A danger emanating from the above was aptly demonstrated in the United States in the case of *JB Kies Construction Co.*²⁴⁹. Williams and Quinot succinctly explain the facts of this case as follows:

‘The bidder for a public contract obtained a three-year debarment which started three years and two months before the challenged tender proceedings. However, the government agency only placed the firm on the list of excluded contractors three months after the debarment was supposed to have begun. As a result, the firm was still considered debarred at the time of the bid opening and its bid, which was the lowest, was rejected as a result. The firm’s subsequent protest was denied on the basis that the administrative delay in listing was not sufficient ground for the debarment to be waived.’²⁵⁰

The persons against whom an endorsement may be issued is wide. For instance in terms of subsection 28(1)(c) and (d), it is not only the person or enterprise which was convicted of the offence which will be subject to endorsement, but also every other enterprise which is owned or controlled by the convicted person, as well any other enterprise to be established in the future which will be wholly or partly owned or controlled by the convicted person, which will be subject to the endorsement. In terms of subsection 28(3)(a)(iii) any government entity must ignore any tender offered by such persons or disqualify any such person from making any offer or obtaining any agreement relating to government procurement. It is submitted that such a wide application of the endorsement provisions is welcome, in that the separate legal

²⁴⁸ Subsection 28(3)(a)ii) of the PCCA.

²⁴⁹ *JB Kies Construction Co. Comp.* Gen. B-250797, 93-1 CPD 127, 2-4.

²⁵⁰ Williams & Quinot (note 238 above) 356.

persona of juristic persons cannot be manipulated to create further entities capable of doing business with the State, notwithstanding that its directors, members or shareholders are persons barred from doing business with the State.

However the problem with respect to the delays which may ensue between the time when the court orders an endorsement and the time when the endorsement is actually placed on the Register by the National Treasury still persists. As illustrated in the American case cited above, such time delays may prejudice a tenderer whose endorsement ought to have come to an end but for the delays in the actual recording thereof. On the other hand it could also create the situation, where a court makes an order for endorsement in respect of a particular person, but due to the delays by the National Treasury in the actual recording thereof, such person successfully tenders for a subsequent government tender during the time of the court order and the time when National Treasury records the endorsement. It is submitted that this possibility is highly untenable in the fight against corruption in the public procurement sector, as may render the purpose of section 28 nugatory.

It is submitted that the purpose of section 28 is to protect the State from the risks associated with doing business with persons convicted of corruption offences within the public procurement sector.²⁵¹ Notwithstanding this purpose, section 28 places a discretion on the courts to order such endorsements. The result is that not every person or enterprise convicted of a corruption offence in terms of section 12 or section 13 of the PCCA may be barred from doing business with the State. Bolton states that the PCCA, by the use of the word ‘may’ in section 28(1) affords the courts discretion to order the blacklisting of convicted persons or enterprises.²⁵² She goes further to commend this discretion afforded to courts, in light of the serious nature and consequences of debarment.²⁵³ While this assertion has merit, in that debarment lessens the pool of persons who compete for government contracts, and may consequently have an adverse impact on competition in public procurement, it is submitted that, legislation ought to offer guidance on the factors that a court should take account of when exercising the discretion to debar.²⁵⁴

²⁵¹ On the rationale for debarment see S. Williams & G Quinot ‘To Debar or Not to Debar: When to Endorse a Contractor on the Register for Tender Defaulters’ (2008) 125 *SALJ* 248.

²⁵² P Bolton ‘The Exclusion of Contractors from Government Contract Awards’ *Law, Democracy and Development* 25, 38.

²⁵³ *Ibid.*

²⁵⁴ The Regulations regarding the Register for Tender Defaulters, Government Gazette Number 27365, also does not provide any such guidance.

Bolton further submits that the PCCA as well as the Regulations regarding the Register for Tender Defaulters²⁵⁵ do not expressly refer to the position regarding subcontractors in the procurement process.²⁵⁶ It is therefore unclear whether a primary contractor should be excluded if it proposes doing work with an endorsed subcontractor.²⁵⁷ Bolton is of the view that:

‘...only if there will be direct contact between the government and the subcontractor, in the sense that the proposed subcontract is subject to government consent, or the debarred subcontractor plays a disproportionate role in the overall operation of the contract to be awarded, should the main contractor be denied the contract on the ground that it lacks the necessary ability to render performance under the contract.’²⁵⁸

However seeing that debarred or endorsed persons may use the mechanism of subcontracting to obtain the benefits of public procurement contracts, albeit in an indirect manner, it is submitted that legislative silence on this issue is untenable.

3.5.4 *The Duty to Report*

Section 34 of the PCCA mandates any person who holds a position of authority to report to the South African Police, any corrupt activity involving an amount of R100 000-00 or more which may have occurred in terms of the Act. To facilitate the implementation of this section National Treasury issued a Circular dated 6 September 2011 informing heads of all Departments of their duty in terms of section 34 of the PCCA.²⁵⁹ In terms of clause 7 of this Circular, a ‘person who holds a position of authority’ includes the Director-General or Head of a national or provincial department, the chief executive officer of a constitutional institution, the accounting authority of a public entity, officials serving in the senior management service of departments or any head, rector or principal of a tertiary institution. It is uncertain why this Circular does not make reference to local government. However section 34 (4)(b) of the PCCA states that in the case of a municipality, this term includes the municipal manager.

²⁵⁵ The Regulations regarding the Register for Tender Defaulters, Government Gazette Number 27365.

²⁵⁶ Bolton (note 252 above) 40.

²⁵⁷ Currently in South Africa it appears that the only restriction on sub-contracting is with regards to an enterprises claim for preference points, in that Regulation 11(9) of the 2011 PPPFA Regulations states that a person awarded a contract may not subcontract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BEE status level than the person concerned.

²⁵⁸ Bolton (note 252 above) 41.

²⁵⁹ Republic of South Africa National Treasury Circular: ‘Duty to Report Known or Suspected Corrupt Transactions’ 6 September 2011 available at www.nationaltreasury.gov.za accessed on 20 August 2015.

The limitations of section 34 are apparent. Firstly the duty created in this provision is limited only to senior officials and heads of institutions. Secondly the duty to report seems to only apply *after* the commission of an offence. The second limitation, it is submitted, does not take into account the peculiarities of public procurement corruption. As explained earlier, various acts of corruption can take place at any point in the procurement process. A logical question flowing from the wording of section 34 is: does the furnishing of insider information to one tenderer only during the tender stage amount to the commission of an offence in terms of the PCCA? Taking into account the discussion pertaining to the definition of corruption earlier, it is unlikely that this question will be answered in the affirmative. Therefore even if one were to have knowledge that such an act has occurred, in terms of section 34 of the PCCA, one would not necessarily be under a duty to report it. This limitation however, may be cured by an amendment to the definition of corruption in the Act, and not necessarily to an amendment to section 34 itself.

The first limitation, essentially removes responsibility from those officials who are not senior managers. In the case of procurement corruption, this limitation is problematic. Often, it may not be a senior manager who knows, or ought reasonably to have known of a corrupt act during the procurement process. To this end the Protected Disclosures Act²⁶⁰ may be of assistance. This Act makes provision for procedures in terms of which employees in both the private and public sectors may disclose information regarding unlawful or irregular conduct within their working environment, either by their employers or fellow employees.

Unlike the PCCA, the Protected Disclosures Act makes provision for the disclosure of information, even while an offence is being committed or is likely to be committed.²⁶¹ This is helpful in the case of public procurement corruption. Corruption within the public sector often requires lengthy planning and negotiations between corrupt parties before the actual commission of the offence. Therefore where a person has information pertaining to such planning, then such person may be protected in the disclosure of such information. Section 5 of the Act, protects a person who makes any disclosure to a legal practitioner or person whose occupation it is to provide legal advice. Other provisions of the Act offer protection when disclosure is made in good faith to other persons.²⁶² However as Malunga avers:

²⁶⁰ 26 of 2000.

²⁶¹ Section 1(i)(a).

²⁶² Sections 6-9.

‘there is no express obligation in terms of the PDA on organisations, both public and private, to take proactive steps to encourage and facilitate whistleblowing in the organisation, or to investigate claims that are made by whistle-blowers.’²⁶³

The Protected Disclosures Act does not create a legal duty on employees to disclose or report information, as does section 34 of the PCCA. It merely protects employees from an occupational detriment in the event of a protected disclosure. It is submitted though that while the criticism levelled by Malunga above is true, in the case of government, the Protected Disclosures Act may be useful. Although the Protected Disclosures Act does not obligate an organisation to investigate any claims, both the PFMA Regulations and the MFMA Regulations place a duty on the accounting officer to investigate any allegations against an official or other role player of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the supply chain management policy.²⁶⁴ A disclosure in terms of the Protected Disclosures Act could therefore trigger such investigation.

While it is accepted that it is perhaps unreasonable to place a legal duty on every official to report known or suspected acts of corruption, it is submitted that section 34 of the PCCA ought to, at least follow the route of the Protected Disclosures Act in providing for the reporting of not only offences which have been committed but which are in the process of being committed or likely to be committed. Further taking into account what has been mentioned earlier regarding the difficulty with obtaining evidence of acts of corruption, the PCCA ought to include a provision which mandates public entities to investigate allegations of corruption which appear to be reasonable. While not expecting procuring entities to investigate claims which are clearly frivolous and baseless, taking into account the nature of procurement corruption, procuring entities ought to accept allegations which might otherwise not meet the higher standards of reasonable suspicion.

One of the limitations of the PCCA in its efficacy in the fight against public procurement corruption is that the PCCA was not enacted specifically to address this type of corruption. It therefore overlooks and does not provide for some of the idiosyncrasies related specifically to public procurement corruption. A significant way in which the PCCA may come to the assistance of courts and law enforcement agencies is with regards to the gathering and

²⁶³ K. Malunga ‘Whistle-blowing in South Africa: Empowering whistleblowers in South Africa-dealing with intimidation and strengthening people and institutions’ (2015) A paper presented at the launch of the Anti-Intimidation and Ethical Practice Forum available at http://www.aepf.co.za/Documents/Whistleblowing_in_SouthAfrica_Kevin_Malunga.pdf accessed on 15 June 2015.

²⁶⁴ Regulations 16A9.1(b) and 38(1)(b) of the PFMA Regulations and the MFMA Regulations respectively.

admissibility of evidence of procurement corruption as well as appropriate presumptions. The definition of corruption, particularly in relation to section 13 of the PCCA does not take into account all the various ways in which corruption may take place within the public procurement setting. Other provisions relating to endorsements and the recordings thereof may also be amended such that the State does not engage in business with convicted or unscrupulous persons. With regards to the reporting of corrupt activities, the PCCA ought to include the reporting of activities which are in the process of being committed or likely to be committed, as well as to place a legal duty on public entities to investigate allegations of corruption. Such legal duty need not only arise upon well substantiated allegations, but also where allegations are, due to the nature of the crime, unable to be supported by the most cogent evidence. In the circumstances it is submitted that there are material and substantive ways in which the PCCA may be amended in order to increase its efficacy in the fight against public procurement corruption.

4 CONCLUSION

The preceding chapters have illustrated that public procurement is an area that is susceptible to corruption. To this end relevant research questions were identified to assist the legislative evaluation undertaken in this chapter. The international law and constitutional frameworks pertaining to anti-corruption and public procurement were also discussed earlier. The interpretation of various laws in this chapter was therefore undertaken, bearing in mind these legal frameworks.

In South Africa public procurement is implemented in terms of an integrated supply chain management system which aims to ensure that value is added at every stage of the procurement process. The key phases of public procurement were identified as the demand phase, the acquisition phase, the logistics phase and the disposal phase. While some legislative attention is given to the demand phase, the primary legislative focus is on the acquisition phase. This is notwithstanding that there is cogent evidence to show that corruption occurs at every stage of the procurement process.

The key public procurement and anti-corruption laws have been analysed, using five research questions as the analysis tool. These research questions have been able to offer an indication of the key weaknesses in the legislative framework which may lead to or promote corruption within the public procurement sector.

It has been found that the public procurement legislative framework is indeed plagued by a plethora of laws. While South Africa has adopted an integrated supply chain management system, a lack of clear legislative direction on core minimum elements of such a system has the potential to create inconsistencies in the implementation thereof.

While each level of government, that is, the national and provincial level on one hand, and the local level on the other hand, have key legislation such as the PFMA, the MFMA and the Municipal Systems Act which regulate public procurement, a large number of National Treasury prescripts also have to be adhered to and complied with. This is so, because while the PFMA, the MFMA and the Municipal Systems Act regulate public procurement, these Acts are not solely dedicated to public procurement specifically. The PFMA and the MFMA regulate government finances in general. While the Municipal Systems Act has provisions which apply to procurement, this Act provides overall core principles, mechanisms and processes for municipalities to achieve their constitutional obligations. It was found that the Regulations issued in terms of the PFMA as well as the MFMA, are also lacking in providing adequate directives with respect to public procurement. In order to fill the lacunae found in primary and subordinate legislation, the National Treasury issues directives, on a vast range of procurement issues.

The large number of Treasury prescripts has resulted in ambiguities, inconsistencies and uncertainties. From these ambiguities, inconsistencies and uncertainties, arise the possibility for corrupt activities to flourish. Selective application of laws and the ability to manipulate processes due to such ambiguities, may lead to lack of transparent systems and the ability to conceal corrupt intentions. Adherence to a large number of technical formalities also presents opportunity for corruption, as the system tends to place undue reliance on form over substance. Such a system cannot be deemed to be transparent and fair to lay persons who rely on and who are indeed entitled to a fair, equitable and transparent system, as required by the Constitution and the various international anti-corruption instruments to which South Africa is a party.

One of the hallmarks of a fair administrative system, is the ability for parties to access and effectively utilise an appropriate appeal process. This ensures that processes, actions and decisions taken during the process are regular and lawful. The legislative analysis revealed that, while anomalies do exist, at least at local government level, regarding the time period allowed for the lodging of appeals against procurement decisions, the real threat to an

effective appeal process, lies in the fact that legislation does not come to the aid of appellants in ensuring that impugned decisions are not acted upon prior to the finalisation of an appeal process. This legislative impotence applies to all levels of government. The result is that where contracts are finalised prior to the conclusion of an appeal process, often the appellant has no incentive to continue with the appeal after the finalisation of the contract. In such cases where corruption may have played a role in the award of the contract in question, such corruption may go undetected forever. This does not bode well for the fight against public procurement corruption.

An effective procurement system is also one which has built-in legislative mechanisms aimed at detecting corrupt activities before the finalisation of the procurement process. Although legislation does require procuring entities to adopt effective systems of risk management, it was found that the procurement processes lack effective mechanisms to detect and act upon risks. During the pre-tender stage, it was found that while there is evidence that the law does appreciate the need for proper demand management and procurement planning, the law does not go far enough in ensuring adherence to procurement plans and proper implementation of such plans. Similarly with respect to the drafting and approval of tender specifications, legislation does not contain sufficient and effective checks and balances to ensure that specifications are not drafted with corrupt motives. On the contrary ambiguities between Treasury prescripts and other laws, create more room for corruption in this respect. This is especially so with respect to national and provincial government, where uncertainty exists as to whether or not approval from the accounting officer is necessary prior to the adoption of tender specifications. The law with respect to the composition of tender specification committees, at all levels of government, was also found to be so inconsistent and ambiguous so as to create confusion and room for corruption. This is regrettable taking into account the fact that the formulation and adoption of tender specifications is a most crucial aspect of procurement, and which, if not effectively managed may present adequate room for corruption by self-serving individuals.

With respect to the tender stage, it was found that, while the law does call for the public advertisements of tenders, a real danger exists in that legislation does not regulate how requests for further information ought to be handled and managed by government departments. This creates the real possibility that corrupt officials may be able to favour certain suppliers with more information which competitors may also be entitled to, but may

not necessarily receive. This erodes the principles of fairness and competitiveness in public procurement.

It was found that most of the legislative focus tends to be up until the point of an award. Unfortunately corrupt intentions may motivate many unlawful or irregular acts after the award of a tender and during the contract administration stage of the procurement process. The legislative framework does not have sufficient mechanisms to ensure that contracts are administered strictly according to the tender specifications or that amendments of terms of contracts are executed in accordance with legislative prescripts. Further with respect to variations in contract prices, it was found that the National Treasury prescripts pertaining to thresholds on contract variations, create more room for corruption, rather than the prevention thereof. It was found that the law pertaining to public procurement does little to ensure that corruption does not take place after a tender award.

Having evaluated key public procurement laws, the focus of the legislative evaluation turned to the PCCA, as the chief anti-corruption legislation in South Africa. It was found that since the PCCA was not enacted to react to public procurement corruption specifically, provisions relating to the procurement and withdrawal of tenders may lack an appreciation of idiosyncrasies which pertain to public procurement corruption. The evaluation of the PCCA centred around the efficacy of the PCCA to assist courts to admit evidence of alleged corruption in cases involving the judicial review or appeal of a tender process, provisions relating to the appropriateness of the definition of corruption, as well as provisions relating to the endorsement of persons convicted of corruption and the duty to report corrupt transactions.

With respect to evidentiary matters it was submitted that rules of evidence, while serving to promote the principles of natural justice, are not cast in stone. Rules of evidence may be relaxed or changed in certain deserving situations. It was argued that public procurement is one such situation. It was found that a key shortcoming of the PCCA is that it does not go far enough in assisting courts and enforcement agencies in the gathering and admitting evidence pertaining to procurement corruption. While certain presumptions as contained in the PCCA are certainly helpful, further legislative assistance in this regard is needed. This legislative assistance is needed, in light of the fact that evidence of corruption is often difficult to uncover and often come to light late in the day. Specifically with respect to public procurement corruption, if such evidence comes to light once an impugned contract has

already been finalised, the purpose of any further enquiry may be academic and futile. Apart from the legislating of a presumption pertaining to the possession of unexplained wealth which will ease the evidentiary burden on the prosecution, the evaluation has motivated a need for the PCCA to come to the assistance of civil courts such that courts may be allowed to admit and evaluate evidence of corruption for the purposes of review or appeal proceedings.

It was found also that the definition of corruption both in terms of section 13 of the PCCA as well as the general offence of corruption, does not take into account the many permutations of public procurement corruption, and as such many corrupt acts may escape the strict elements of the legislative definition. The evaluation has also revealed that the PCCA provisions relating to endorsements and the recording of such endorsements on the Register of Tender Defaulters, does not effectively ensure that government does not do business with convicted persons.

Section 34 of the PCCA creates a duty on senior managers to report corrupt transactions. The limitations of this section are that it may only be invoked *after* the commission of an offence, and that it applies only to senior managers. Salient provisions of the Protected Disclosures Act were discussed. It was argued that this Act may be useful in the fight against public procurement corruption, notwithstanding that it does not create a duty to report corrupt transactions.

In the circumstances it is submitted that the evaluation has addressed the five key research questions. The evaluation revealed that the legislative framework is plagued by a plethora of laws and technical formalities which create room for corruption, the current challenge processes are not adequately effective, the legislative framework does not contain adequate or effective methods to detect acts of corruption either prior to a tender award being made or after and that the provisions of the PCCA are not sufficiently applicable to public procurement corruption.

As mentioned earlier courts are frequently tasked with adjudication of tender processes. It is therefore necessary to discuss the approach of the courts to public procurement. The following chapter provides a discussion of the judicial approach to both the interpretation of the constitutional procurement principles, as well as the judicial approach to public tendering in South Africa.

CHAPTER FIVE: APPROACH OF THE COURTS

1 INTRODUCTION

This chapter provides a discussion of the approach of South African Courts to various aspects related to public procurement. A consideration of the judicial approach will assist firstly in understanding the courts' interpretation of the constitutional procurement principles and relevant legislation discussed in the last two chapters. Secondly since the courts are 'swamped with cases concerning complaints about awards of public tender',¹ a discussion of cases, will assist in understanding factual circumstances wherein such issues arise. This will also highlight difficulties and challenges posed by legislation from a practical perspective.

Firstly the judicial approach with respect to the interpretation of the principles contained in section 217(1) of the Constitution is discussed. Thereafter relevant case law pertaining to the award of tenders is discussed. Where appropriate, decisions of other quasi-judicial fora such as bid appeal tribunals are also discussed. This ensures that the evaluation of laws undertaken in the previous chapter is not merely an academic exercise devoid of reference to real situations. Reference to the approach of the courts ensures that the legislative evaluation is not undertaken in an academic vacuum.

While it would be unrealistic to refer to every judgment wherein a public tender award was scrutinised, relevant and salient judgments which highlight issues raised in the previous two chapters are addressed.

2 THE JUDICIAL APPROACH TO THE CONSTITUTIONAL PRINCIPLES

The principles enunciated in section 217(1) of the Constitution are not unique or applicable only to the procurement sector. They are general principles which permeate the Constitution. For instance, the principle of equity is applicable also to the division of national revenue², the principle of fairness is applicable also to anyone who is a party to a justiciable dispute in that such person is entitled to a fair public hearing³, and the principles upon which the democratic state is founded as enshrined in section 1 (c) of the Constitution reflects the principle of transparency by calling for accountability, responsiveness and openness in government. Where such is the case it may therefore, be necessary to defer to judgments, although the

¹ *Groenewald NO and Others v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA) para 1.

² Section 214(1)(a) of the Constitution.

³ Section 34 of the Constitution.

subject matters of which are not related to public procurement, wherein such principles may be interpreted. This is particularly the case with respect to the principle of fairness.

Two of the most relied upon authorities for an interpretation of the word ‘fair’ in legal discourse are the judgements in *S v Zuma*⁴ and *S v Ntuli*.⁵ Notwithstanding that these cases did not interpret the meaning of the word ‘fair’ within the context of public procurement, the extent to which these judgments have been referred to in legal discourse would make any attempt to examine the principle of fairness within any context, incomplete without reference to them.⁶

The Constitutional Court in *S v Ntuli*⁷ interpreted the meaning of a ‘fair trial’ and held that this concept includes substantive fairness and not merely procedural fairness. The court in *S v Zuma*⁸ held (referring also to the right to a fair trial) that ‘it embraced a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force’.⁹ The court in arriving at this conclusion had regard to the manner in which the law was interpreted pre-1994 in *S v Rudman and Another; S v Mthwana*¹⁰, where the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire:

‘whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.’¹¹

A court of appeal, it was said:

‘does not enquire whether the trial was fair in accordance with “notions of basic fairness and justice”, or with the “ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration.”’¹²

⁴ *S v Zuma* 1995 4 BCLR 401 (CC).

⁵ *S v Ntuli* 1996 (1) SA 1207 (CC).

⁶ See Bolton P *The Law of Government Procurement in South Africa* (2007) 46, De la Harpe *Public Procurement Law: A Comparative Analysis* (unpublished doctoral thesis, University of South Africa, 2009) 276 and Steytler N *Constitutional Criminal Procedure* (1998) 205.

⁷ *S v Ntuli* (note 5 above).

⁸ *S v Zuma* (note 4 above).

⁹ *ibid* at para 11.

¹⁰ *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A). (these two cases were heard together and reported under the same judgement).

¹¹ *S v Zuma* (note 4 above) at para 16.

¹² *Ibid*.

The Constitutional Court in *S v Zuma* pointed out that the above was an authoritative statement of the law before 27th April 1994.¹³ Since that date, the Constitutional Court held, that the Constitution has required criminal trials to be conducted in accordance with just those ‘notions of basic fairness and justice’¹⁴ In other words ‘fairness’ included issues of substantive fairness as well as procedural fairness. In the context of interpreting the meaning of a fair trial (most especially a criminal trial, wherein a person’s liberty and freedom lies in the balance), it is not surprising that the court has attached such a broad and inclusive interpretation to ‘fairness’. The question is whether a similar interpretation may be attached to fairness in other contexts.

The Constitutional Court in *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another*¹⁵ (hereinafter referred to as ‘*Bel Porto*’) had occasion to examine the concept of fairness in the context of administrative law. In this case certain schools in the Western Cape had sought to challenge a policy decision of the Western Cape Education Department, which they averred had violated their right to just administrative action. In the context of administrative law, the court held as follows:

‘The duty to act fairly, however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not...The role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, courts would not interfere with the decision.’¹⁶

It appears therefore, that in the context of administrative law, ‘fairness’ refers only to procedure and not substance. However it is submitted that one ought to be mindful of the factual context within which courts render judgements. Although the court in *Bel Porto*¹⁷ dealt with administrative law, the facts of the case involved a government restructuring scheme aimed at redressing the gross inequalities created by apartheid policies within the educational context, and the court was cautious not to usurp the powers of the executive in delving into the substance of the government’s rationale for adopting the scheme or whether viable alternatives existed to one adopted by government.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ 2002 (9) BCLR 891 (CC).

¹⁶ *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* (ibid) at para 85-87.

¹⁷ *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* (note 15 above).

In *Metro Projects CC v Klerksdorp Local Municipality* the Supreme Court of Appeal has held that fairness must be decided on the circumstances of each case.¹⁸ Hoexter submits that a ‘crucial consideration is the administrative context of the decision, as it will usually bring special features or meanings to the concept of fairness.’¹⁹ Further it is submitted that the guidance as provided by the Constitutional Court in *S v Zuma*²⁰ must be heeded in the interpretation of constitutional provisions. The Court in *Zuma* stated that: ‘...the Constitution must be interpreted so as to give clear expression to the values it seeks to nurture for a future South Africa.’²¹ In the case of *Logbro Properties CC v Bedderson NO and Others* (hereinafter referred to as ‘*Logbro*’) the Supreme Court of Appeal stated that ‘in determining what was fair to the appellant, it could hardly have been proper for it to ignore competing claims on the public purse’²² Fairness therefore connotes fairness to all involved, including the state, the general public and all possible tenderers.²³

It seems therefore that the principle of fairness as contained in section 217(1) of the Constitution may be interpreted to mean something more than only procedural fairness. This is notwithstanding that government procurement is administrative action which, according to traditional legal principles, are subject only to procedural fairness. The guidance with respect to constitutional interpretation as provided by the Court in *S v Zuma*²⁴ as well as the guidance provided by the Court in *Logbro*²⁵, are particularly relevant to the public procurement sector. As stated in the preceding chapters, corruption and irregularities within public procurement have a direct bearing on the public at large, mainly because it involves government expenditure of public funds.

The Supreme Court of Appeal in *Minister of Social Development v Phoenix Cash and Carry* held as follows:

‘The award of public tenders is notoriously subject to influence and manipulation...a process which lays undue emphasis on form at the expense of substance facilitates corrupt practices by providing an excuse for avoiding the consideration of substance. It is inimical to fairness, competitiveness and cost-effectiveness....It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after

¹⁸ 2004 (1) SA 16 (SCA).

¹⁹ Hoexter C *Administrative Law in South Africa* (2012) 365.

²⁰ *S v Zuma* (note 4 above).

²¹ *Ibid* at para 17.

²² 2003 (1) ALL SA 424 para 19.

²³ De La Harpe (note 6 above) 277.

²⁴ *S v Zuma* (note 4 above) para 17.

²⁵ *Logbro Properties CC v Bedderson NO and Others* (note 22 above).

giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price.’²⁶

It appears therefore that the judicial interpretation accords with the submissions made in chapter three, that fairness, as enunciated in section 217(1) of the Constitution includes substantive fairness and that all the circumstances of a particular case will be relevant in deciding what constitutes a fair decision. This interpretation of fairness is supported by the majority of the Constitutional Court in *Minister of Health and Another v New Clicks South Africa and Others*²⁷ which is currently the leading case on whether administrative decisions may be reviewed for reasonableness. Writing for the majority Chaskalson CJ states as follows:

‘Under section 33 administrative decisions can now be reviewed for reasonableness. That is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions that would have been competent under the interim Constitution.’²⁸

As with fairness, the courts have held that equity too depends on all the relevant circumstances of a case. The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* had to decide what was equitable in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.²⁹ In this regard the court held that in that instance the court had to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances, which would necessitate bringing out an equitably principled judgment.³⁰

The issues related to transparency have been significantly ventilated in the courts. While the Supreme Court of Appeal in *South African National Roads Agency Limited v The Toll Collect Consortium and Another* held that once a tender is issued and evaluated and a contract awarded in an open and public fashion, that discharges the constitutional requirement of transparency³¹, other judicial decisions support the interpretation put forth in chapter three that transparency entails the furnishing of written reasons by a public body. In other words transparency means that the rationale for a particular decision must be accessible and made available.

²⁶ 2007 SCA 26 at para 1-2.

²⁷ 2006 (2) SA 311 (CC).

²⁸ *Ibid* para 108.

²⁹ 2005(1) SA 217 CC.

³⁰ *Ibid* para 33.

³¹ 2013 (6) SA 356 (SCA) para 18.

The court in *Aquafund (Pty) Ltd v Premier of Western Cape* held that the provision of reasons was necessary to enable a bidder to know whether his or her rights to fair administrative action was infringed or not.³² The case of *Transnet Ltd v Goodman Brothers (Pty) Ltd* (hereinafter referred to as ‘*Goodman Brothers*’) took this point further by stating as follows:

‘The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action.’³³

Chapter three postulated that the Constitution appears to limit the right to written reasons to persons whose rights are adversely affected by a procurement decision. The courts, however have interpreted this right generously with the understanding that it will, in most instances, be very difficult if not impossible for an unsuccessful tenderer to articulate precisely which right and in what manner such right was adversely affected without first having had the opportunity to study the reasons for the public body’s decision.³⁴

It often happens, as it did in *Goodman Brothers*³⁵ that public bodies include a standard provision in tender documents entitling it to refuse to furnish any reasons for its decisions. The court in this case, however rejected the argument that by accepting the terms of the tender document, Goodman Brothers had waived its rights to reasons. The court warned that ‘one must be careful not to allow all forms of waiver, estoppel, acquiescence, etc, to undermine the fundamental rights guaranteed in the Bill of Rights.’³⁶ The written reasons referred to in the Constitution furthermore do not simply refer to formal, standard reasons but rather quality reasons which reflect the rationale and reasoning process of the decision-maker. The court in *Goodman Brothers* citing Baxter³⁷ stated as follows:

‘In the first place, a duty to give reasons entails a duty to *rationalise* the decision...Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached...Thirdly – and probably a major reason for the reluctance to give reasons –

³² 1997(2) BCLR 907 (C) para 1.

³³ 2001 (1) SA 853 (SCA).

³⁴ This judicial approach overrules the reasoning in *SA Metal Machinery Co Ltd v Transnet Ltd* (1998) JOL 3984 (W) para 996H-997A where the court held that a person was effectively a stranger to the tender process and therefore had no protectable right or interest entitling him to just administrative action.

³⁵ *Transnet Ltd v Goodman Brothers (Pty) Ltd* (note 31 above).

³⁶ As quoted by P Volmink ‘Enhancing Transparency Within Public Sector Procurement: The South African Experience’ (2010) A paper presented at the 4th International Public Procurement Conference. Available at www.ippa.org/proceedings-paper18-11 accessed on 22 September 2015.

³⁷ L G Baxter *Administrative Law* (1989).

rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review.³⁸

Further the Supreme Court of Appeal in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another*, (hereinafter referred to as ‘*Phambili Fisheries*’) held as follows with regard to what constitutes ‘adequate’ reasons within the meaning of section 5(3) of the Promotion of Administrative Justice Act³⁹ (hereinafter referred to as ‘PAJA’):

‘This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.’⁴⁰

The Court in *Phambili Fisheries (Pty) Ltd and Another* went on further to state that:

‘It is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.’⁴¹

In *ABBM Printing (Pty) Ltd v Transnet Ltd* (hereinafter referred to as ‘*ABBM Printing*’) the Court held as follows:

‘It would be counter-productive and contrary to the Constitution to allow the Respondent to hide behind an unsubstantiated blanket claim to confidentiality on behalf of tenderers. By way of example only, a claim to confidentiality should not protect from disclosure a “side letter” containing terms other than those appearing in the tender or for that matter the provision of a “kick back”’⁴²

In the case of *Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works and Others* the government department refused to provide certain requested documentation to the Appellant on the ground that it is considered to be confidential information belonging to each tenderer.⁴³ The Appellant contended that the only way to achieve a fair hearing is for the appellant to be provided with the required

³⁸ *Transnet Ltd v Goodman Brothers (Pty) Ltd* (note 33 above) para 5.

³⁹ 3 of 2000.

⁴⁰ (2003) 2 ALL SA 616 (SCA) at para 40.

⁴¹ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (ibid) Quoting Hoexter ‘The New Constitutional and Administrative Law’ Vol 2 244 para 40.

⁴² 1997 (10) BCLR 1429 (W) at para 24.3.

⁴³ 2008 (1) SA 438 (SCA) para 6.

documentation, otherwise the right of appeal is rendered nugatory.⁴⁴ The court agreed with the Appellant citing with approval the Appellant's reliance on the judgment in *ABBM Printing* and held that:

'where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert, in that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other.'⁴⁵

It is therefore clear that an unsuccessful tenderer is not only entitled to written reasons for a decision. The unsuccessful tenderer is also entitled to quality reasons which have been properly formulated after the decision-maker has thoroughly applied his mind thereto in order to ensure that full reasons are furnished which reflect the thought processes, logics and facts used to arrive at conclusions. Although not concerned with a matter of public procurement the judgment in *Koyabe and Others v Minister of Home Affairs and Others*⁴⁶ is currently the leading authority on the furnishing of reasons by a government body. At paragraphs 62 to 63 of the judgment the court states as follows:

'Providing people whose rights have been adversely affected by administrative decisions with reasons, will most often be important in providing fairness, accountability and transparency...What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case.'

The requirement of transparency is therefore not a formal requirement. It is one that requires full and open disclosure, whether or not such disclosure will lead to rational criticism. On the contrary, it is submitted, that the intention of the Legislature, in providing for transparency in procurement processes, is to encourage exactly such criticism of the process so that irrational, unlawful or corrupt intentions do not remain 'lurking in dark corners.'⁴⁷

Taking into account the abovementioned judicial pronouncements it is submitted that the principle of transparency as envisaged in section 217(1) of the Constitution goes beyond merely ensuring that the issuing, evaluation and award of tenders are carried out in an open and public fashion. It is also unlikely that public bodies will be able to successfully rely on

⁴⁴ Ibid para 8.

⁴⁵ *Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works and Others* (note 41 above) para 14.

⁴⁶ 2009 (12) BCLR 1192 (CC).

⁴⁷ Volmink (note 36 above).

confidentiality clauses or the disclosure of commercial information or trade secrets, in all instances, in order to justify a refusal to access to information. The judicial approach is therefore that transparency ought to be interpreted broadly and generously and in a manner which will always give effect to an open and democratic society.

As explained in chapter three, competitiveness within the public procurement sector is closely linked to government's attempts to redress economic imbalances of the past, and the need to ensure that a greater number of suppliers, particularly those previously disadvantaged, are given an opportunity to compete for government work. In the case of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*, (hereinafter referred to as 'AllPay') the Constitutional Court, quoting dictum from *Premier, Free State, and Others v Firechem Free State Ltd*⁴⁸ stated as follows with respect to competitiveness:

'One of the requirements...is that the body adjudicating tenders be presented with comparable offers in order that its members be able to compare...Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender...That would deprive the public of the benefit of an open competitive process.'⁴⁹

As can be gauged from the above quote, competitiveness is linked to equality of treatment. This ensures that all participants, whether large suppliers or small and medium businesses, are subjected to equal treatment and hence able to compete on an equal footing.

The public procurement system as a whole is intended to operate in a manner which fulfils the principles of the Constitution. This was alluded to in *The Chief Executive Officer of the South African Social Security Agency N.O and Others v Cash Paymaster Services (Pty) Ltd* when the court stated as follows in reference to section 217(1) of the Constitution:

'This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation.'⁵⁰

However as discussed in chapter three, there are times when considerations of cost-effectiveness, or other considerations such as emergencies, will necessitate a departure from the standard competitive procurement system. The Court in *Buena Vista Trading 15 (Pty)Ltd*

⁴⁸ [2000] ZASCA 28.

⁴⁹ 2014 (1) SA 604 (CC) para 39.

⁵⁰ ZASCA 13 (2011) para 15.

*and Another v Gauteng Department of Roads and Transport and Others*⁵¹ confirmed, that the public procurement regime is one which permits departure from the competitive process for specific procurement, example emergencies. As illustrated in chapter three, an emergency situation may be one which calls for the abandonment of competition in order to ensure cost-effectiveness.

Cost-effectiveness is, however also nullified in situations wherein unfair processes result in unlawful disqualification of bidders, to the extent that the procuring entity is left with an insufficient number of bidders among whom to compare prices. This was the situation in the *AllPay*⁵² case. In the same matter, but in a separate judgement, when the Constitutional Court deliberated on the issue of remedies, the Court stated as follows:

‘The second was that Bidders Notice 2 did not specify with sufficient clarity what was required of bidders in relation to biometric verification, with the result that only one bidder was considered in the second stage of the process. This rendered the process uncompetitive and made any comparative consideration of cost-effectiveness impossible.’⁵³

This confirms the assertion made in chapter three, that competitiveness and cost-effectiveness may sometimes be mutually exclusive principles.

3 CORRUPTION AND PROCEDURAL IRREGULARITIES: THE JUDICIAL APPROACH

A severe criticism levelled against the judiciary in chapter one, is that courts fail to notice or address the role that corruption may have played in cases involving the appeal or review of public procurement decisions. The case review which follows indicates that this criticism is not baseless.

When a court is tasked with adjudicating an appeal or review of a public procurement decision, it seems to make a distinction, between corruption on the one hand, and failure to comply with tender rules and regulations on the other. The court in *Moseme Road Construction CC and Others v King Civil Engineering Contractors and Another* (hereinafter referred to as ‘*Moseme*’) commented as follows:

⁵¹ [2012] ZAGPJHC 232 para 30.

⁵² *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (note 46 above).

⁵³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (6) BCLR 641 para 1.

‘Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders.’⁵⁴

It is submitted, the court in this case, may not appreciate the view, as mentioned in chapter one, that such deviations may be indicators of corruption. This distinction is short-sighted since the possibility of corruption having played a role in such cases is real. In an unreported decision of a Municipal Bid Appeals Tribunal established by the Kwa-Zulu Natal Provincial Treasury⁵⁵ in the matter of *Melody Hills Trading 112 cc t/a Clive Lee Engineering and Mechanical Repairs v Hibiscus Coast Municipality and Others* (hereinafter referred to as ‘*Melody Hills*’) the Tribunal held as follows:

‘The evidence led before the Board appears to indicate that this tender award was bedevilled by a toxic combination of document tampering, price fixing, collusive dealing, fraudulent practices and, at best, an inept keeping of committee records. Taken together, these factors, in the Tribunal’s respectful view, tend to vitiate the fairness of the decision.’⁵⁶

Notwithstanding this real possibility that corruption may play a role in tender processes, courts tasked with the adjudication of tender appeals or reviews tend to overlook this aspect.

The case of *Municipal Manager: Qaukeni Local Municipality and Others v F V General Trading cc*⁵⁷ (hereinafter referred to as ‘*Quakeni Local Municipality*’) is an example wherein corruption may have played a role. In this case the Municipality procured the services of the Respondent through the tender process for the collection of refuse for a particular period. The Respondent delivered the services in terms of an oral contract. However the Municipality thereafter decided to extend the contract period with the Respondent for a further year, by means of a written contract. This extension was in violation of the initial tender specifications in terms of which the service was for a specific time period.

Of significance in this case, is the fact that the review of the subsequent contract entered into between the Municipality and the Respondent was brought by the Municipality itself. This was because of a change in management, in that it was a previous municipal manager who had entered into the initial oral contract as well as the subsequent written contract to extend

⁵⁴ 2010 (3) ALL SA 549 (SCA) para 1.

⁵⁵ The Provincial Treasury in Kwa-Zulu Natal, established in 2013 a municipal bid appeals tribunal to assist municipalities with tender appeals.

⁵⁶ Kwa-Zulu Natal Municipal Bid Appeals Tribunal: Hibiscus Coast Municipality Appeal: Hib (1) (2014) para 3.1.1.

⁵⁷ 2010 (1) SA 356 (SCA).

the oral contract.⁵⁸ Although the subject of the appeal was the validity of the subsequent written contract, it is submitted that the initial oral contract was also invalid and contrary to section 76(b) of the Municipal Systems Act⁵⁹, which requires a municipality to enter into a service delivery agreement with a service provider who is contracted to provide a municipal service. Such services could therefore never be rendered in terms of a mere oral agreement. It is possible and in fact probable that the municipality, under a new administrative management, recognised corruption having played a role by the previous municipal manager, and therefore sought to have the contract set aside. Unfortunately the court, did not *mero motu* consider this possibility, nor did it comment at all on the invalidity of the initial oral contract in violation of section 76(b) of the Municipal Systems Act. This is seemingly because the validity of the initial oral contract was not challenged.⁶⁰ The court in this case, decided the matter strictly on the basis of a public body seeking to set aside its own irregular administrative act. As demonstrated in the previous chapters, corruption is a crime often executed in extreme secrecy, and therefore difficult to uncover. In such instances therefore, it is regrettable that the prevailing judicial approach is not to *mero motu* recognise possible corrupt intents which may have played a part in the entire process under review.

This judicial reluctance is perhaps most clearly demonstrated in the case of *Allpay Consolidated Investment Holdings and Others v The Chief Executive Officer of the South African Social Security Agency and Others*⁶¹ (hereinafter referred to as '*AllPay-SCA judgement*'). In this case, the Supreme Court of Appeal had refused to admit into evidence the transcript of a conversation between two individuals which conversation revealed allegations or suspicions of corruption. The court in refusing to allow the evidence relied on the following reasoning:

‘that evidence sought to be admitted was new evidence and sought to be admitted only after the appeal had been heard. That the evidence sought to be admitted constituted hearsay evidence. That the inferences drawn by the person alleging the dishonesty will be denied by other parties.’⁶²

The court went further to comment as follows:

⁵⁸ Ibid. para 4.

⁵⁹ 32 of 2000.

⁶⁰ *Municipal Manager: Qaukeni Local Municipal Manager and Others v F V General Trading cc* (note 58 above) para 3.

⁶¹ *AllPay Consolidated Investment Holdings and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (678/12)[2013] ZASCA 29 (27 March 2013).

⁶² Ibid paras 12, 15 & 17.

‘Whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse it has no place in the courts – neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair if not improper to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond.’⁶³

Although strict rules of evidence pertaining to evidence and the admission thereof, play a crucial role in legal proceedings, it is submitted that a more flexible judicial approach is needed in cases involving the review of public tenders. This submission has been substantiated in the previous chapter. The court in *AllPay-SCA judgment* in fact viewed the question relating to the allegation of corruption as a diversion, rather than as an allegation which may be central to determining the integrity of the tender process.⁶⁴ A further tragedy is that the Constitutional Court also did not adopt a different approach to the issue of the admission of evidence of alleged corruption. The Constitutional Court in *AllPay* pronounced as follows with respect to the very same evidence sought to be admitted: ‘the evidence sought to be introduced fails the test of being so crucial that, if accepted, it would likely change the outcome of the matter.’⁶⁵

Since the constitutional recognition of public procurement principles in section 217 of the Constitution, the judicial approach is rightly, to consider all reviews of public tender processes within the framework of the constitutional principles. The Supreme Court of Appeal in *The Industrial Development Corporation of South Africa Limited v Trencon Construction (Pty) Limited and Another* held that:

‘It is established that the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is s 217 of the Constitution.’⁶⁶

Indeed the Constitutional Court in *AllPay* stressed as follows as well:

‘It is because procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner.’⁶⁷

⁶³ *AllPay Consolidated Investment Holdings and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (note 59 above) para 4.

⁶⁴ *AllPay Consolidated Investment Holdings and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (note 60 above) at para 18 the Court noted as follows: ‘For the present I think we should put aside the diversion and continue to decide the case that was presented.’

⁶⁵ *AllPay Consolidated Investment Holdings and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (note 49 above) para 94.

⁶⁶ (642/13) [2014] ZASCA 163 (1 October 2014) para 12.

⁶⁷ *AllPay Consolidated Investment Holdings and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (note 49 above) para 4.

The irony presented by this approach is that a forum which ostensibly undertakes to assess the fairness and transparency of a process, also chooses to jettison evidence of alleged corruption, which allegations may strike at the heart of all the constitutional procurement principles. This approach is also regrettable taking into account that the possibility of corruption having played a role in a public procurement process, can hardly be said to be remote or farfetched. The criticism levelled against the judiciary in chapter one, is therefore not unsubstantiated.

4 THE JUDICIAL APPROACH TO TENDER APPEALS OR REVIEWS

A question put forward in chapter one, is whether the current legislative framework for public procurement is plagued by a plethora of laws thereby creating inconsistencies and/or ambiguities in the process. There is evidence in case law which indicates that this question may be answered in the affirmative as did the evaluation undertaken in the previous chapter. The judicial comment in *Moseme*⁶⁸ above makes reference to a number of rules and regulations applicable to tenders.

Further, the Supreme Court of Appeal in *Dr JS Moroka Municipality and Others v Bertram (Pty) Ltd and Another* remarked as follows:

‘The necessity to comply with the obligations imposed by section 217 of the Constitution relating to public procurement policies and procedures to be adopted by organs of state, including municipalities, has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of laws and requirements that have proved to be fertile ground for litigation with the law reports becoming littered with cases dealing with public tenders.’⁶⁹

It has been found that even the courts experience difficulty in focusing on the most relevant laws applicable in a given situation. This was evidenced in the case of *South African National Roads Agency Limited v The Toll Collect Consortium and Another*.⁷⁰ The apparent conflict between clause 4.1(b) of National Treasury Circular dated 27 October 2004 and Regulation 16A6.3(b) of the Public Finance Management Act⁷¹ (hereinafter referred to as the ‘PFMA’) Regulations⁷² was discussed in chapter four. These laws relate to the disclosure of relevant

⁶⁸ *Moseme Road Construction CC and Others v King Civil Engineering Contractors and Another* (note 54 above).

⁶⁹ 2014 (1) ALL SA 545 (SCA) para 8.

⁷⁰ 2013 (6) SA 356 (SCA).

⁷¹ 1 of 1999.

⁷² Republic of South Africa National Treasury : Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities. Issued in terms of the PFMA (2005) Government Gazette Number 27388.

evaluation criteria to be provided to potential bidders, and appear to be anomalous. In the *South African National Roads Agency Limited*⁷³ (hereinafter referred to as ‘SANRAL’) case, the Supreme Court of Appeal had occasion to deliberate on this issue, but regrettably did not settle the anomaly in the laws.

In the above case, the South African National Roads Agency Limited (hereinafter referred to as ‘SANRAL’), advertised a tender for the operation of the N2 South Coast Toll Plaza. The tender documents provided that the assessment of tenders would take place in two stages. First bidders would be assessed for quality and given a score out of 100. Failure to receive 75 or more points would result in the automatic disqualification of the tender irrespective of price and other considerations such as black economic empowerment.⁷⁴ In disclosing the evaluation and adjudication criteria for quality, the tender documents set out three broad quality criteria and the maximum score in respect of each criterion.⁷⁵ No other scores were provided. It appears though that at the time of the evaluation, specific scores were allocated to specific goals falling under each of the three broad quality criteria. While the tender documents did direct bidders to address such goals in their bids, no guidance was given as to the scoring each goal would carry. Unfortunately the Supreme Court of Appeal, did not address, at all the prescripts of either Regulation 16A6.3(b) of the PFMA Regulations or Clause 4.1(b) of the Treasury Circular mentioned above. This, despite the fact that the PFMA Regulations are applicable to SANRAL.⁷⁶ The court in this case only had regard to the Supply Chain Management Policy and Procedure Manual of SANRAL and in the final analysis held that SANRAL had not failed to make proper disclosure of the evaluation criteria provided that the basic criteria upon which tenders will be evaluated are disclosed.⁷⁷

It is respectfully submitted that this judgement is reflective of the following: the large number of laws, applicable to the facts in this judgement are the PFMA, the PFMA Regulations, National Treasury Circular dated 27 October 2004, National Instruction Note dated 03 September 2010⁷⁸, as well as SANRAL’s Supply Chain Management Policy and Procedures.

⁷³ Ibid.

⁷⁴ *South African National Roads Agency Limited v The Toll Collect Consortium and Another* (note 70 above) para 2.

⁷⁵ *South African National Roads Agency Limited v The Toll Collect Consortium and Another* (note 70 above) para 4.

⁷⁶ Regulation 16A2.1(c) of the PFMA Regulations.

⁷⁷ *South African National Roads Agency Limited v The Toll Collect Consortium and Another* (note 70 above) para 22.

⁷⁸ This Treasury Note states, at clause 3.3(iii) that an institution must indicate the evaluation criteria for measuring functionality and the weight of each criterion.

Further, this judgement reflects that no reference to key laws were made, either because Counsel for respective parties or the court itself were not aware of such laws, or that Counsel or the court were under the belief that in the presence of SANRAL's Supply Chain Management Policy and Procedure, referral to other laws was not necessary, as each entity subject to the PFMA were, in any event, guided primarily by their own policies. It is submitted that this possibility is most regrettable, as it would completely erode consistency and transparency in any public procurement system.

To further complicate matters, it is stated in the judgement that Counsel for the unsuccessful bidder had also placed some reliance on the Preferential Procurement Policy Framework Act⁷⁹ (hereinafter referred to as the 'PPPFA').⁸⁰ It is respectfully submitted that the prescripts of the PPPFA do not find application to the facts in this case. The prescripts of the PPPFA are applicable to the disclosure of criteria applicable to points awarded for price and reference and any 'specific goal' as stated in sections 2(1)(d) and (e) of the PPPFA refers to goals relating to preference. This is in conformity with the purpose for which the PPPFA was enacted.⁸¹ In the *SANRAL*⁸² judgment, the specific goals and criteria under judicial scrutiny related to quality and functionality of the bid, and not to price or preference.

The case of *Quakeni Local Municipality*⁸³ reviewed above is also an example where the court failed to refer to an applicable law, in not recognising that the initial oral contract was in violation of section 76(b) of the Municipal Systems Act. The non-reference to applicable laws, as well as apparent reference to inapplicable laws by courts, is problematic. This cogently points to the fact that the current legislative public procurement framework in South Africa does indeed consist of voluminous laws, which seemingly creates confusion also for judicial officers.

⁷⁹ 5 of 2000.

⁸⁰ *South African National Roads Agency Limited v The Toll Collect Consortium and Another* (note 70 above) para 9.

⁸¹ This was also confirmed by the Kwa-Zulu Natal High Court in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others* 2011 (4) SA 406 (KZP), in which it was argued that Regulation 8 of the PPPFA Regulations, 2001 is *ultra vires* in terms of section 2(1)(b) of the PPPFA. The Applicant, in this case, complained that Regulation 8 introduced points for functionality as part of points for price which was contrary to section 2(1)(b)(i) of the PPPFA which only deals with the scoring on price and other specific goals. The Court found that Regulations 8(2) to 8(7) of the PPPFA Regulations, 2001, were indeed *ultra vires* in terms of the PPPFA and therefore invalid. However later, in 2013, the Court in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 complicated matters and held that functionality criteria must also play a role after the award of points for price and preference. For a more detailed discussion on this aspect see P Bolton 'An Analysis of the Criteria used to Evaluate and Award Public Tenders' (2014) 1 *Speculum Juris* 2013.

⁸² *South African National Roads Agency Limited v The Toll Collect Consortium and Another* (note 70 above).

⁸³ *Municipal Manager: Quakeni Local Municipality and Others v F V General Trading cc* (note 57 above).

Strict and rigid adherence to technical conditions of tender and a plethora of rules, may promote corruption. A number of court judgments have pronounced on this aspect of the public tendering process. The facts in the case of *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*⁸⁴ (hereinafter referred to as ‘*Metro Projects*’) are as follows: the Municipality invited tenders for the development of 1 333 stands in a township. Part of the tender conditions was that tenderers must stipulate the size of the house it intended to build in the township.⁸⁵ In this case however the successful tenderer was afforded an opportunity, by an official of the Municipality, to amend its tender offer after the close of the tender process. The Supreme Court of Appeal was tasked with assessing whether this non-adherence to strict rules, which disallowed a procuring entity to allow a tenderer to alter its offer after close of the tender process, was fair in the circumstances. Referring to *Logbro Properties CC v Bedderson*⁸⁶ the Court in *Metro Projects* stated as follows:

‘Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender, it may be fair to allow a tenderer to correct an obvious mistake, it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.’⁸⁷

When referring to the definition of ‘acceptable tender’ as provided for in the PPPFA, the Supreme Court of Appeal further commented:

‘There are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance with “the specifications and conditions of tender” may not be an easy question to answer.’⁸⁸

It is submitted that the approach of the court in this case, is that it may, in certain circumstances be fair for there to be a measure of deviation from standard rules. In this respect the court referred to the ‘ever-flexible duty to act fairly’.⁸⁹ The salient principle to be distilled from this case, is that if a deviation advances the concept of fairness then courts may

⁸⁴ *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* (note 18 above).

⁸⁵ *Ibid* para 2.

⁸⁶ *Logbro Properties CC v Bedderson NO and Others* (note 22 above).

⁸⁷ *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* (note 18 above) para 13.

⁸⁸ *Ibid* para 15.

⁸⁹ *Ibid* para 11, referring to the comment by Cameron JA in *Logbro Properties CC v Bedderson NO and Others* (note 22 above).

exercise their discretion to condone such deviation. In *Metro Projects*⁹⁰ the court declined to hold that the process was fair, as the deviation was occasioned by subterfuge and deceit.⁹¹

This flexible judicial approach is seen in other cases as well. The Supreme Court of Appeal in *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* held as follows:

‘the definition of “acceptable tender” in the PPPFA must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is “:fair, equitable, transparent, competitive and cost-effective”. In other words, whether “the tender in all respects complies with the specifications and conditions set out in the contract documents” must be judged against these values.’⁹²

In *Millennium Waste Management v The Chairperson of the Tender Board: Limpopo Province and Others*⁹³ the Department of Health and Social Development advertised a tender for the removal, treatment and disposal of medical waste. Fourteen companies responded to the advertisement. The tender evaluation consisted of two phases, an administrative compliance phase and a technical compliance phase. Seven tenderers, including the Appellant, were disqualified for failure to comply with administrative requirements. The Appellant’s tender was disqualified because it failed to sign a form titled ‘declaration of interest’. Six of the remaining tenders were disqualified in the second phase.⁹⁴ The successful tenderer was therefore the only compliant tenderer and was subsequently awarded the contract.

The Appellant appealed this decision on the basis that disqualification of the Appellant’s tender violated its right to procedural fairness.⁹⁵ The procuring entity sought to argue that signature of the ‘declaration of interest’ form was a peremptory requirement of the tender conditions and that non-compliance would lead to disqualification.⁹⁶ It was therefore of the view that the disqualification was proper as the Appellant’s tender did not meet the definition of ‘acceptable tender’ as defined in the PPPFA.⁹⁷ The court disagreed with this argument,

⁹⁰ *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* (note 18 above).

⁹¹ *Ibid* para 14.

⁹² 2005 (4) ALL SA 487 (SCA) para 14.

⁹³ *Millennium Waste Management v The Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481.

⁹⁴ *Ibid* para 6-7.

⁹⁵ *ibid* para 13.

⁹⁶ *Ibid* para 14.

⁹⁷ *Ibid*.

and looked at the definition of ‘acceptable tender’ in light of the constitutional principles set out in section 217 of the Constitution. The court held that:

‘In this case condonation of the appellant’s failure to sign would have served the public interest as would have facilitated competition among the tenderers.’⁹⁸

In arriving at the above position the court looked at the nature of the non-compliance. The procuring entity attempted to argue that the form, in question was meant to curb corruption and that failure to sign may mean that certain conflicts exist and that officials within the Department may have an interest in the award of the tender to Appellant.⁹⁹ The court however, it is submitted adopted a much more substantive and meaningful approach to the signing of such forms and held as follows:

‘A perfunctory perusal of the appellant’s declaration shows that the failure to sign was inadvertent. Secondly, the tender committee does not say the information furnished by the appellant to the effect that it had no relationship with the department’s employees was false. I am unable to appreciate how signing of the form would have safeguarded against corruption.’¹⁰⁰

This judicial reasoning supports the submission that mere compliance with technical formalities alone is not an adequate or even reliable manner of ensuring the absence of corruption in a tender process. The court in this case consequently held that by ‘insisting on disqualifying the appellant’s tender for an innocent omission, the tender committee acted unreasonably.’¹⁰¹

Similarly the case of *Minister of Social Development v Phoenix Cash and Carry – Pmb*¹⁰² is one which places substance over form. In this case the appellant’s tender was disqualified for not having provided audited financial statements, bank statements and a letter from the bank containing sufficient information.¹⁰³ However the appellant had submitted a letter from its bank confirming its financial resources. The court remarked as follows:

‘...a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of

⁹⁸ Ibid para 17.

⁹⁹ Ibid para 20.

¹⁰⁰ Ibid para 20.

¹⁰¹ Ibid para 21.

¹⁰² *Minister of Social Development v Phoenix Cash and Carry-Pmb* (note 26 above).

¹⁰³ Ibid para 12.

compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion.’¹⁰⁴

Courts have also had occasion to determine whether non-compliance with conditions pertaining to the submission of tax clearance certificates, constitutes a justifiable ground for disqualification. The previous chapter has shown that the necessity for tenderers to demonstrate that their tax affairs are in order, is found in legislation. The court in *Imvusa Trading 134 v Dr Ruth Mompoti District Municipality* the Court rightly noted as follows:

‘It is a sound principle of public administration that those who do not contribute their lawful share to the fiscus are not permitted to benefit from public work by obtaining tenders from public organs at any level.’¹⁰⁵

Notwithstanding the importance for a tenderer to demonstrate that one’s tax matters are in order, the courts have once again held that substance ought to take precedence over form. In *Imvusa Trading 134 v Dr Ruth Mompoti District Municipality*¹⁰⁶ a bidder had provided an out-dated tax clearance certificate and the procuring entity allowed the bidder to submit an updated tax clearance certificate, during the evaluation process.¹⁰⁷ The court confirmed the following principles:

‘(a) The tender process must be fair, transparent competitive and cost-effective;(b) The tender board is permitted to condone some deficiencies;(c) *Bona fide* mistakes should not, on their own, disqualify a tenderer;(d) Substance should prevail over form;(e) A distinction should be drawn between a material factor and the evidence needed to prove that factor;(f) Attention must be paid to the entire set of facts in the context of the applicable legislation and the principles involved;(g) The words “acceptable tender” in the PPPF Act involves a consideration of the degree of compliance with the tender conditions;(h) The interest of all concerned and especially that of the public must be taken into account.’¹⁰⁸

Taking into account the facts of that case, the court held that the procuring entity was entitled to condone the omission.¹⁰⁹

¹⁰⁴ Ibid para 2.

¹⁰⁵ 2008 ZANWHC 46 (20 November 2008) para 8.

¹⁰⁶ Ibid.

¹⁰⁷ The facts of the case are that the errant bidder had submitted a valid tax clearance certificate when the tender was first advertised. A few months later this same tender was re-advertised and the bidder in question had simply submitted the very same certificate which it had submitted in the first round, which it failed to notice had by this time become expired.

¹⁰⁸ *Imvusa Trading 134 v Dr Ruth Mompoti District Municipality* (note 105 above) para 7.

¹⁰⁹ Ibid para 16.

In the case of *VDZ Construction (Pty) Ltd v Makana Municipality and Others*¹¹⁰ one of the conditions of tender was the submission of an original valid Municipal Billing Clearance Certificate. In this case page 2 of the Billing Certificate submitted by the Applicant was not an original but rather a photocopy. This was so seemingly because the Applicant had been provided with such a certificate by the municipality concerned.¹¹¹ There was no evidence or suggestions of any intention of fraud, malpractice or other duplicity on the part of the Applicant, in submitting a copy of the second page of the certificate.¹¹² Notwithstanding this, the procuring entity held that since the tender conditions called for the submission of a valid original municipal billing certificate, the Applicant's tender was disqualified on this ground.¹¹³ The court however held that the non-compliance of the Applicant was one which was in mere form as opposed to substance, and therefore does not remove it from the definition of 'acceptable tender' as defined in the PPPFA. In arriving at this conclusion the court had regard to the judicial positions put forward in *Metro Projects*,¹¹⁴ and *Minister of Social Development v Phoenix Cash and Carry*.¹¹⁵ The Court ultimately held as follows:

'I am of the opinion that the second respondent failed to consider whether the failure by the applicant to furnish a Municipal Billing Clearance Certificate with both pages in original, was failure in form or substance and whether such formal shortcoming goes to the heart of the process or not, and further whether it could be condoned or not without thereby flouting the principles of fairness, transparency, competitiveness and cost-effectiveness.'¹¹⁶

The judicial positions enunciated in the judgements above, seem to stress that decisions to condone non-compliance with tender conditions should not be exercised in a mechanical and technical manner. Where decisions are taken to disqualify bids for non-compliance with formal technical conditions which do not go to the heart of the process, then such decisions may very well serve to frustrate the constitutional principles entrenched in section 217(1) of the Constitution, as opposed to upholding them. It is submitted that such flexible judicial reasoning is to be commended as it places substance over form, and places the advancement of constitutional principles at the heart of the enquiry. It is also more in line with international definitions of responsive tenders which calls for material or substantial compliance with tender conditions. Such a judicial approach, it is submitted, is helpful in the fight against

¹¹⁰ (1834/2011) [2011] ZAECHC (3 November 2011).

¹¹¹ *Ibid* para 15.

¹¹² *Ibid*.

¹¹³ *VDZ Construction (Pty) Ltd v Makana Municipality and Others* (note 110 above) para 5.

¹¹⁴ *Metro Projects CC v Klerksdorp Local Municipality* (note 18 above).

¹¹⁵ *Minister of Social Development v Phoenix Cash and Carry* (note 26 above).

¹¹⁶ *VDZ Construction (Pty) Ltd v Makana Municipality and Others* (note 110 above) para 18.

corruption, as unscrupulous bidders and unscrupulous officials would be unable to use mere technical formalities to favour a specific bid or disqualify a disfavoured bid.

Regrettably though, the court in *Dr JS Moroka Municipality and Others v Betram and Another*¹¹⁷ (hereinafter referred to as '*J.S Moroka*') adopted an approach which favours strict compliance with tender conditions. In this case, the disqualified bidder did not submit an original tax clearance certificate and was disqualified on this ground alone. The tender conditions called for an original and valid tax clearance certificate. The court *a quo* had held that the decision of the municipality was wrong in that according to Regulation 43 of the Municipal Finance Management Act Regulations¹¹⁸ (hereinafter referred to as 'MFMA Regulations'), it was in any event incumbent on the Municipality to check with the revenue services whether a bidder's tax matters are in order. The Supreme Court of Appeal however, noted that, at the time of the tender in question, section 4 of the Income Tax Act¹¹⁹ would have prevented the Municipality from quering the tax standing of the bidder, unless the bidder provided its consent under section 4(2B) of that Act.¹²⁰ The Court further held as follows:

'Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" under the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.'¹²¹

In addition the court held that the Municipality did not possess a discretion to condone the non-compliance, as, according to the court, no power to condone could be found in any legislation or regulation. It is respectfully submitted that the reasoning of the Supreme Court of Appeal is flawed for the following reasons: in the first instance, reference to the secrecy provisions of the then Income Tax Act¹²² is not a cogent argument, since its highly likely that the bidder in question would have given its consent, at that time, for the Municipality to query its tax standing with the revenue services. As Bolton submits:

¹¹⁷ *Dr JS Moroka Municipality v Betram* (note 69 above).

¹¹⁸ Local Government Municipal Finance Management Act , 2003 Municipal Supply Chain Management Regulations. Government Gazette Number 27636.

¹¹⁹ Income Tax Act 58 of 1962.

¹²⁰ *Dr JS Moroka Municipality v Betram* (note 69 above) para 10.

¹²¹ *Ibid.*

¹²² The position has since altered. Section 4 of the Income Tax Act was repealed by section 271 of the Tax Administration Act 28 of 2011, section 256 of which provides a procedure whereunder a person to whom a taxpayer has presented a tax clearance certificate may confirm a taxpayer's tax compliance with the South African Revenue Service.

‘It is hard to believe that the second respondent would have refused permission for the municipality to investigate its tax affairs. All bidders know that tax compliance is a precondition to investigate its tax affairs.’¹²³

Secondly while the condition to submit a valid original tax clearance certificate may not be unreasonable or immaterial, a decision to condone non-compliance which is due to an oversight or human error, and which does not go to the heart of the process, may be unreasonable. This is especially so, since no legislation or regulation strictly calls for the submission of a valid and original tax clearance certificate, as the *only*¹²⁴ method of showing that one is in good standing with the revenue service.¹²⁵ Further procuring entities are empowered and obligated to verify the tax standings of recommended bidders. In this respect also, it can be cogently argued, that procuring entities then indeed do have a discretion to condone the non-submission of a valid original tax clearance certificate since they are empowered by law to check into the tax status of recommended bidders. The court in *J.S Moroka*, as cited above, pointed out that it was for the ‘municipality and not the court, to decide what should be a prerequisite for a valid tender’.¹²⁶ It is humbly submitted that if a municipality has discretion in deciding what ought to be a tender condition, then it ought also to have the discretion to condone non-compliance therewith under deserving circumstances. A court may later be called upon to decide if such discretion was exercised lawfully and properly.

Thirdly the decision in *J.S Moroka*¹²⁷ failed to take into consideration the public interest. In this case, the bid price of the first respondent was almost R2 million lower than the winning bidder. As Bolton points out:

‘If the second respondent¹²⁸ had been made aware of its failure to submit an original tax clearance certificate...the second respondent would simply have been put in a position to correct a “mistake”/“omission” in its tender. Doing so would also have ensured compliance with the requirements of PAJA...A distinction should in other words be drawn between allowing the correction of a mistake or omission in a tender, and allowing the amendment of a tender which results in the

¹²³ P Bolton ‘Disqualification for Non-Compliance with Public Tender Conditions’ (2014) 17 *PELJ* 2314, 2341.

¹²⁴ Own emphasis.

¹²⁵ This aspect is discussed further in chapter five.

¹²⁶ *Dr JS Moroka Municipality v Betram* (note 69 above).

¹²⁷ *ibid.*

¹²⁸ Presumably Bolton meant to refer to ‘first respondent’ and not ‘second respondent’, as according to the judgment itself it was the first respondent whose bid was disqualified.

‘The Hong Kong Special Administrative Region shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.’

It is submitted that the above provision refers to general financial management and good governance. Although sound financial management and good governance may be linked to public procurement,²¹ the Basic Law does not constitutionalise public procurement principles as does the South African Constitution.

2.3 Public Procurement Laws

Public procurement in Hong Kong is based on the following principles: public accountability, value for money, transparency and open and fair competition.²² Article 106 of the Basic Law states that: ‘The Hong Kong Special Administrative Region shall have independent finances.’ Article 110 states that: ‘The monetary and financial systems of the Hong Kong Special Administrative Region shall be prescribed by law.’ The Public Finance Ordinance²³ provides the statutory framework for the control and management of the public finances of Hong Kong. Public procurement, in particular is governed by the Stores and Procurement Regulations.²⁴ The Financial Services and Treasury Bureau also issues circulars and memoranda from time to time, which supplement the Stores and Procurement Regulations. Procedures laid down in the Regulations as well as in circulars and memoranda are compliant with the World Trade Organisation Government Procurement Agreement²⁵ to which Hong Kong is a party. The principle legislation which forms the public procurement framework in Hong therefore include the Public Finance Ordinance, the Stores and Procurement Regulations and the World Trade Organisation Government Procurement Agreement. In terms of government policy the purpose of these laws is to achieve the procurement principles mentioned above.

Hong Kong appears to have in place a system of both decentralised and centralised public procurement. While individual government departments are authorised to procure goods and

²¹ This is seen in chapter three, where article 9(2) of the UNCAC is discussed and shown to link public procurement to good governance.

²² The Treasury Branch. Financial Services and the Treasury Bureau. ‘Guide to Procurement’ (2013) available at <http://www.fstb.gov.hk/tb/en/guide-to-procurement.htm> accessed on 09 July 2015.

²³ Public Finance Ordinance (1983) Chapter Two of the Laws of the Hong Kong Special Administrative Region.

²⁴ Stores and Procurement Regulations issued by the Financial Secretary in terms of section 11 of the Public Finance Ordinance.

²⁵ World Trade Organisation Government Procurement Agreement (1994), as revised in 2011. Reference to this Agreement is reference to the 2011 revised version.

setting of price thresholds, which may be amended from time to time. In terms of Regulation 300 the tender procedures set out in Chapter III of the SPR are to be followed for the procurement of stores and services which exceed \$1.43 million and for construction and engineering services which exceed \$4 million.³⁰ In other words procurement above these thresholds cannot be undertaken in terms of other methods such as requests for quotations.

Individual departments are authorised to procure goods not exceeding their direct purchase authority ranging from \$500 000 to \$1.43 million. However with respect to the procurement of services individual departments may make purchases irrespective of value in accordance with the SPR.³¹ The Government Logistics Department purchases goods on behalf of departments which exceed \$1.43 million up to an amount of \$ 10 million, unless such tenders fall within the ambit of other subsidiary tender boards such as the Public Works Tender Board. The Central Tender Board generally decides on the acceptance of tenders exceeding \$10 million.³² The provisions of the SPR are applicable to departments, subsidiary tender boards such as the Government Logistics Department, and the Central Tender Board. In this way it can be seen that Hong Kong has elements of a centralised as well as a decentralised procurement system.

By being applicable to all departments and tender boards, the SPR presents a set of uniform procedures to be followed throughout government procurement in Hong Kong. The SPR also does not seem to allow for the formulation of independent procurement policies within different departments. Although the SPR makes provision for different tendering methods, such as selective tendering, where service providers on an approved list are invited to tender,³³ the normal procedure adopted is open tendering.³⁴ In terms of Regulation 316 open tendering involves a procedure wherein all interested service providers are free to submit tenders.

Regulation 340 provides for the publication of tender invites in the government gazette, the internet and local or international newspapers. Regulation 340(e) sets out minimum information which ought to be contained in a tender advert, which includes the closing date of the tender, contact details to obtain relevant tender documents and the fact that late tenders will not be accepted. Regulation 340(f) also stipulates that in order to allow potential

³⁰ Reference to \$ means the Hong Kong dollar.

³¹ Report of Audit Commission Hong Kong (note 26 above).

³² *Ibid*.

³³ Regulation 320(a).

³⁴ Regulation 315.

tenderers sufficient time to prepare and submit tenders, a minimum of three weeks is normally required before the closing date. It is submitted that the provision of sufficient time for tender preparation and tender submission, may assist in reducing corrupt activities. In certain instances corrupt officials may deliberately set an inappropriately short period before tender close date, in order to ensure that only a few tenders are submitted and thereby reduce competition. These conditions pertaining to the advertisement of tender invites, appear to be similar to the conditions set in terms of South African law as discussed in chapter four.

Regulation 345 sets out the criteria and information to be included in tender documents.³⁵ As is the case in terms of South African law, Hong Kong requires procuring entities to furnish potential tenderers the terms of tender, general and special conditions of contract, tender specifications, bills of quantities and price schedules. In this respect South African law also specifically requires procuring entities to disclose all evaluation criteria in the tender invitation.³⁶

The prescripts pertaining to the formulation of tender specifications as set out in Regulation 350 also largely mirror the prescripts set out in South African law, specifically those in the MFMA Regulations as discussed in chapter four. In chapter three however, it was pointed out that international law encourages the conducting of market research prior to embarking on the procurement process in order to prevent activities such as price fixing. The Hong Kong SPR provides for this in Regulation 350 (e), where market research is recommended for high-value contracts in order to better understand the goods or services likely to be available in the market.

As in South Africa, Hong Kong adopts a committee system responsible for the evaluation and award of tenders. At departmental level an initial evaluation is conducted by a tender assessment panel³⁷ which then provides a tender recommendation report either to a departmental tender committee (for those contracts falling within the purview of departmental authority explained earlier) or to a tender board, such as the Government Logistics Department or the Central Tender Board. In the previous two chapters it was argued that South Africa adopts an unduly strict approach to the compliance with technical formalities when assessing whether a tender is acceptable or not. In Hong Kong, while the law does not seem to provide for a definition of acceptable tender, it appears that it also

³⁵ Example see Tender Form Gf 231 Tender for Services.

³⁶ Regulation 4(3) of the PPPFA Regulations.

³⁷ Regulation 370.

adopts a strict approach to compliance with technical formalities. Regulation 365 (e) states as follows:

‘Where the provision of certain information is specified as an “essential requirement” in the tender document and it is stipulated that non-compliance with it will render the tender non-conforming, the tender shall be considered as non-conforming if such information is not submitted. Departments shall not approach the concerned tenderer for the missing information.’

It is submitted therefore that with regards to tender procurement processes from tender specification formulation through to tender award, there appears to be little difference between Hong Kong and South Africa. As indicated earlier, though, unlike South Africa, Hong Kong is a party to the World Trade Organisation Government Procurement Agreement (hereinafter referred to as the ‘WTO GPA’).³⁸ Chapter four revealed certain significant inadequacies in the challenge processes applicable in South Africa. It is submitted that Hong Kong, in this respect may present a legislative model worthy of emulation. Article XVII of the WTO GPA requires each party to establish a non-discriminatory, timely, transparent and effective procedure to enable suppliers to challenge alleged breaches of the procurement process. Article XVIII (1)(4) requires Parties to establish at least one independent administrative or judicial authority to receive and review a challenge by a supplier. Where an administrative authority is established, then according to Article XVIII (1)(6) such authority must be subject to judicial review.

Hong Kong elected to establish an independent administrative authority dedicated to receive and review challenges by suppliers. This authority is called the Review Body on Bid Challenges. The Rules of Operation of the Review Body³⁹ sets out clear time frames within which complaints must be lodged, as well as clear time frames for subsequent responses from parties, as well as time frames within which the Review Body is to render its decisions. In terms of clause 13 of the Rules of the Review Body, a supplier may request a ‘rapid interim measure’. This means that the review body may order the suspension of the procurement process pending the finalisation of the review.⁴⁰ It is submitted that this model presents a solution for much of the challenges highlighted in the South African appeal and review system pertaining to public tenders. In the first instance, the Hong Kong model affords

³⁸ The provisions of the WTO GPA are applicable to contracts with a value of approximately \$4.5 million for general products and services and \$56 million for construction services.

³⁹ Rules of Operation of the Review Body on Bid Challenges (2014).

⁴⁰ Article XVIII (1)(7)(a) states that ‘the procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied.’

Shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.’

Taking into account the nature of public procurement corruption the creation of an illicit enrichment offence may be useful in assisting the prosecution. Section 10(1) of the POBO places the burden on the accused to offer a satisfactory explanation regarding his standard of living or wealth. As discussed in chapter four this burden on the accused is a reasonable one, taking into account the fact that in such instances it may be only the accused who is in a position to offer a legitimate explanation regarding his wealth or standard of living. Section 12A of the POBO also provides for confiscation orders to be sought from the court in respect of property or resources under the control of a person convicted of an offence under section 10(1)(b).

The POBO also provides for the protection of informers in section 30A. This section provides that the names and addresses of persons who have given information to the Commissioner⁴² with respect to any offence under the POBO, will be protected. Section 30A(1)(b) provides that no witness shall be obliged to disclose the name or address of any informer or to answer any question if the answer thereto may reveal the name or address of such informer. Section 30A(1) also provides that the court shall be entitled to conceal from view or to obliterate any passage from any document or paper which has been tendered as evidence, in order to protect the identity of an informer. It is submitted that such a provision may encourage persons to report acts of corruption. As discussed in chapter four, the PCCA creates a statutory duty to report corrupt transactions. However no legislative protection is afforded to persons who provide information to the investigative authorities. The difficulty in detecting acts of corruption has been discussed in previous chapters. Taking this difficulty into account Man-wai submits that an effective anti-corruption system must include an effective complaints system which provides ‘assurance to the complainants of the confidentiality of their reports and if necessary, offer them protection.’⁴³

The protection of informers in corruption cases is not unique to Hong Kong legislation. In Jordan the Informers, Witnesses, Informants and Experts in Corruption Cases and their

⁴² ‘Commissioner’ refers to the commissioner of the Independent Commission Against Corruption, a statutory organisation established to enforce anti-corruption laws and to investigate allegations of corruption in Hong Kong.

⁴³ T K Man-wai ‘Investigation of Corruption Cases’ Eleventh International Training Course on the Criminal Justice Response to Corruption (2008) United Nations Asia and Far East Institute. Resource Material Series No. 79. 140, 141.

Relatives and Closely related Persons Protection Regulation⁴⁴ provides for the establishment of a Protection Unit, which is mandated to adjudicate applications for protection of persons who inform, give testimony or expert reports on cases of corruption. In Tanzania sections 51(1) and (2) of the Prevention and Combating Corruption Act⁴⁵ mirror the provisions of section 30A of the POBO in protecting the names and addresses of informers. Commenting on the important role which informants play in corruption investigation cases, Man-wai states that in Hong Kong such informants may be necessary to lead investigators to larger corruption syndicates and that the Independent Commission Against Corruption provides special housing and protection facilities to such informants.⁴⁶ Section 18 of the PCCA in South Africa creates an offence of unacceptable conduct relating to witnesses, in terms of which it is an offence for any person to intimidate, coerce, improperly influence a witness or use physical violence against a witness in order for such witness to *inter alia* testify in a particular way, withhold testimony or delay the testimony of such witness. However the PCCA does not offer any statutory protection to such witnesses who may be informers and who may be subjected to intimidation for the disclosure of information relating to corruption offences.

Unlike the PCCA though, the POBO does not create a register of persons convicted of corrupt offences. In South Africa, this register relates only to persons convicted of procurement related corruption offences. In Hong Kong though, the court is empowered by section 33A of the POBO, to order the prohibition of further employment of convicted persons. In terms of section 33A(1)(a-d), the court may of its own accord, if it is in the public interest to do so, order that a convicted person in the position of director or manager of a public or private body, or a professional person, or a person who is a partner or manager in a private firm, be prohibited from being so employed for a period not exceeding seven years. This prohibition relates to conviction of any offence in Part II of the POBO, and is not confined to any particular offence. South Africa does not have a similar provision. It is submitted that such a provision may be effective in discouraging the immediate re-entry of corrupt persons into the world of commercial activities. The shortcoming of the Hong Kong legislation though is that in the absence of a register of defaulters, government is not prohibited *per se* from doing business with convicted persons. The POBO is also unclear

⁴⁴ Informers, Witnesses, Informants and Experts in Corruption Cases and their Relatives and Closely related Persons Protection Regulation No. (62) for the year 2014.

⁴⁵ Prevention and Combating of Corruption Act (Chapter 329) of the Laws of Tanzania.

⁴⁶ Man-wai (note 43 above) 143.

whether such persons may be re-employed by other organisations in the same positions within the seven year prohibition period. However notwithstanding these shortcomings, it is submitted that South Africa may benefit from a similar provision which seeks to discourage the re-entry of corrupt and venal persons into the commercial sphere.

It is submitted that there are similarities between the provisions of the PCCA in South Africa and the POBO in Hong Kong. However Hong Kong's provisions relating to the possession of unexplained wealth, the protection of informers and the prohibition of employment of convicted persons, may be useful in the fight against corruption in South Africa.

2.4.2 *Independent Commission Against Corruption Ordinance*

The Independent Commission Against Corruption Ordinance⁴⁷ (hereinafter referred to as the 'ICAC Ordinance') establishes Hong Kong's Independent Commission Against Corruption (hereinafter referred to as the 'ICAC'). The ICAC has been hailed as a powerful anti-corruption enforcement body largely responsible for the reduction of corruption in Hong Kong.⁴⁸ This is not a study of institutional anti-corruption frameworks, or models of institutional structures best suited to combat corruption. However since the reputation of the ICAC has received global acclaim as a significant contributor to the reduction of corruption in Hong Kong, it is prudent to review the legislative instrument which establishes the ICAC. This is not a review of every provision of the ICAC Ordinance, but rather a review aimed at highlighting the legislative interventions which may have contributed to the success of the ICAC.

The ICAC is an 'anti-corruption agency independent of the police force and civil service.'⁴⁹ In terms of section 5 of the ICAC Ordinance the ICAC Commissioner is appointed by the Chief Executive Officer⁵⁰ and accountable only to the Chief Executive Officer. The term of office of the Commissioner and the Deputy Commissioner are determined by the Chief Executive Officer.⁵¹ By contrast South Africa does not have an independent agency dedicated

⁴⁷ Independent Commission Against Corruption Ordinance 7 of 1974 (Chapter 204) Laws of Hong Kong Special Administrative Region.

⁴⁸ In this respect see M Manion 'Lessons for Mainland China from Anti-Corruption Reform in Hong Kong' (2004) 4 *The China Review* 81, 97

⁴⁹ *Ibid* 84.

⁵⁰ The Chief Executive Officer is the administrative head of the Hong Kong Special Administrative Region.

⁵¹ Sections 5 & 6 of the ICAC Ordinance.

to anti-corruption efforts.⁵² While the work of the ICAC has been commended and applauded it is submitted that the legislative framework within which it operates has assisted in creating an environment within which it may be effective. Manion submits that the legal basis for ICAC action are represented in three laws: the Corrupt and Illegal Practices Ordinance⁵³, the POBO and the ICAC Ordinance.⁵⁴ Manion further submits that these Ordinances afford the ICAC extraordinary powers.⁵⁵ This is seen in the ICAC Ordinance itself. For instance section 10 of the ICAC Ordinance affords an officer authorised by the Commissioner the power to effect arrest without a warrant if he reasonably suspects that such person is guilty of an offence under any of the abovementioned Ordinances. It appears from the provisions of the ICAC Ordinance that officers appointed in terms of its provisions have enforcement powers and authority as would any other law enforcement official.⁵⁶ As Manion submits:

‘ICAC investigators have powers of search, seizure, and detention of anything believed to be evidence of offences for which they have powers of arrest. They have special powers of investigation-to examine bank accounts, to question people under oath, and to restrict the disposal of property during an investigation. They may carry firearms in situations considered dangerous. The ICAC has its own detention facilities.’⁵⁷

In the circumstances it is submitted that in establishing the ICAC Hong Kong clearly did not intend for this agency to be impotent, and accordingly afforded it the necessary legislative authority to carry out its enforcement function. In addition the ICAC Ordinance charges the Commissioner to ‘educate the public against the evils of corruption; and enlist and foster public support in combatting corruption.’⁵⁸ The independence, strong enforcement capabilities and strong emphasis on education cannot be discounted as significant contributing factors to the success of the ICAC. It is beyond the scope of this study to critically analyse institutional anti-corruption frameworks or to suggest which model may be best suited for a particular jurisdiction. However seeing that the ICAC has received widespread acclaim as an anti-corruption agency, and seeing further that the South African

⁵² In this regard refer to the judgement in *Hugh Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, wherein the Constitutional Court held that the Directorate of Priority Crimes located within the South African Police Service did not constitute an independent body as envisaged in international law.

⁵³ Corrupt and Illegal Practice Ordinance (Chapter 554) Laws of Hong Kong Special Administrative Region. This Ordinance applies to elections specified in the Ordinance. The Ordinance applies to all corrupt and illegal conduct concerning an election.

⁵⁴ Manion (note 48 above) 85.

⁵⁵ Ibid.

⁵⁶ Example section 10D empowers an officer to take finger-prints and photographs.

⁵⁷ Manion (note 48 above) 85.

⁵⁸ Sections 12(g) & (h) of the ICAC Ordinance.

Prior to 2007, the World Bank found that no law existed which regulated public expenditure or procurement in Nigeria. Rather Financial Regulations would be issued by the Ministry of Finance which would *inter alia*, regulate and delegate procurement responsibilities, establish regulations concerning functioning of tender boards and actual procurement processes.⁹⁵ Such regulations would be issued at federal and state level. The World Bank expressed the following criticism in respect of such financial regulations:

‘The FR⁹⁶ is not a law or an act of similar authority, but an administrative document, which could be amended by the Minister of Finance without regard to fundamental rights of the supplier/contractors. Therefore, the rights of the suppliers/contractors with regard to the protective measures of for example open advertisement, public award criteria and so forth are only protected by the good will of the Government in power at any given time. In addition, the FR are superficial in their statutory regulation of the actual procurement process.’⁹⁷

As shown in chapter four, in South Africa crucial aspects of the public procurement process are also regulated by various Treasury prescripts. The legislative authority of such prescripts was questioned, and the room for prejudice against suppliers or contractors by virtue of inconsistencies and ambiguities was demonstrated. Williams-Elegbe also points out that, in Nigeria, such financial regulations, are not accessible to the public and are subject to constant change thereby eroding the principle of transparency.⁹⁸ This view was shared also in respect of South Africa. While financial prescripts may be necessary for the issuance of directives of those matters which may require amendment from time to time, it is submitted that substantive aspects of a tender process, such as composition of bid committees or rules of tender boards cannot, for the reasons of both the World Bank and the submissions put forward in chapter four, be regulated in documents which have questionable legislative authority or subject to amendment from time to time at the will of the government.

As a result of its study, ⁹⁹ the World Bank recommended the promulgation of a public procurement law in Nigeria, in line with the UNCITRAL Model Law.¹⁰⁰ This culminated in the adoption of the PPA. Regulations have also been issued in terms of the PPA, known as the Public Procurement (Goods and Works) Regulations (hereinafter referred to as the

⁹⁵ Ibid.

⁹⁶ Referring to ‘Financial Regulations’.

⁹⁷ World Bank: ‘Nigeria: Country Procurement Assessment Report’ (note 92 above).

⁹⁸ S Williams-Elegbe ‘A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practice’ (2015) 59 *Journal of African Law* 832, 840.

⁹⁹ World Bank: ‘Nigeria: Country Procurement Assessment Report’ (note 92 above).

¹⁰⁰ 2011 UNCITRAL Model Law on Public Procurement: United Nations General Assembly Resolution 66/95 of 2011.

other body tasked with the oversight of procurement processes in particular, the Procurement Board in Botswana is responsible for the supervision of all procurement decisions. The Procurement Board has also issued a detailed Operations Manual on Standard Operating Policies and Procedures for Public Procurement (hereinafter referred to as the ‘Operations Manual’).¹⁶³ In terms of section 26 thereof the Procurement Board must ensure that all procuring and disposal entities undertake procurement processes taking into account, *inter alia*, the principles of competition, fairness, equity, accountability and transparency. The Procurement Board also has power to adjudicate a bid where bid recommendations are submitted to it by competent bodies.¹⁶⁴

Botswana’s public procurement philosophy is based on the universal principles of transparency, equity, fairness, competitiveness and cost-effectiveness. These are clearly implicit in the Operations Manual.¹⁶⁵ Further to this Botswana has highlighted much of the challenge areas identified in the domestic legislative review in chapter four, as critical to achieve and maintain a sound public procurement system. For example the Operations Manual highlights the importance of certain aspects of the tender process, such as the formulation of specifications, the tender opening processes, availability of documents and records for oversight purposes and a robust complaint handling mechanism.¹⁶⁶ In chapter four important challenges with respect to each of these aspects were raised and it was suggested that legal reform with respect to such issues may contribute to a better procurement system. So too in Botswana the procurement philosophy is to adopt an understanding that periodic review of the legal framework is important and necessary to ensure that procurement law is more consistent with international best practice and to ensure an optimal procurement system at all times.¹⁶⁷ This is in keeping with the notion that while reduction of corruption in public procurement is as much dependent on factors such as political will or levels of development, since procurement processes are implemented according to legal principles, the laws relating to public procurement also play a critical role in either promoting or preventing corruption.

In terms of Chapter V of the PPADA Regulations¹⁶⁸ the methods of procurement are open domestic bidding, open international bidding, restricted international bidding, restricted

¹⁶³ Public Procurement and Asset Disposal Board: ‘Operations Manual, Standard Operating Policies and Procedures for Public Procurement’ (2013).

¹⁶⁴ Section 37.

¹⁶⁵ Section 2.2 of the Operations Manual.

¹⁶⁶ Ibid.

¹⁶⁷ Section 2.3 of the Operations Manual.

¹⁶⁸ Public Procurement and Asset Disposal Regulations 2006.

domestic bidding, quotation proposals, micro procurement¹⁶⁹ and direct procurement¹⁷⁰ The open domestic bidding means the domestic tendering method.¹⁷¹These methods are also provided for at local government level in terms of Part IV of the Local Government Regulations. As seen in the laws of Hong Kong and Nigeria, as well as South Africa, the tendering method in Botswana also has certain standard procedural aspects, such as the public notification of bids¹⁷²and the establishment of committees tasked with specific aspects of the tendering procedure such as specification formulation, evaluation and adjudication. However, the manner of implementation of these procedures as well as emphasis on certain key phases of the tender procedure are worthy of particular notice.

Firstly although each procuring entity¹⁷³ is responsible for the management of its own procurement,¹⁷⁴ Botswana law has established an interesting system of oversight and supervision of the processes undertaken by the procuring entity and its evaluation and adjudication committees. As mentioned above the Procurement Board is responsible for this oversight and supervisory role. In terms of section 61 of the PPADA read with Regulations 9 and 10 of the PPADA Regulations, Ministerial Committees are set up by the Procurement Board for the procurement entities encompassed by each Ministry.¹⁷⁵ The functions of the Ministerial Committees are among other things to recommend to the Procurement Board the procurement procedure to be employed, recommend the type of bidding documents to be used before issue of solicitation documents, preside over and manage public bid openings, prepare contract documents and provide overall guidance on procurement development within the procuring entity.¹⁷⁶ It is submitted that in terms of the language employed in the PPADA and the PPADA Regulations, the Ministerial Committee is to execute these functions in respect of every procurement. In this way the Procurement Board executes its oversight role in respect of all procurements.

¹⁶⁹ In terms of Regulation 60, where the estimated value of the procurement does not exceed a predetermined threshold.

¹⁷⁰ In terms of Regulation 61 where the selection of the supplier is conducted on a sole supplier basis in certain defined situations.

¹⁷¹ In terms of section 2 of the PPADA bid means a tender and *vice versa*.

¹⁷² Regulation 55(3) of the PPADA Regulations

¹⁷³ A procuring entity is defined as any Ministry or department duly authorised to engage in public procurement, in terms of section 2 of the PPADA.

¹⁷⁴ Regulation 6 of the PPADA Regulations.

¹⁷⁵ District Administrative Committees are set up by section 64 of the PPADA in respect of local government.

¹⁷⁶ Regulation 9(2) of the PPADA Regulations

Complaints Review Committee.¹⁸⁴ At local government level the Local Government Act establishes an Appeal Board for each local authority.¹⁸⁵ In terms of section 24(5) of the Local Government Act a person aggrieved by a decision of the Adjudication Committee may appeal to the Appeals Board within thirty days of notification of the decision. In terms of Regulation 78(4) of the PPADA Regulations a complaint must be lodged within fourteen days of the bidder coming to know of the complaint. In the case of central government the complaint must first be lodged with the Procurement Board and if the dispute remains unresolved within fourteen days from date of submission the dispute is then referred to the Independent Complaints Review Committee.¹⁸⁶ Botswana’s legislation also allows for the suspension of any further proceedings in the procurement process, where a complaint has been lodged.¹⁸⁷ It is submitted that this legislative directive is helpful in ensuring that invalid procurement decisions are not implemented prior to the finalisation of an award or review. Further Botswana law requires that notice of the best evaluated bidder be advertised in a public notice a specified number of days prior to the award of the contract.¹⁸⁸

4.3 Anti-Corruption Law: Corruption and Economic Crime Act

The main anti-corruption law in Botswana is the Corruption and Economic Crime Act¹⁸⁹ (hereinafter referred to as the ‘Corruption Act’). As with the South African law, as well as the law in Hong Kong and Nigeria, the Corruption Act in Botswana creates offences in respect of different categories. Most of the categories of offences, though, relate to corruption by or of a public officer.¹⁹⁰ In essence, the elements of an offence of corruption, includes the giving or acceptance of some valuable consideration¹⁹¹ to or by a public officer in exchange for the public officer’s improper use of his office or official influence. Unlike the South African PCCA, the Botswana Corruption Act does not establish as many categories of offences as does the South African law.

¹⁸⁴ Section 95.

¹⁸⁵ Section 24(1).

¹⁸⁶ Regulation 78(6)

¹⁸⁷ Regulation 79(1) of the PPADA Regulations.

¹⁸⁸ Regulation 53(3) of the PPADA Regulations.

¹⁸⁹ Note 158 above.

¹⁹⁰ In this respect see sections 24, 25, 26, 27,29,31 and 33 of the Corruption and Economic Crime Act.

¹⁹¹ The term ‘valuable consideration’ is given a wide definition in terms of section 2.

As is the case in terms of the South African PCCA, section 34 of the Corruption Act in Botswana allows the Director of the Directorate on Corruption and Economic Crime¹⁹² to investigate any person where there are reasonable grounds to suspect that such person maintains a standard of living above that which is commensurate with his present or past sources of income. Unlike the South African law though, the Corruption Act places a duty on the suspect to offer a satisfactory explanation as to how she or he was able to maintain such a standard of living, failing which the suspect is deemed to be guilty of corruption. As argued earlier, the provision of such a presumption may greatly assist prosecuting authorities in the prosecution of corruption cases.

Section 42 of the Corruption Act creates a presumption of corruption. This presumption applies to all offences created in the Act. In terms of this presumption where the prosecution has proved the offer or acceptance of a valuable consideration, a presumption is created that such consideration was offered or accepted as an inducement or reward as alleged in the particulars of the offence concerned. Although South African law contains a similar presumption, the limitation of this presumption, as was pointed out in chapter four, is that it does not apply to corrupt activities relating to the procuring and withdrawal of tenders. Section 45 of the Corruption Act protects the identity of informers. As submitted earlier the protection of informers is important in the fight against corruption.

As does the law in Hong Kong and Nigeria, the Corruption Act in Botswana establishes an independent agency dedicated to the enforcement of the Corruption Act. The Corruption Act grants the Directorate on Corruption and Economic Crime investigative powers, including the powers of arrest without warrant¹⁹³ and the powers of search and seizure.¹⁹⁴ This anti-corruption agency also performs other functions such as educating the public against the evils of corruption,¹⁹⁵ enlisting and fostering public support in combatting corruption¹⁹⁶ and advising and assisting people on ways in which corrupt practices may be eliminated.¹⁹⁷ To a large extent the legislative provisions relating to the Corruption and Economic Crime Directorate are based on Hong Kong's ICAC model.

¹⁹² In South Africa this authority is given to the National Director of Public Prosecutions after such Director has obtained an investigation order from a court.

¹⁹³ Section 10(1).

¹⁹⁴ Section 11.

¹⁹⁵ Section 6(i).

¹⁹⁶ Section 6(j).

¹⁹⁷ Section 6(g).

5. COMPARATIVE LESSONS

Chapter four provided an evaluation of the domestic legislative framework pertaining to public procurement and corruption in South Africa. In this chapter the public procurement laws as well as the main anti-corruption laws of Hong Kong, Nigeria and Botswana are reviewed. This review was intended to provide a comparative dimension to the domestic law evaluation. The three jurisdictions were chosen with respect to the different perspectives each one has on public procurement. Like South Africa, each of the three foreign jurisdictions is based largely on English law.

The review undertaken in this chapter has shown that public procurement legislative reform contains certain universal principles. The World Bank has assisted many countries in Africa, including South Africa, which have gone through periods of transition, with the legal reform of public procurement processes. Therefore even though, countries, including countries such as Nigeria which are notoriously graft-ridden have adopted laws upon recommendation of the World Bank, which reflect modern international law principles on public procurement. In Hong Kong it was found that the public procurement laws are largely in compliance with the WTO GPA, while in Nigeria the UNCITRAL Model Law is the basis of the procurement reform. Botswana's laws are also reflective of modern international best practice in public procurement. In each of the jurisdictions reviewed it is seen that the basic universal principles of transparency, competitiveness, fairness and cost-effectiveness are reflective in the public procurement laws. The fact that both Hong Kong and Nigeria have afforded the fight against corruption constitutional importance is commendable. In the case of Nigeria though, it is disappointing to note that notwithstanding this constitutional recognition the Constitution creates state monopoly over key commodities and it does not contain entrenched socio-economic rights.

All countries reviewed also have specific anti-corruption laws. In general all anti-corruption laws criminalise the offering or acceptance of some undue advantage in exchange for a reward which entails the abuse of public office. Notwithstanding this, there have been lessons as well as shortfalls identified in each jurisdiction in respect of both procurement laws and anti-corruption laws which may be helpful for South Africa.

The review began with Hong Kong. Hong Kong is globally acclaimed for its efforts in reducing public sector corruption. It was found that Hong Kong has specific laws dedicated to public procurement. Its Public Finance Ordinance creates a sound legislative basis for

accountable government expenditure, promotes effective demand planning and creates layers of responsibility within the staff of government entities. With respect to tendering it was found that Hong Kong adopts elements of a centralised as well as a decentralised tendering system. Depending on the threshold of bids, individual departments or a central tender board are responsible for awards of government contracts. Regardless of which entity is responsible for the procurement in question Hong Kong has a uniform set of laws applicable to all procuring entities. In keeping with international procurement principles Hong Kong provides for a system of public tendering and a committee system responsible for evaluation and adjudication of bids. It was found that Hong Kong also has an established and independent body, known as the Review Body on Bid Challenges, which is responsible to receive and review challenges of the procurement process by suppliers. The challenge system adopted by Hong Kong conforms with international best practice, particularly the provisions of the WTO GPA, and ensures that the review process affords aggrieved bidders an effective recourse mechanism.

In respect of Hong Kong's anti-corruption laws the provisions of the POBO relating to the possession of unexplained wealth, as well as the provisions relating to the protection of informers may provide some lessons for South Africa. A striking shortfall of the POBO however, is that it does not create a mechanism whereby defaulters are endorsed. Its provisions relating to the prohibition of further employment of convicted persons has merit in ensuring that convicted persons do not immediately re-enter the commercial sphere. Hong Kong's anti-corruption agency, the ICAC has been hailed as an iconic corruption fighting body. It is established in terms of the ICAC Ordinance. While this is not a study on anti-corruption agencies, this review has suggested that perhaps from a legislative perspective South Africa may do well to refer to the provisions of the ICAC in attempting to model its own anti-corruption agency.

The review of Nigeria's laws revealed that while Nigeria has embarked on public procurement reform, and for the first time in 2007 adopted legislation on public procurement, in certain crucial aspects the legislation, even though modelled on the 2011 UNCITRAL Model law, does not take into account certain realities in the country. The distrust of politicians and government functionaries in Nigeria is high and credible, with most scholars agreeing that Nigeria has not been blessed with visionary and morally ethical leaders. Despite this it appears that the legislation has not been able to adequately address the issue of the involvement of politicians and government functionaries in the public procurement process.

Another major criticism of the Nigerian legislative framework is that although the PPA is based on international best practice, it does not apply to all government entities. In fact it does not apply at all to the States and local governments, who may only choose to apply the law at their own volition. To say therefore that Nigeria as a country has reformed its public procurement laws in line with international best practice is not entirely accurate.

The Corrupt Practices Act was reviewed as the main anti-corruption statute in Nigeria. However Nigeria also has other anti-corruption statutes. For instance it was argued that provisions in the Money Laundering Act may be useful in the fight against public procurement corruption in that it requires transactions above a specified threshold to be done via a financial institution. Unlike the South African PCCA, the Corrupt Practices Act envisages offences which fall outside the realm of the offering and acceptance of undue advantage or gratification. A serious shortcoming of the Nigerian Act relates to the inconsistent manner in which provisions creating offences are worded. It was argued above that such inconsistencies may create legislative loopholes which accused persons may use to evade conviction. As does Hong Kong legislation, the Corrupt Practices Act creates an anti-corruption agency. It was argued above though that this agency may be subjected to undue political influence due to inappropriate power conferred on politicians in the legislation.

Botswana is known to be the least corrupt country in Africa. Its legislative framework consists of laws which regulate public procurement at central and local government level. The interesting feature of Botswana procurement laws is that although each procuring entity is responsible for the management of its own procurement, the country has established a system of oversight and supervision of the processes undertaken by the procuring entity and its evaluation and adjudication committees. The appointment of members of bid committees is also not arbitrary and in certain respects requires the involvement of the private sector as well as members of the public. It is submitted that this is reflective of Botswana's commitment to transparency and openness.

It was found that certain provisions in Botswana's Corruption Act may also be worthy of emulation. These are provisions which relate to the possession of unexplained wealth, the presumption of corruption and the protection of informers. Botswana has also established an anti-corruption agency with extensive powers of investigation. This agency is largely modelled on the ICAC. It is known as the Directorate on Corruption and Economic Crime.

The above review has revealed that despite differences in governance, levels of corruption or levels of development, the common factor in all three jurisdictions is the existence of specific laws dedicated solely to public procurement. South Africa on the other hand does not have a dedicated public procurement law. While South Africa has a public procurement regime predicated on a system of integrated supply chain management, it does not have a law dedicated to the regulation of all aspects of the system. Rather as seen in the foregoing two chapters, rules and procedures on the procurement system are scattered among various laws.

It is noted from this review that the foreign jurisdictions have a system of independent oversight of procurement decisions taken by procuring entities. In Hong Kong this function may be carried out by the ICAC as well as bodies such as the central tender board. Nigeria has established the Bureau of Public Procurement which exercises an oversight role, while Botswana has set up the Procurement Board. In South Africa there is no dedicated body which provides specific oversight over procurement decisions taken by procuring entities.

The legal regimes of Hong Kong, Nigeria and Botswana also appear to have challenge procedures which set out clearer processes for appeal or review, as well as for the suspension of procurement processes until the finalisation of a challenge. The establishment of independent review bodies may be useful in ameliorating some of the problems encountered through recourse via the court system.

With respect to anti-corruption laws the common thread found in all three jurisdictions is the existence of a dedicated anti-corruption agency. It is impossible, and also beyond the scope of this study, to credibly assert here whether such institutions are mainly responsible for a country's successful reduction in corruption. As indicated earlier, there seems to be consensus among many that this is true for Hong Kong. However it is doubtful whether the same can be said for the Nigerian anti-corruption Commission. Notwithstanding the existence of a dedicated anti-corruption Commission Nigeria is still plagued by high levels of corruption. This does not mean though that the concept of a dedicated and independent anti-corruption commission is to be jettisoned. As discussed in chapter three the South African Constitutional Court has held that South Africa lacks an independent anti-corruption agency. It was also suggested above that perhaps the Hong Kong legislative model establishing the ICAC, taking into account the ICAC's apparent success in reducing corruption, may be referred to by South Africa in establishing its own agency. The laws pertaining to the agencies of both Nigeria and Botswana are based largely on similar provisions as contained in the ICAC. Perhaps a lesson

to be distilled from the Nigerian model is the avoidance of the conferment of undue legislative political power to decide the fate of the Head of its anti-corruption Commission.

It was further seen that the anti-corruption laws of these foreign jurisdictions include provisions such as the criminalising of unexplained wealth, the protection of informers and a wider scope of offences to include offences which may not necessarily entail the offering or acceptance of undue advantage. Such provisions are lacking in the South African law.

6. CONCLUSION

This chapter has submitted that regardless of the levels of corruption existing in each of the three jurisdictions reviewed, the laws of each jurisdiction present both lessons and shortfalls. For instance the legislative provisions pertaining to Hong Kong's world-acclaimed ICAC are notable, as are its provisions of accountability and sound financial management found in its Public Finance Ordinance. On the other hand the most important shortfall existing in Nigerian law is the inability of legislation to adequately reduce the influence of politicians in procurement processes. Botswana, although having elements which are known to contribute to corruption elsewhere in the world, such as low public wages, nonetheless enjoys the position of being the country perceived to be least corrupt in Africa. Its system of procurement oversight and supervision by an independent body is notable. The existence of a dedicated law on public procurement in all three jurisdictions is, it is submitted, a valuable lesson which South Africa may do well to learn from, rather than a system which consists of a plethora of laws.

In the circumstances it is submitted that the review of foreign legal systems has provided some valuable insight into recommendations for legal reform in South Africa. Chapter four has highlighted many areas of the law which may be in need of review, such that public sector corruption is further reduced in South Africa. Following from the domestic evaluation in chapter four as well as the foreign review in this chapter, the concluding chapter which follows provides recommendations for legal reform in South Africa.

CHAPTER SEVEN: RECOMMENDATIONS AND CONCLUSION

1 INTRODUCTION

The aim of this study was to conduct an evaluation of the legislative framework pertaining to public procurement in South Africa, as well as salient provisions of the Prevention and Combating of Corrupt Activities Act¹ (hereinafter referred to as the 'PCCA'), with a view to recommending legal reform in order to combat public procurement corruption. Since corruption occurs widely and in almost every facet of human life there was a need to confine the study to a specific context. Public procurement was identified as the context for the study.

Although the public sector is broader than government and includes other entities, government is the largest spender of public funds. The study was therefore confined to public procurement within government departments at national, provincial and local level. The foregoing chapters have revealed that corruption is prevalent within government tendering processes. The tendering process is generally also the method of procurement in terms of which the largest sums of public money are expended. The study was therefore confined to corruption within the government tendering processes.

Five research questions were identified which formed the basis for the legislative evaluation. South Africa has a system of constitutional supremacy. The South African Constitution upholds the recognition of relevant international law and it enshrines procurement principles. Furthermore public procurement processes are frequently the subject of judicial scrutiny in South Africa. An understanding of the international and constitutional framework pertaining to corruption and public procurement was necessary for a meaningful evaluation of the domestic laws. A review of salient judicial decisions provided an understanding of the approach of the courts to public procurement.

The evaluation of the domestic laws revealed that room does exist for legislative reform in order to reduce public procurement corruption in South Africa. A review of the public procurement and corruption laws of three foreign jurisdictions provided a comparative dimension to the study. This comparative review presented certain lessons which are useful in putting forward recommendations for domestic legal reform.

¹ 12 of 2004.

This concluding chapter therefore provides a summary of the domestic legislative evaluation and thereafter recommendations for legal reform in order to combat or reduce public procurement corruption in South Africa. Finally the chapter provides a conclusion to the study undertaken.

2. SUMMARY OF DOMESTIC EVALUATION

2.1 Public Procurement Legislation

The evaluation of the domestic legislative framework pertaining to public procurement was undertaken with a view to addressing the following questions:

- Is the current legislative framework plagued by a plethora of laws thereby creating uncertainties, ambiguities and technical formalities which may promote corruption?
- Does current public procurement legislation provide effective appeal and review mechanisms?
- Does the legislative framework contain effective mechanisms to detect acts of corruption prior to the finalisation of a procurement process? and
- Does the legislative framework provide effective anti-corruption measures after procurement decisions are made?

The evaluation done in this study has revealed that South Africa does not have legislation dedicated solely to public procurement. Laws regulating public procurement are found in a number of statutes, regulations and government prescripts. South Africa also adopts a supply chain management system applicable to all public procurement transactions. The system of government procurement in South Africa is decentralised, with each government department or municipality being accountable and responsible for procurement decisions it takes. Public procurement rules and policies of various procuring entities may differ. It was shown that the large number of laws, rules and policies regulating public procurement has created fertile ground for litigation and corruption due to inconsistencies, ambiguities, a large number of technical formalities and selective application of laws.

It was also shown that the public procurement regime in South Africa tends to favour form over substance. This approach coupled with large numbers of technical requirements in the tender process creates opportunity for corruption. This problem is exacerbated by the fact that the tender process in South Africa seems to lack adequate and appropriate methods of

detecting acts of corruption during the procurement process, including after the award of a tender.

The legislative evaluation has also revealed that South Africa does not have effective challenge procedures available to those aggrieved by a particular procurement decision. The limitations found pertain to inconsistencies in the law relating to time periods within which complaints ought to be lodged and in certain situations aggrieved persons may not have any statutory appeal provision available, save the provisions of the Promotion of Administrative Justice Act² (hereinafter referred to as ‘PAJA’), to rely on. The major limitation, it was argued though, was that South African law does not adequately guard against the implementation of impugned decisions prior to the finalisation of any appeal or review proceeding. The evaluation therefore revealed that room does exist for meaningful legal reform of the legislative framework governing public procurement in South Africa.

2.2 The PCCA

The research question identified with respect to the anti-corruption law was whether the provisions of the PCCA are suitably applicable to public procurement corruption. The review of court judgements revealed that while the courts are swamped with cases involving tender irregularities, there have been few of such cases wherein actual findings of corruption, in terms of the PCCA, were made. The difficulties identified related to challenges which courts faced in admitting evidence of alleged corruption in cases involving the review or appeal of a procurement decision. In this respect it was argued that perhaps room exists to reform the evidentiary provisions of the PCCA where such relates specifically to public procurement corruption. In addition it was argued that the definitions of corruption in terms of the PCCA may be amended in order to be more applicable to public procurement corruption.

While the PCCA creates a system to have convicted persons endorsed in a Register of Tender Defaulters, it was argued that the legislative provisions pertaining to such endorsements suffer from shortfalls. Similarly, although the PCCA creates a legal duty to report certain corrupt transactions, it was submitted that scope exists to render this legislative duty more effective. The evaluation revealed that the provisions of the PCCA are not adequately applicable to public procurement corruption. There are material and substantive ways in

² 3 of 2000.

It is submitted that a committee system presents a documented process which is capable of being scrutinised and reviewed based on reasoning which must be apparent from records of such deliberations. In instances wherein discretion is afforded to a single individual, as is currently the case of contract expansions or variations within a certain threshold, the ability to rationalise and scrutinise such a decision is rendered more difficult. This erodes the principles of transparency and fairness.

It is also recommended that thresholds values for contract expansions or variations which determine the threshold at which a contract may be expanded without the necessity of further approval or community consultation, should be a stipulated amount (reviewable from time to time) as opposed to being a percentage of the original contract value. As shown in chapter four, in instances where the threshold is determined as a percentage of the original contract value, the actual amount of the expansion may be significantly high.

A significant limitation of the law currently is that focus seems to be only until an award is made. Therefore, the committee system prescribed by legislation stops at the award stage with the bid adjudication committee. It is submitted that the creation of contract administration committees will extend the legislative focus to include the post award stage. Just as the function of the bid evaluation committee is to ensure that bids are evaluated according to the tender specifications and advertised award criteria, so too should the function of a contract administration committee be to ensure that ensuing contracts are executed in line with tender specifications. As discussed in chapter four, section 116 of the Municipal Finance Management Act³² provides sound provisions on contract management and certain mandatory terms and conditions which all contracts must contain. It is submitted that this section is one which ought to be retained in national law, as it provides a framework for the functions of a contract administration committee.

Another significant criticism of the legislative framework pertaining to public procurement is that South Africa lacks adequate or effective challenge processes. The legislative provisions are confusing and uncertain regarding time periods allowed for the lodging of complaints, and the manner in which aggrieved persons may invoke the legislative provisions. The system is also ineffective in ensuring that irregular decisions are not implemented prior to the finalisation of any appeal or review. In respect of national and provincial legislation there appears to be no legislative provisions pertaining to appeals or reviews of procurement

³² Municipal Finance Management Act (note 28 above).

decisions. Due to ambiguities in legislation pertaining to local government and lack of legislation pertaining to national and provincial government, in many respects aggrieved bidders are left with only the provisions of PAJA to rely on.

It is recommended that national legislation must provide clear and effective challenge procedures. In this regard the 2011 UNCITRAL Model Law contains comprehensive provisions. De la Harpe asserts that the 1994 UNCITRAL Model Law³³ provides the following essential provisions:

- 'Reference in the first instance of disputes to the procuring entity (or approving authority) itself;
- The adherence to strict timeframes;
- The provision of written decisions with reasons;
- The existence of effective and various remedies and corrective measures;
- Cost of efficiency;
- The requirement of notification to all tenderers of the initiation of review procedures and the opportunity to participate;
- The availability of information to the public;
- Confidentiality with regard to legitimate commercial interests, the possible inhibition of fair competition, and matters of public interest;
- The suspension of proceedings during review proceedings;
- The inclusion of minimum information in the record of proceedings; and
- The availability of judicial review in terms of administrative law.'³⁴

It is submitted that although De la Harpe's comments above refer to the 1994 UNCITRAL Model Law, such comments are applicable also to the provisions of the 2011 UNCITRAL Model Law. In terms of Article 22(2) thereof a procuring entity cannot accept the bid of the successful supplier until after the end of a 'standstill' period. A 'standstill' period is defined in this Law as the:

³³ 1994 United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services. United Nations General Assembly Resolution 49/54 of 1995.

³⁴ S P L De la Harpe *Public Procurement Law: A Comparative Analysis* (note 3 above) 158.

Both Hong Kong and Botswana have established independent review bodies. South Africa does not have such a body, save for the Municipal Bids Appeal Tribunal alluded to in chapter five. Such Appeal Tribunals however do not have jurisdiction nationally and provinces may elect to establish such structures. It is submitted that a dedicated review body will obviate some of the problems associated with the formal court process, such as court delays as well as the high costs which are generally associated with formal court proceedings. It is also submitted that such independent bodies will, over time, develop specialist skills in the adjudication of procurement decisions and therefore the idiosyncrasies of procurement-related matters may be more effectively attended to. In the circumstances it is recommended that South Africa may do well to refer to the provisions of the 2011 UNCITRAL Model Law in crafting effective domestic challenge procedures related to public procurement.

It is fair to note that some of the recommendations proposed above have been taken into account by the South African government. In 2012, the National Treasury issued a set of draft PFMA Regulations for public comment.³⁷ Being issued in terms of the PFMA these draft regulations apply only to national and provincial government. Unlike the current PFMA Regulations though, these draft regulations present a more comprehensive set of rules pertaining to supply chain management. For instance the draft regulations provide certain minimum core principles of an appropriate supply chain management system, which are based on the five constitutional procurement principles. It also contains provisions pertaining to each phase of the supply chain management process from demand management to disposal management. Specific noteworthy features of the draft regulations are as follows:

Provisions relating to the composition of bid committee are clearer with little room for ambiguity, for instance draft regulation 20.6.5 provides that a bid specification committee must consist of at least three employees of the institution. The role and function of bid committees are defined in more detail than is currently the case. Example draft regulations 20.8.4 (a-f) places a duty on the bid adjudication committee to scrutinise and verify the processes and decisions taken by the bid specification committee. Draft regulation 20.11.3 places a duty on the bid evaluation committee to verify the identity numbers of the directors, trustees or members of the preferred bidder(s) against the institution's staff establishment. It appears from a reading of this draft regulation that such an exercise must be carried out regardless of the submission made by the bidder in its bidding document. It is noted that the

³⁷ Public Finance Management Act, 1999 Draft Treasury Regulations published in Government Gazette Number 35939 (2012).

draft regulations also attempt to use the bid committees to create a system of checks and balances. For instance, bid specifications must be approved by the accounting officer only upon recommendation by the bid adjudication committee.³⁸ Draft regulation 23 is dedicated to contracts and contract management. This provision in essence entrenches the importance of having legally sound contracts in place, the importance of the monitoring and reporting of contracts being administered as well as the evaluation of supplier performance. The provisions on contract management seem to mirror section 116 of the MFMA which were discussed in chapter four.

Notwithstanding the above improvements, it is submitted that these draft regulations do not address some of the fundamental shortcomings identified in this study. It was submitted in chapter four that a fundamental shortcoming of the legislative framework pertaining to public procurement in South Africa, is the fact is that each procuring entity adopts its own supply chain management system or policy, which in effect may create a different law applicable to each procuring entity. The draft PFMA regulations still require each department to adopt its own supply chain management system. While the draft regulations appear to offer more detail on the content of such a system, it is submitted that it has not changed the position with respect to certain crucial aspects. For instance the current practice of placing undue emphasis on a number of technical formalities has not been changed. No clear guidance is offered to a bid evaluation committee which is tasked with assessing the technical correctness of a bid. Draft regulation 20.7.1(c) requires the bid evaluation committee to scrutinise bids for completeness and technical correctness. Unless the definition of ‘acceptable tender’ is altered to reflect substantial compliance as opposed to compliance in every technical respect, the risk of unscrupulous officials manipulating the contents of bids to disqualify competitors is very real.

While the composition and functions of bid committees have been given greater clarity, the draft regulations do little to incorporate elements of transparency in the proceedings. Unlike the 2011 UNCITRAL Model Law, the draft regulations do not contain general provisions pertaining to communications with bidders or potential bidders during the procurement process, or provisions which overcome some of the shortfalls identified during a tender opening session. Yet these are crucial areas which provide scope for corruption to creep in. Provisions related to contracts and contract management, in the draft regulations, do not

³⁸ Draft Regulation 20.6.4.

provide any mechanism whereby the duties imposed therein may be carried out. In this regard, just as the establishment of bid committees is entrenched, so too should the establishment of a contract administration committee be required.

In many respects, notwithstanding the areas of improvement highlighted above, it appears that these draft regulations have simply codified rules and regulations currently found in a number of different sources, into a single text, without necessarily reviewing provisions which may provide room for corruption. For instance, provisions related to the expansions or variation of contract prices have not been changed much. In terms of draft regulation 23.5.1 it is still within the discretion of the accounting officer to approve expansions by not more than 15% of the original contract value. The lack of any challenge procedures in the draft regulations is also conspicuous.

In the circumstances it is submitted that, while South Africa appears to be taking steps to reform its supply chain management laws, the recommendations proposed herein are worthy of consideration. Furthermore it is recommended that the reforms proposed herein ought to be applicable to all levels of government. Since government seems to implement the same procedure for competitive bidding at all levels, there is no sufficiently cogent reason why different laws should apply to different levels of government. A comprehensive national law, together with effective regulations, which take into account the recommendations proposed herein and which are applicable to all levels of government will provide certainty and uniformity in the manner in which different departments or local government entities implement supply chain management processes.

3.2 The PCCA

A significant challenge identified in the foregoing chapters was the reluctance courts have to admit evidence of alleged corruption in proceedings of review or appeal of a procurement decision. It was also submitted that since the PCCA was not enacted to respond specifically to procurement corruption, its provisions were not designed to adequately take into account the peculiarities of procurement corruption, most notably the challenges faced with respect to gathering evidence of corruption. In this regard it is submitted that the PCCA may come to the assistance of courts in the admission of such evidence. Although this study was not one which related primarily to the issue of evidence, chapter four has demonstrated that in deserving instances strict laws of evidence may be justifiably relaxed. It is therefore recommended that the PCCA be amended to provide for relaxed rules for the admission of

evidence in instances of procurement corruption. It is beyond the scope of this study to recommend the exact manner in which such rules may be relaxed suffice to propose here that where such evidence is brought to light during appeal or review proceedings, the PCCA should prescribe criteria which the court may follow in admitting such evidence.

Apart from provisions related to defences and presumptions the PCCA does not contain any specific provision relating to evidence. However with respect to procurement corruption specifically some salient considerations which a court may take into account in admitting evidence which might otherwise not pass the test for admissibility may be *inter alia* as follows: the nature of the evidence; the relevance of the evidence to the allegations made by any party to the appeal or review proceedings, or the impact that such evidence may have on the integrity of the process under scrutiny. A court tasked with adjudicating the review or appeal of a tender process essentially executes a civil law function, as opposed to a criminal law function. It is therefore recommended that such evidence may be admitted not with the intention of making a finding in terms of an offence of the PCCA, but rather with a view to assessing whether the process under scrutiny was regular and lawful, as well as to refer a particular matter for further investigation by the competent authorities.

Section 22 of the PCCA grants the National Director of Public Prosecutions the authority to institute an investigation relating to any property which he has ‘reason to suspect’ may have been used in the commission of any offence. In such instances, it is submitted that such ‘reason to suspect’ may or may not be based on evidence which at all times meets the strict rules for admissibility. So too, it is recommended that courts ought to be granted the authority to admit evidence of alleged corruption, notwithstanding that such evidence may not meet the strict requirements of the rules of evidence, with the intention to refer a matter for further investigation by the competent authority. A complete rejection or dismissal of such evidence is however inappropriate and does little to combat corruption. The PCCA may be appropriately amended to mandate a court to receive such evidence and thereafter refer such matter for further investigation.

The review of the three foreign jurisdictions has provided valuable lessons on the manner in which the PCCA may be further reformed in order to ease the evidentiary burden on the prosecution in corruption cases. Chapter four has argued that the creation of an offence which criminalises the possession of unexplained wealth, is particularly helpful in the case of procurement corruption. Such provisions were found in Hong Kong and Botswana laws. As

discussed in chapter three the AU Convention on Preventing and Combating Corruption requires member states to have all public officials declare their assets at the time of assumption of office. Such a provision will assist in the detection of illicit wealth. It is therefore recommended that the PCCA may be amended to create an offence of unexplained wealth, as well a provision for the declaration of assets.

Unscrupulous officials and individuals may also attempt to conceal illicit wealth through various transactions. South Africa may do well to introduce provisions in its anti-money laundering laws which require transactions above a certain threshold to be executed through a financial institution. Such provisions were seen in Nigerian law as well. Further the PCCA may create a presumption which deems any transaction above a certain threshold and which was not conducted through a financial institution to have been conducted with the intent to conceal illicitly obtained wealth.

The Nigerian Corrupt Practices Act³⁹ presents a further valuable lesson by providing for a reverse onus clause in offences related to procurement corruption. Due to the difficulty in adducing and presenting evidence of procurement corruption, it is suggested that the prosecution may be legislatively assisted by merely proving the receipt or offer of a gratification, where-after the burden falls upon the accused to prove that such gratification was lawfully received or given. In this regard section 13 of the PCCA may be amended so that the presumption created in section 24 is applicable also to offences in terms of section 13.

Chapter four has revealed that the definition of corruption in terms of the PCCA is not broad enough to encompass all forms of procurement corruption. Unfortunately the definitions of corruption in all three foreign jurisdictions reviewed in chapter six, are largely also the same as the definitions in the PCCA. The legal reform recommended here is that the definition of corruption be broadened to include instances where the giving, receiving or offering of a gratification is absent but the conduct nonetheless has the effect of abusing official power or manipulating the procurement process for self-serving motives. The definition of corruption may be appropriately amended to include instances wherein bidders collude to fix prices, or where officials use their positions to influence a tender process for their benefit. It may be argued that such acts may be criminalised in other areas of the law, such as competition laws or common law offences such as fraud. However the effect of such acts in the public

³⁹ 5 of 2000.

procurement setting may be the same as the offer and acceptance of an undue gratification. In the circumstances it is submitted that in reconsidering the definition of corruption the Legislature ought to consider the effect of an act on the integrity of a public procurement process. Adherence to strict technical elements without due regard to the effect that a particular conduct has on the procurement process is myopic and excludes a range of activities which may have corrupt consequences.

It was also discussed in chapter four that endorsement in the Register for Tender Defaulters is limited to persons convicted in terms of offences in terms of sections 12 or 13 of the PCCA. The current narrow definition of corruption further reduces the efficacy of such endorsements. This may be illustrated by an example: where a person avoids conviction in terms of either section 12 or section 13 of the PCCA, but nonetheless is convicted of an alternate offence such as fraud in relation to public procurement, such person would not necessarily be liable to be endorsed on the Register of Tender Defaulters due to no conviction in terms of the PCCA. The result is that a person who nonetheless committed an act of corruption through fraud, escapes endorsement and procuring entities are in danger of doing further business with such person. The recommendation to broaden the definition of corruption, particularly with respect to procurement corruption is a compelling one.

Chapter four has also revealed shortcomings with respect to the endorsement provisions of the PCCA. In this respect it is recommended that the category of convicted persons liable to be endorsed be widened and not be limited to those convicted in terms of section 12 or 13 of the PCCA. In order to obviate time delay problems from the time that a court orders an endorsement and the time when Treasury actually places the endorsement on the Register for Tender Defaulters, it is recommended that the PCCA be amended to provide a clear time frame from date of court order within which the Treasury must record such endorsement.

It was noted also in chapter four that the discretion afforded to courts to order an endorsement without the provision of guidelines as to how such discretion is to be exercised, is problematic. Unfortunately the anti-corruption laws of the foreign jurisdictions reviewed in chapter six do not seem to offer any significant lessons regarding endorsement of convicted persons. However it is submitted that just as in traditional sentencing procedures the Court in *S v Zinn*⁴⁰ set out the well-known triad of factors to be taken into account before sentence is

⁴⁰ 1969 (2) SA 537, 540.

handed down,⁴¹ so to it is recommended that legislation ought to provide salient factors which a court must take into account in exercising its discretion to order an endorsement. Some salient factors in this respect may *inter alia*, be as follows: the seriousness of the offence; whether the convicted person has other convictions of crimes involving dishonesty; value of the contract and seniority of official concerned if convicted person is an official.⁴²

As discussed in chapter four, the PCCA creates a legislative duty to report corrupt activities. While this legislative duty is to be applauded, as it prevents entities from simply requiring corrupt employees or officials to resign, rather than report such persons to the law enforcement agencies, it is submitted that this duty may be strengthened. Firstly it is recommended that this duty ought not to apply only after the commission of an offence, but also when any reasonable suspicion of corrupt activities in the process of taking place has arisen. Furthermore the PCCA may be amended to mandate all entities to conduct an investigation into any credible allegation of corruption. While not expecting procuring entities to investigate claims which are clearly frivolous or baseless, taking into account the nature of procurement corruption, procuring entities as well as private entities ought to accept allegations which might not otherwise meet the higher standards of creating a reasonable

⁴¹ The Court in *S v Zinn* (ibid) held that the triad of factors are the crime, the offender and the interests of the society.

⁴² The Washington State Legislature has set out the following aggravating and mitigating factors which a debarment official may consider in determining to debar or the length of the debarment period: (1) the actual or potential harm or impact that resulted or may result from the wrongdoing; (2) the frequency of incidents and/or duration of the wrongdoing;(3)whether there is a pattern or prior history of wrongdoing;(4)whether the contractor or affiliate has been excluded or disqualified by an agency of the federal government or has been allowed to participate in state or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this rule;(5) whether the contractor or affiliate has entered into an administrative agreement with a federal agency or a state or local government that is not government-wide but is based on conduct similar to one or more of the causes for debarment specified in this rule;(6)whether the contractor or affiliate has accepted responsibility for the wrongdoing and recognises the seriousness of misconduct that led to the cause for debarment;(7)whether the contractor or affiliate has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution;(8) whether the contractor or affiliate has cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the reviewing official or debarment official may consider when the cooperation began and whether the contractor or affiliate disclosed all known pertinent information;(9)the kind of positions held by the individuals involved in the wrongdoing;(10)whether the contractor or affiliate took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence;(11)whether the contractor or affiliate brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner;(12)whether the contractor or affiliate has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the reviewing official or debarment official;(13)whether the contractor or affiliate had effective standards of conduct and internal control systems in place at the time of the wrongdoing occurred;(14)whether the contractor or affiliate has taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the cause for debarment;(15)other factors appropriate to the circumstances of a particular case. These factors are provided for in Chapter 200-3015 of the Washington Administrative Code (2013)

suspicion. Once again the Legislature may provide certain guidelines to assist an entity in deciding whether a particular allegation is frivolous or baseless. Such guidelines may include, *inter alia*, factors such as: whether any motive exists for the complainant to unjustifiably raise any allegation against another; independence of the person making any allegation; other corroborative factors, if any; the position held by the person making the allegation and the harm which may be caused if the allegation is not further investigated. It is also recommended that the duty to report should not be confined to senior personnel. With respect to procurement corruption, and specifically within the public sector, this duty ought to be extended to all staff of procurement units and members of all bid committees.

The review of foreign laws in chapter six has further highlighted that provisions relating to the protection of informers may be useful in anti-corruption legislation. This will serve to encourage the reporting of complaints involving corruption. It is suggested that the PCCA may be amended to offer protection against the disclosure of names and addresses of *bona fide* informers. While South Africa has the Witness Protection Act⁴³ it is submitted that the protection afforded in terms of this statute is confined to persons who are deemed to be witnesses and not necessarily to informers. Due to the nature of corruption not all informers may fall within the definition of ‘witness’ as provided for in the Witness Protection Act.⁴⁴ Such persons may therefore not be entitled to the protections afforded in terms of this legislation. It is furthermore submitted that the PCCA is the ideal legislation to afford statutory protection of informers in respect of corruption related matters.

South Africa may also follow the example in Hong Kong and empower a court to order the prohibition of further employment of convicted persons for a stipulated period of time. It is further suggested though, that the PCCA contain guidelines on how such discretion is to be employed by the courts. For instance, the ordering of such a prohibition may be linked to the severity of an offence, whether the convicted person is a repeat offender, the likelihood or ability of the convicted person repeating such or similar offence, the position held by the convicted person at his or her place of employment, the personal circumstances of the convicted person, or whether or not such prohibition should apply only to the convicted person’s current employer or other institutions of employment as well (bearing in mind that increasing the number of un-employable persons in a country may lead to further corruption).

⁴³ 112 of 1998.

⁴⁴ Section 1 of the Witness Protection Act defines witness as ‘any person who is or may be required to give evidence, or who has given evidence in any proceedings.’

All three foreign jurisdictions reviewed in chapter six also have dedicated anti-corruption agencies. It was beyond the scope of this study to evaluate the efficacy of such agencies, suffice to mention here that perhaps this is also an area worthy of further investigation. As mentioned earlier the ICAC of Hong Kong has been hailed as model agency around the world, and is credited with much of the success in the reduction of corruption in Hong Kong. Notwithstanding this recognition, this alone does not provide definitive evidence that dedicated anti-corruption agencies are the single most critical element in any anti-corruption strategy. For instance although Nigeria has an anti-corruption agency, the country still suffers from high levels of corruption. However as discussed earlier in the study, the Constitutional Court has held that South Africa has an international obligation to establish an independent anti-corruption agency.⁴⁵ This constitutional pronouncement as well as the fact that Hong Kong’s ICAC seems to provide a model example of a dedicated anti-corruption agency which is effective, suggest that further study is necessary on the establishment of an effective anti-corruption agency in South Africa.

A contrast found in the legislative framework evaluated is that while South Africa must be praised for affording procurement principles constitutional status, it does not afford the same recognition to the fight against corruption specifically. As was seen in chapter six there is evidence in the constitutional texts of both Hong Kong and Nigeria that the will to fight corruption is constitutionally recognised. Perhaps efforts to combat corruption in South Africa will be further strengthened if anti-corruption efforts are made a constitutional obligation of government. It is submitted that taking into account the South African contextual background outlined in chapter two, where political expediency tends to stand in the way of decisive legal action against corruption, constitutional recognition of anti-corruption duties may encourage a stronger governmental will to combat corruption.

4 CONCLUSION

This study was prompted by the large numbers of irregular and probably corrupt procurement decisions in South Africa. The research problem identified was that the legislative framework applicable to public procurement as well as the provisions of the PCCA are not sufficiently conducive to reducing corruption within this sector. In order for the study to address this problem and recommend areas for legal reform it was necessary for the study to identify key

⁴⁵ See *Hugh Glenister v President of the Republic of South Africa and others* [2011] ZACC 6 para 183 discussed in chapter three.

procurement is a sector susceptible to corruption, the study has revealed that it is also an area wherein significant reform may be implemented in order to reduce opportunities for corruption. The constitutional entrenchment of a governmental duty to combat corruption is also justified. The recommendations proposed in this study are intended to create a legal framework of public tendering which is more resistant to corrupt practices thereby assisting government in combating procurement corruption and fulfilling its constitutional mandate of pursuing the public welfare.

ACRONYMS

AU	African Union
COSATU	Congress of South African Trade Unions
HKSAR	Hong Kong Special Administrative Region
ICAC	International Commission Against Corruption (Hong Kong)
MBD	Municipal Bid Document
MFMA	Municipal Finance Management Act
NCCS	National Crime Combatting Strategy
NCPS	National Crime Prevention Strategy
OECD	Organisation for Economic Cooperation and Development
PAJA	Promotion of Administrative Justice Act
PCCA	Prevention and Combating of Corrupt Activities Act 12 of 2004
PFMA	Public Finance Management Act
POBO	Prevention of Bribery Ordinance (Hong Kong)
PPA	Public Procurement Act (Nigeria)
PPADA	Public Procurement and Asset Disposal Act (Botswana)
PPPFA	Preferential Procurement Policy Framework Act
SANRAL	South African National Roads Agency Limited
SBD	Standard Bidding Document
SCM	Supply Chain Management
SPR	Stores and Procurement Regulations (Hong Kong)
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNODC	United Nations Office on Drugs and Crime
WTO GPA	World Trade Organisation Government Procurement Agreement

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