Enhancing public energy procurement through constitutionalism: A comparative study of South Africa and Zimbabwe

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Philippians 4:13, "I can do all things through Christ who strengthens me."

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ABSTRACT

This paper compares the manner in which the Constitution and administrative law influences energy procurement in South Africa and Zimbabwe. South African courts have been called upon to test the validity of government procurement on several occasions, and most recently the Western Cape High Court invalidated the South African-Russian nuclear procurement agreement based on non-compliance with administrative law tenets and the Constitution. On the other hand, we have not witnessed judicial intervention in Zimbabwe pertaining to the Gwanda solar energy procurement project. This dissertation explored how the South African experience may enhance future developments in respect of adherence to constitutional and administrative law in government procurement projects in Zimbabwe, considering the challenges encountered on the Gwanda solar energy project. The research has identified the different challenges affecting procurement in Zimbabwe and provides recommendations to improve public energy procurement based on the South African experience. Overall, the constitutional entrenchment of government procurement has the potential to ensure that public energy procurement is conducted in a manner that is fair, equitable, transparent, competitive and cost-effective. If supported by the appropriate legislative framework and independent state institutions.

Keywords: public energy procurement, constitutionalisation, administrative law.

LIST OF ABBREVIATIONS

AUDA	Acta Universitatis Danubius Administratio
EIA	Environmental impact assessments
EPPPL	European Procurement & Public Private Partnership Law Review
GDP	Gross domestic product
IEP/IRP	Integrated energy plan /Integrated resource plan
IGA	Intergovernmental agreement
IJEFMS	International Journal of Economics, Finance and Management Sciences
JGR	Journal of Governance and Regulation
JGRCS	Journal of Global Research in Computer Science
JLSD	Journal of Law, Society and Development
JPADA	Journal of Public Administration and Development Alternatives
JPP	Journal of Public Procurement
JTSCM	Journal of Transport and Supply Chain Management
Law democr. Dev.	Law, democracy and development
NERSA	National Energy Regulator of South Africa
PAR	Public Administration Research
PWMP	Public Works Management & Policy
PER/PERJ	Potchefstroomse Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
PMF	Public and municipal finance
PRAZ	Procurement Regulatory Authority of Zimbabwe
PPLR	Public Procurement Law Review
RJBM	Research Journal of Business and Management
SI	Statutory instrument
SPB	State Procurement Board
ZPC	Zimbabwe Power Company

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CHAPTER 1 – INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

This study seeks to address the question of the impact of constitutional entrenchment and administrative law on the South African public procurement regime within the framework set out in section 217(1) of the Constitution, and how this can inform the constitutionalisation of procurement in Zimbabwe. As a whole, public procurement has a direct and indirect effect on economic development through investment in infrastructure.[1] South Africa's public procurement is estimated to be 21.77 % of the nation's gross domestic product (GDP),[2] while in Zimbabwe, public procurement accounts for 20%–25% of Zimbabwe's annual budget.[3] The magnitude of public procurement within the economies of the two countries serves to highlight the importance of research on the regulation of procurement activities in key areas such as the energy sector. The constitutional objectives for public procurement in South Africa and Zimbabwe are to ensure compliance to establish a fair, transparent, competitive, cost-effective (as well as 'equitable' in respect of South Africa and 'honest' in respect of Zimbabwe) procurement system.

1.2 Scope of the study

In both jurisdictions, public procurement has important economic and political implications hence ensuring that the process is economical and efficient is crucial. The South African judiciary has on several occasions been called upon to adjudicate on procurement matters based on administrative and constitutional noncompliance. Unfortunately, this is not the case for most developing countries and Zimbabwe as a developing country there is need to examine the impact of the inclusion of procurement in the national constitution.

In South Africa, the national importance of procurement was recognised with the advent of the *Constitution of the Republic of South Africa*, 1996. Although Zimbabwe in

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1 De la Harpe 2015 *PER/PELJ* 1572.
2 Quinot and Arrowsmith *Public Procurement Regulation in Africa* 180.
3 Hassan 2017 http://blogs.worldbank.org.

2013 enacted a new constitution which enshrines procurement as a constitutional principle and has taken steps to reform its public procurement systems, there is still secrecy, inefficiency, corruption, and the undercutting of costs leading to a waste of vast amounts of resources. Corruption and failure to comply with administrative law requirements in public procurement has been encouraged by secret, unaccountable legislation and traditional corrupt practices in public procurement, thus often involving public officials under the control of powerful politicians and businessmen who invite only preferred firms, favour other firms at the short-listing level, design tender documents for particular firms and release of confidential documents.[4]

1.3 Rationale for the study

Based on the South African experience, this study analysed the factors that can affect constitutionalism and enforcement in procurement with focus on public energy procurement in Zimbabwe. The findings of this research project were intended to be useful to the Zimbabwean public energy procurement sector in improving the procurement of goods and services, the introduction and incorporation of procurement practices. The study will also form a basis on which academic researchers can do further studies on compliance in public energy procurement in Zimbabwe.

1.4 Problem statement

In 2013, the South African government embarked on a programme to procure 9600 megawatts of nuclear energy for electricity use.[5] To that end it entered negotiations with three countries, the United States of America, South Korea and the Russian Federation. This resulted in three intergovernmental agreements between South Africa and the three countries. The cost of the Russian nuclear procurement programme was an estimated one trillion, which translates to huge financial and economic implications for the country.[6] The project represented the biggest proposed infrastructure investment programme by the government until it was invalidated for non-compliance

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4 African Development Bank 2014 *GPP* 11.

5 In the 2011 Draft Integrated Electricity Resource Plan for South Africa – 2010 to 2030 (*IRP)*, nuclear prospects for 9600 MWe were revived, supplying 23% of the electricity.

6 *Earthlife Africa Johannesburg and Another v The Minister of Energy and* others [2017] ZAWCHC 50; 2017 (5) SA 227 (WCC) para 44.

with constitutional and legislative law requirements by the Western Cape High Court in *Earthlife Johannesburg and Another v Minister of Energy and Others*.[7]

The intergovernmental agreements were shrouded in secrecy, especially the supposed energy procurement agreement that formed the framework for cooperation in the field of nuclear energy procurement between Russia and South Africa. This was the major reason for the court challenge as its contents were eclipsed from the general populace and its implementation was being fast-tracked.[8] Reports came about suggesting that a Russian entity, Rosatom, had leapfrogged all the other countries and corporations bidding for the contract and bypassed the constitutional requirement of a proper tender process.[9] The Russian procurement agreement forms the basis of the South African discussion in this study.

Section 217 of the South African Constitution[10] effectively constitutionalises public procurement in South Africa. Section 217(2) provides:

> 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.[11]

Section 217(3) further provides that national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. Indeed, the legislative framework contemplated in section 217(3) has been enacted and regulates government procurement on the basis of the five aforesaid constitutional objectives of government procurement, most notably the *Public Finance Management Act* 1 of 1999 and the *Local Government: Municipal Finance Management Act* 56 of 2003.[12] Where procurement takes the form of intergovernmental international agreements, as was the case with the nuclear procurement attempt, section 213(1)–(2) of the Constitution deals with the procedure for entering into international agreements.

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7 [2017] ZAWCHC 50; 2017 (5) SA 227 (WCC).
8 Fabricus 2014 https://oldsite.issafrica.org.
9 Fabricus 2014 https://oldsite.issafrica.org.
10 Section 217 of the *Constitution of the Republic of South Africa* 1996.
11 The discussion in this study does not explore procurement at the local level of government as it focuses on public energy procurement at the national level.
12 Molver and Noeth *The Law Reviews* 212.

The major points of contention before the court in *Earthlife Johannesburg and Another v Minister of Energy*[13] were (a) whether the South African executive circumvented its obligations under section 231 of the Constitution in its failure to or delay in tabling the agreements before Parliament; (b) whether the South African government violated the Constitution in failing to follow a procurement process that is fair, equitable, transparent, competitive and cost-effective as required in section 217(1) of the Constitution; and (c) the need for public and stakeholder consultation that must be conducted by the National Energy Regulator of South Africa[14] before it concurs with the Minster of Energy's proposal for expansion of generation capacity.

The court held that, in terms of section 231(2) of the Constitution, the international agreements had to be tabled in Parliament. It found that by delaying and instead tabling the agreement post facto under section 231(3), the executive branch of government had tried to circumvent parliamentary oversight and approval.[15] The court also considered that the decision of NERSA to agree with the proposed 2013 determination of the Minister without any public participation procedure, made its decision procedurally arbitrary and in breach of the requirements of section 10(1)(d) of the *National Energy Regulator Act* 40 of 2004 read in accordance with section 4 of the *Promotion of Administrative Justice Act* 3 of 2000.[16] The decision by NERSA to agree with the Minister's decision amounted to administrative action.[17] Although the Western Cape High Court found it premature to make a pronouncement with regard to section 217 non-compliance, it nevertheless made clear that should the question arise in future, it has the jurisdiction to entertain the matter.[18] Even though the court did not decide on section 217 non-compliance, it is necessary for the purposes of this research to consider the nuclear procurement's non-compliance with section 217. Constitutional objectives of procurement advance the public's interest, who indirectly fund public procurement. This is accomplished by upholding the values of accountability, honesty

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13 Hereafter *Earthlife*.
14 Hereafter NERSA.
15 [2017] ZAWCHC 50 para 135.
16 Hereafter *PAJA*.
17 [2017] ZAWCHC 50 para 46–47.
18 [2017] ZAWCHC 50 para 120.

and openness, which provide the essential foundations for the rights of interest groups by ensuring equitable, fair, open, efficient and cost-effective procurement.[19]

In Zimbabwe government procurement also enjoys constitutional protection under section 315.[20] Similar to the South African Constitution, section 315(1) of the Zimbabwean Constitution requires Parliament to adopt legislation that prescribes procedures for the procurement of goods and services by the State and all government institutions and agencies at all levels so that procurement is carried out in a transparent, fair, honest, cost-effective and competitive manner. Since 1999, procurement in Zimbabwe had been regulated by the *Procurement Act* 2 of 1999, which established the State Procurement Board[21] to implement government procurement. The system was a centralized system and notorious for its bottle necks and delays. Recently procurement legislation in the country has been overhauled through the adoption of the *Public Procurement and Disposal of Public Assets Act* 5 of 2017, which gives impetus to constitutional principles of section 315(1) of the Constitution.

In 2013 the Zimbabwe Power Company[22] entered into an engineering, procurement and construction contract with Intratrek Zimbabwe Private Limited[23] for the construction of a 100-Megawatt solar energy project in Gwanda. The project, with a total estimated cost of $183 (one hundred eighty three) million US dollars, was awarded in circumstances that have been described as irregular,[24] and as such do not pass the test of the lawful exercise of administrative decision making and constitutional objectives on procurement. Intratrek had come third in the bid process but was ultimately awarded the tender. The ZPC paid a sum of $7 (seven) million US dollars without the contractor having secured a demand bank guarantee as required by the law, contract and standard procedure in construction works.[25] In spite of the apparent irregularities, no steps have been taken to bring the tender before the courts in respect of compliance

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19 De La Harpe *Public Procurement Law. A comparative analysis* 92.
20 Section 315(1) of the *Constitution of Zimbabwe Amendment* (No. 20) Act, 2013.
21 Hereafter SPB.
22 Hereafter ZPC a subsidiary of the Zimbabwe Electricity Supply Authority Holdings, a government-controlled entity.
23 Hereafter Intratrek.
24 Hansard NA vol 44 No63 (31 May 2018) 17.
25 Hansard NA vol 44 No63 (31 May 2018) 18.

with constitutional and administrative law tenets. It has only taken parliamentary investigations in its oversight role to bring attention to the tender award in the form of hearings, which falls short of the power to invalidate the tender and can only go as far as making recommendations to the minister responsible for energy.[26]

The study is motivated by the need to avoid the abuse of public resources in energy procurement, as it involves discretionary decision making on behalf of government. The study explores the importance of the constitutionalism and administrative law in the context of public energy procurement regulation. The disregard of applicable procurement procedures are potential risks experienced in procurement, which may result into corruption, lack of competitiveness and inflated costs, translating to huge losses and undermining economic performance and trade development in any country.[27]

1.5 Research question

The public procurement process is a complicated problem due to the various priorities and goals it aims to accomplish at the same time combined with the numerous regulatory policies and bodies it must adhere to. The key goals of public procurement include ensuring value for money for taxpayers, achieving quality and performance, ensuring fair competition among suppliers, accountability, and transparency. The paper looks at how constitutionalisation ensures the fulfilment of key procurement objectives with focus on energy procurement. Despite its significance, limited scientific research has been undertaken in Zimbabwe to analyse the factors that affect the performance of public institutions in procurement with a focus on energy supply. As such, South Africa's comparative analysis with Zimbabwe is significant due to proximity, similarity in procurement-related constitutional provisions, and South African scholars extensive scientific work on public procurement. In terms of the South African constitution public procurement principles are transparency, integrity, equality, competitiveness, and

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26 As far as Zimbabwean law is concerned, the High Court has the power to review all administrative tribunals ' proceedings. In terms of section 26 of the *High Court of Zimbabwe Act* 29 of 1981, the power to review the proceedings of all administrative tribunals is recognized under common law and in statutory form. The reasons for the review of the proceedings are set out in section 27.

27 Bildfell 2017 *Corruption and Public Procurement* 50.

fairness.[28] This set of principles are not exhaustive but are the foundation upon which South African procurement is anchored. The five constitutional principles have a universal applicability, as they are practised internationally.

In both jurisdictions the failure to comply with constitutional precepts and applicable legislative requirements in the field of public procurement undermines the values on which the constitutional framework should be based, and failure to resolve the challenges results in the failure of the government to fulfil its mandate. Due to the considerable judicial attention that the principles of constitutional procurement have attracted in South Africa, a comparative study with Zimbabwe could potentially assist in the implementation of the constitutional precepts and the legislative realignment process currently under way in Zimbabwe in the light of the 2013 Constitution which enshrines procurement as a constitutional precept. Discussing the judicial approach to interpreting the principles of constitutional procurement and public tendering in South Africa can theoretically inform future judicial adjudication of case law relevant to procurement in Zimbabwe.

Few studies have been conducted in emerging economies, particularly on the public procurement process and its efficiency in delivering public services. Therefore, this research aims to identify the obstacles in public procurement that detract from achieving public sector performance and service delivery in Zimbabwe. This study will contribute to the body of knowledge by identifying areas through which public sector procurement can be improved to enhance service delivery in Zimbabwe.[29]

The dissertation seeks to address the entrenchment of constitutional procurement objectives and administrative law in government procurement and how it enhances the procurement of goods and services, with a focus on energy procurement in South Africa and Zimbabwe. South African courts have been called upon to test the validity of government procurement on several occasions, and most recently the Western Cape High Court, which invalidated the South African-Russian nuclear procurement

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28 Mugadza *A legal analysis* 11.
29 Dzuke Public *Procurement: Panacea or Fallacy* 16.

agreement based on non-compliance with administrative law tenets and the Constitution.

On the other hand, we have not seen much judicial interventions in Zimbabwe pertaining to government procurement. This dissertation therefore explores how the South African experience may enhance future developments in respect of constitutional and administrative law adherence of government procurement projects in Zimbabwe, considering the challenges that were encountered on the Gwanda solar energy project. Ultimately, the study explores how greater accountability in energy procurement can be achieved within the existing constitutional and administrative law framework, especially in Zimbabwe where the concept was only recently enshrined in the constitution.[30] A comparative study is particularly useful in order to draw lessons for Zimbabwe in the observance of constitutional objectives and the impact of administrative law as an aid in government energy procurement.

It took a court challenge to invalidate the South African nuclear procurement project and in Zimbabwe it has taken renewed legislative oversight to bring scrutiny and attention to the proposed project. The question arises why there were different approaches to addressing procurement challenges, as both Constitutions have similar constitutional procurement provisions and administrative law mechanisms aimed at addressing irregular procurement. This research evaluates the challenges in Zimbabwe that led to the fact that a judicial intervention has not occurred. The study will examine how the decision in *Earthlife* potentially strengthens judicial intervention and the application of administrative law, and how this case study can inform jurisdictions like Zimbabwe.

It is worth mentioning that constitutional principles on procurement also find prominence in international instruments such as the World Trade Organization Government Procurement Agreement. However, the international aspect is not part of

[30] In 2013, Zimbabwe adopted a new constitution and unlike the old constitution the new Constitution of Zimbabwe has specific provisions applicable to procurement and outlines objectives which ought to apply in public procurement.

the discussion; the discussion only to reinforce principles enshrined in the domestic laws of the two countries.

1.6 Objectives of the study

1. To examine the pre-eminence of constitutional standards for public procurement and the legislative system regulating public procurement in South Africa and Zimbabwe.

2. To evaluate the validity of the procurement actions undertaken in the context of the Gwanda solar energy project.

3. To evaluate the impact of the judgement invalidating the South African nuclear procurement attempt.

4. To determine measures that can be used to ensure that public energy procurement is undertaken in accordance with constitutional objectives in Zimbabwe as informed by the South African experience.

5. To propose and evaluate additional measures that can be employed in ensuring procurement objectives are fulfilled.

1.7 Research methodology

A desktop study was conducted and applicable textbooks, law journals, legislation, case law, internet sources, government and parliamentary reports were consulted. Furthermore, a legal comparative study of the procurement framework of South Africa and Zimbabwe with a focus on energy procurement was undertaken.

1.8 Limitations of the research study

The limitation of the study is that comparison, especially of legal institutions, rules, procedures, and principles, will seldom produce valid knowledge if undertaken in abstract. This does not mean that abstract comparison, be it by way of finding similarities or by listing contrasts and differences, is impossible. In fact, such a procedure will probably form part of every comparative exercise. It is however to be

doubted that such an approach alone, without the aid of other methods, would produce results of much scientific value. The essence of a particular comparative goal and the content to be compared will, however, influence methodological decision taking. Material comparability can be determined by the similarity of the legal problems, processes and solutions in the comparative structures, or by the complete complexity of which analysis may be deemed valuable precisely because of the disparity. In this instance the proximity of South Africa and Zimbabwe and similarity of Constitutions of the two respective jurisdictions is a key factor for the comparison. Much in the legal comparative process depends on the reason for which it is being conducted. One's comparative job objectives can differ widely.

The primary aim of any legislative comparison exercise should be to establish new awareness or understanding of the law. Nonetheless, this basic aim does not suffice to decide the correct method and approach for a particular comparative project. There may be several other more common goals to follow. The broader the object of comparison is, the more paradigmatic and focus is placed on achieving fresh and checked scientific findings, the greater is the material's sensible comparability. Nonetheless, the degree and extent of comparability are most likely co-determined by the existence of the selected comparative standard. Nevertheless, the degree and extent of comparability are more likely to be co-determined by the extent of the model or structure selected. This is inherent to remember that given the comparability of the two jurisdictions, there is no coherence of process to be found in the field of legal analysis, even less so in the area of constitutional law. Some of the short-term findings of the study are that the constitution is a document that serves as the basic norm for the legal system concerned and is often confronted with broad formulations and imprecise notions. However, in many respects, the Constitution of Zimbabwe is similar to the Constitution of South Africa. The difference lies in the application and interpretation of the Constitution by the judiciary in respect of both jurisdictions. South Africa is better equipped with stronger and more independent state institutions than Zimbabwe, and this has a far-reaching impact on procurement as a whole. The South African judiciary has also been proactive and progressive in interpreting the Constitution. In the context of South Africa and Zimbabwe, it should therefore not be a

matter of concern to find that values are often fundamental to the operation and application of constitutional law.

1.9 Framework

Chapter 1 provides the contextual background of the study and explains the research problem and research question. It outlines the constitutional imperatives of South Africa and Zimbabwe in respect of public procurement. This is because the South African Constitution entrenches procurement principles and Zimbabwe in 2013 adopted a Constitution with specific principles applicable to procurement. This chapter also outlines the study and four key research questions. Then also describes the research methodology employed. The research adopts a comparative approach of the two energy procurement projects identified from the applicable jurisdictions.

The aim of Chapter 2 is to identify and discuss the challenges encountered in the award of the tender for the Gwanda solar energy procurement project and its stalled implementation. The chapter provides a discussion of the Zimbabwean constitutional provision on procurement, the administrative law framework and other applicable legislation. It is descriptive and narrative in nature as it outlines the project and the challenges encountered at length. The assessment is informed by a report produced by the Parliamentary Portfolio Committee on Mines and Energy in respect of the energy project.

The third chapter provides an assessment of the Western Cape High Court's application of administrative law and its implications for energy procurement in South Africa. Constitutional foundational principles are discussed and analysed with the facts of the case. Relevant legislation in support of the constitutional principles are briefly outlined. The findings of the court are accessed, and the implications are considered.

The fourth chapter juxtaposes lessons from the South African experience and their applicability and relevance to the Zimbabwean scenario. It restates the importance of constitutional procurement objectives and administrative law based on the findings of the dissertation and its impact on public energy procurement. The two jurisdictions are contrasted with a view to identifying lessons applicable to Zimbabwe.

The fifth and final chapter provides recommendations and conclusions based on the research findings of the dissertation. It aims to provide insights into the South Africa experience how it can potentially strengthen constitutionalism and administrative law application in Zimbabwean government energy procurement.

CHAPTER 2: CASE STUDY DISCUSSION OF THE ZIMBABWE GWANDA SOLAR ENERGY PROJECT

2.1 Introduction

The study of the Gwanda solar energy public procurement project is descriptive in nature, as it examines a case study procurement scenario. It is also exploratory as it aims to identify the challenges encountered in respect of the tender award of the project. This chapter discusses the Zimbabwean solar energy project, awarded to Intratrek through ZPC a subsidiary of the Zimbabwe Electricity Supply Authority Holdings.[31] This project is examined in the context of the Zimbabwean public procurement and administrative law, with specific reference to the role of government in the procurement of the solar energy project and consequent controversies. The discussion of the solar energy project is informed by the Parliamentary Portfolio Committee on Mines and Energy's report on the state of the project. The paper aims to highlight several problem areas in the Zimbabwean public energy procurement regime. The findings of the Committee are assessed, considering legislation governing procurement. The chapter also considers the possible reasons why awarding Intratrek the contract has not culminated in a court challenge despite questions being raised over the award and qualification of Intratrek.

The starting point is the recent constitutionalisation of procurement in Zimbabwe, which envisions the principles to apply to all procurement initiatives. These principles are transparency, competitiveness, cost-effectiveness, fairness and honesty. In this regard legislation governing procurement must be in line with the provisions of section 315(1) of the Constitution. In advancement of this constitutional provision the legislature has undertaken steps aimed at enacting legislation that is aligned with the constitutional public procurement imperative. Parliament enacted the *Public Procurement and Disposal of Public Assets Act* 5 of 2017, which came into effect on the 1st of January 2018 and the *Public Procurement and Disposal of Public Assets Act Regulations Statutory Instrument* 5 of 2018. Prior to the enactment of the new procurement

[31] Hereafter ZESA.

legislation, the main legal texts for public procurement were the *Procurement Act* 2 of 1999, *Procurement Regulations* of 2002, *Procurement Regulations (Amendment*) 2003 No 2 and the *Urban Councils Act* 22 of 2002.[32] As of 2013, procurement is anchored in section 315 *of the Constitution of Zimbabwe (Amendment) Act* 20 of 2013.

Several changes have arisen with the enactment of a new procurement regime, which is aligned with the Constitution. One of the key changes in the current procurement legislation is that, unlike the previous Act which centralised procurement functions with the SPB, the new Act decentralises procurement to individual government departments and state entities. The successor to the SPB that is the Procurement Regulatory Authority of Zimbabwe[33] is now responsible for overseeing and regulating procurement activities, so it has now assumed an oversight role and is not an active participant in procurement as was the case with the SPB.[34] The discussion to follow assesses the Gwanda solar energy project and the shortcomings that surrounded the tender award and implementation of the project. Constitutional principles and their applicability to the project are considered.

The discussion will also consider the steps taken to interrogate the manner and procedure in which the tender was awarded to Intratrek. Scholarly commentary on procurement in Zimbabwe is limited. The discussion is informed by media sources and the Committee report. The project has attracted much attention, and the situation is worsened by the media reports that provide conflicting statements regarding the project commencement. Media reports have raised allegations of irregularities in the manner in which the tender was awarded, including allegations of bribery and influence peddling in negotiation of the bid.[35] These allegations have been substantiated by the

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32 Chigudu 2014 *JGR* 24.

33 Hereafter PRAZ.

34 According to the now repealed *Procurement Act* 2 of 1999, the SPB rendered procurement on behalf of procurement bodies. Nonetheless, if the cost of building works is below a given threshold, public entities are now responsible for their own procurement under the new procurement law.

35 In his testimony before the Committee Intratrek's managing director acknowledged that he approached high-profile people, including the Energy Minister at the time, the President's office, and the Cabinet and State Procurement Board to seek their help in landing the contract. According to the report of the Committee;

> This means that the project has been full of irregularities in the tendering process; negotiation of bids submitted; vetting of bidders and Intratrek's position and profile.

investigations conducted and articulated in the Parliamentary Portfolio Committee on Mines and Energy report.

2.2 Gwanda solar energy project background

The solar project was estimated to cost around USD183 million, with a capacity to generate 100 MW. There was a call for bids in 2013, which was initially awarded to China Jiangxi Corporation. Among the pool of initial bidders was Intratrek, which participated and lost. The SPB, which was at the time responsible for all public procurement initiatives in the country, was regulated by the now repealed *Procurement Act* 2 of 1999.[36] The government, through the procuring entity and with the support of the SPB, was of the view that procedures and provisions of the *Procurement Act* 2 of 1999 were not complied with during the award of the tender to China Jiangxi. One such non-compliance noted was that before the conclusion of the selection, the ZPC's[37] accounting officer recommended a joint award of the tender to China Jiangxi and Intratrek. This recommendation was in contravention of section 31(1)(n) of the *Procurement Act* 2 of 1999, which prohibited the negotiation of submitted bids.[38] Further to that, investigations by the Committee also revealed that the former executive chairman of the SPB was complicit by allowing negotiations on submitted bids to take place.[39] Minutes availed to the Committee by officials from PRAZ on board resolutions of the SPB highlighted attempts to frustrate and push out the original winner of the bid, China Jiangxi.[40]

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[36] The *Procurement Act* 2 of 1999 has since been replaced by the *Public Procurement and Disposal of Public Assets Act* 5 of 2017. Section 5 of the repealed Act established the functions of the SPB (a) to conduct procurement on behalf of procurement entities where procurement is of a class prescribed in procurement regulations; and (b) to supervise procurement procedures conducted by procurement entities to ensure that this Act is properly complied with.

[37] ZPC was the procuring entity on behalf of its holding company the ZESA.

[38] Section 31(1)(n) of the *Procurement Act* 2 of 1999 dictates that no negotiations shall take place between the procuring entity and a supplier with respect to a tender submitted by the supplier.

[39] Hansard NA vol 44 No63 (31 May 2018) 13.

[40] The functions of the SPB were outlined in section 5 of the *Procurement Act* 2 of 1999 as;

> (1) Subject to this Act, the functions of the SPB are to: (a) conduct procurement on behalf of procurement entities where procurement is of the class prescribed in the procurement regulations; and (b) supervising procurement proceedings by procurement entities to ensure adequate compliance with this Act; and (c) launching inquiries under section 46 and taking action under that section under section 47 And d) perform any other role conferred or imposed by or under this Act or any other law on the State Procurement Board.

As a result, the award was withdrawn and there was another invitation for bids, and the bid was subsequently awarded to Intratrek. The withdrawal of the bid was at the instigation of a Mr Chivayo, an Intratrek director who admitted to the Committee that he approached high ranking government officials persuading them to have the award nullified.[41] Due to his lobbying efforts, government withdrew the tender. However, it is of concern that Mr Chivayo approached government officials when procedure and the law required him to have approached the courts to get redress if he was of the view that there were grounds to have the tender revoked.[42] He instead approached government officials, yet the appropriate forum would have been the Administrative Court.

Approaching government officials raises suspicions of corruption, bribery, bias perception and lack of public confidence in the procurement system. As a result of Mr Chivayo's lobbying campaign, the tender that had been awarded to another competitor was withdrawn and awarded to Intratrek. Considering the negotiations and lobbying, it is common cause that the procurement regulatory framework failed to safeguard against inappropriate conduct within the energy procurement sector.

Projects of national significance as dictated by law require participants to provide performance bonds before government commits public finance. Intratrek was required by law to secure a performance bond. However, the Parliamentary Committee on Mines and Energy noted that malpractice was apparent, not only before the tender was awarded, but also after in that a payment was made to Intratrek without the company providing a performance bond.[43] The payment of a performance bond is international

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41 In terms of section 28 of the new procurement Act bidders are permitted to participate in procurement without regard to nationality. However, in the evaluation of bids a procuring entity may give preference to Zimbabwean bides provided that the preference is clearly stated in the bidding documents.

42 Hansard NA vol 44 No63 (31 May 2018) 13.

43 In terms of Section 27(1)–(2) of the *Procurement Regulation or Statutory Instrument 171* of 2002 when security has to be provided by successful tenderers;

> (1) It shall be in the form of a guarantee by a bank or approved negotiable securities or otherwise in the form of a cash deposit with the procuring entity. (2) Any security furnished in terms of the subsection (1) shall represent ten per centum of the value of the contract unless otherwise decided by the Board.

The Statutory instrument cited above was in effect at the time when the tender was awarded to Intratrek it has now been replaced by the *Public Procurement and Disposal of Public Assets (General) Regulations Statutory Instrument* 5 of 2018.

best practice in construction projects and a requirement of section 27(1)–(2) of the now repealed *Procurement Regulations* 171 of 2002 which were applicable at the time the contract was awarded.[44] It is glaring to note that such malpractices were overlooked in the project, exposing the government to the risk of being unable to recover its funds in the event of non-performance by the contractor, as appears to be the case. The Committee conducted oral evidence sessions with several persons of interest, among them former Ministers and several employees from the power utility.[45] As public energy procurement involves decision making by government functionaries, it falls within the ambit of administrative law. Therefore, an overview of administrative law in Zimbabwe is necessary.

2.3 Administrative law in Zimbabwe

Administrative law is the legal body that regulates the relationship between public authorities and private individuals and bodies, as well as between a public authority and other public authorities. The purpose of administrative law is to ensure reasonable legal control over the exercise of their functions by administrative authorities and to ensure that they do not exceed or abuse their powers.[46] By enforcing the rules that are conducive to sound administration, administrative law facilitates good administration. The legislation thus aims to encourage the efficient use of administrative power while providing protection against the misuse of power. Feltoe goes on to argue that administrative law attempts to strike a balance between public authorities and those

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44 A performance (or- construction) guarantee assures payment to the employer in the event of the contractor failing to perform its obligations under the construction contract properly or at all. The amount guaranteed is normally between *5* percent and 15 per cent of the construction-contract price: The amount can be fixed or variable.

45 The Committee recommended the following;

> (1) Auditor General to perform a value-for-money audit to assess the damages that government may have incurred through this contract in the exercise of its oversight role. (2) The Minister for Energy and Power Development shall appoint a newboard(s) for an agency that is competent and has the expertise necessary to deal with gender issues. Board tenure should be in line with Parliament's life to enable oversight work to continue, "the report says. (3) Ministries and deputy ministers involved in the Gwanda Solar Project scandal should be investigated by the Zimbabwe Republic Police. (4) After investigations have been concluded, the money paid to Intratrek should be recovered. It is important to note, apart from the recommendations, that the Committee does not have the authority to void a contract, but its conclusions and recommendations will add weight to cancelation at the appropriate forum.

46 Feltoe *A Guide to Administrative and Local Government law in Zimbabwe* 2.

with whom they interact, and it wants to ensure that the public interest is maintained in the process.[47]

There is an Administrative Court dealing with administrative cases as far as Zimbabwean law is concerned. The Administrative Court was created in 1979 under the *Administrative Court Act* 7 of 1979.[48] It is a statute creature and has no jurisdiction inherent in common law. It mostly deals with appeals[49] against decisions made by various public authorities, but in some cases it exercises original jurisdiction and has review[50] jurisdiction is some instances.[51] The Administrative Court has jurisdiction in respect of specific Acts of Parliament and one of those Acts is the now repealed *Procurement Act* 2 of 1999. Under this Act the court could hear appeals against decisions of the SPB.[52] This entails that it also has jurisdiction over the recently enacted *Public Procurement and Disposal of Public Assets Act* 5 of 2017.[53] The procedures will vary in accordance with whether the court is exercising original jurisdiction, review jurisdiction or appellate jurisdiction.

Notable examples of matters within the competence of the Administrative Court include administrative decisions taken by local authorities; administrative decisions taken by statutory regulatory bodies, for example, the SPB, the Rent Board, the Liquor Licensing Board and the Medicines Control Authority. Appeals against decisions of this court lie directly with the Supreme Court as such it has the same status as that of the High Court. Considering the above, the Gwanda solar energy procurement tender decision could have been challenged at the Administrative Court forum. In the circumstances of

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47 Feltoe *A Guide to Administrative and Local Government law in Zimbabwe* 2.

48 Section 3 of the *Administrative Court Act* 39 of 1979.

49 Feltoe is of the view that;

> In the broad sense, an appeal is a full re-hearing and fresh decision with or without additional evidence. In the ordinary strict sense, it is a summary of the merits, but restricted to the facts or details on which the decision under appeal was made and in which the main conclusion is whether the decision was correct or incorrect.

50 According to Feltoe;

> A review is limited to re-hearing with or without additional evidence or details, not whether the decision under appeal was correct or not, but whether the arbitrators exercised their powers and authority in a lawful and proper manner.

51 Feltoe *A Guide to Administrative and Local Government law in Zimbabwe* 15.

52 Feltoe *A Guide to Administrative and Local Government law in Zimbabwe* 18.

53 Section 77 of the *Public Procurement Disposal of Public Assets Act* 5 of 2017.

the case under consideration, the Administrative Court had the requisite jurisdiction to entertain the matter.

The Administrative Court has in the past considered a number of public procurement litigation and has granted relief that includes invalidating the tender and ordering new procurement procedures.[54] A notable example is the case of *Oswell Security Pvt Ltd v State Procurement Board and others*[55] where the applicant sought an order suspending the conclusion and operation of service contracts between the respondents until the validity of such contracts had been adjudicated by the court. The court in this matter found that the winning companies had submitted illegal bids and granted relief, ordering new tender proceedings to be commenced.[56]

2.4 Selection of bid criteria

In terms of the Zimbabwean Constitution, principles of fairness, equity, transparency and competition must be the overarching consideration in any procurement, vetting or selection criteria. ZPC floated the tender for construction of the 100-megawatt solar project in 2013 round about the same time that the new Constitution came into effect. The discussion of the vetting of bidders is as such equally informed by the above constitutional principles. However, the requirements of section 34(f) of the *Procurement Act* 2 of 1999 outlined the need for the SPB to conduct vetting of participants based on criminal record and previous conviction of a company and its directors.[57] The managing director of Intratrek indicated that he was once convicted and imprisoned on charges of fraud. The selection of his company was in violation of section 34(f) of the *Procurement Act* 2 of 1999 read together with section 173 of the *Companies Act* 47 of 1951.[58] These provisions were not taken into consideration as a basis for disqualifying the bid by Intratrek. Section 173(1)(d) of the *Companies Act* 47 of 1951 requires that any person should be disqualified from being appointed a director of a company;

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54 Quinot and Arrowsmith *Public Procurement Regulation in Africa* 205.
55 Quinot and Arrowsmith *Public Procurement Regulation in Africa* 205.
56 Quinot and Arrowsmith *Public Procurement Regulation in Africa* 205.
57 Hansard NA vol 44 No63 (31 May 2018) 14.
58 This entails that Mr Chivayo, who was once convicted of fraud, was ineligible for appointment as a director of a company. In terms of Section 34(f) of the *Procurement Act* 2 of 1999 due to the conviction Intratrek should have been disqualified from participating in the bid. Hence its participation was irregular and unlawful.

> Who has at any time been convicted whether in Zimbabwe or elsewhere of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefore to serve a term of imprisonment.[59]

It is my submission that the implications of the above provisions are quite clear in that Mr Chivayo was not suitable for appointment as a director of a company. This entails that the establishment of the company was illegal and in violation of the law and it should not have been able to conduct business with State entities. Evidence of the conviction of a managing director and a plain reading of the legislative provisions alluded to in the above paragraph was enough cause for the invalidation of the Intratrek procurement bid without need to resort to any other legislative provisions.

Despite the concerned individual professing ignorance about regulations barring persons with previous convictions from being directors of a company, section 173(1) of the *Companies Act* 47 of 1951 proves otherwise. The SPB was at fault by not invoking the relevant legislation in disqualifying Intratrek. These provisions are safeguards meant to protect the interests of all contracting parties and shareholders.[60] The omissions by the SPB proved that no due diligence was done to protect public interest. Furthermore, section 44(1)(a)(iv) of *the Public Finance and Management Act* 11 of 2009 outlines that an accounting officer for a public entity must establish and maintain a system for properly evaluating all major capital projects prior to a final decision on the project. In principle, this also entails looking at the eligibility and suitability of the contracting party.[61]

2.4.1 Outline of Intratrek in the solar project

The profile of a company and its track record are considerations in accessing their potential of successfully completing extensive projects. However, Intratrek was allegedly incorporated and registered in Zimbabwe in 2012 and the majority

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59 Section 173(1) of the *Companies Act* 47 of 1951.

60 Hansard NA vol 44 No63 (31 May 2018) 15.

61 It is submitted that the fact that Mr Chivayo had a criminal record and the *Companies Act* of 1965 section 173(1)(d) prohibits individuals convicted of certain offences from being company directors. Intratrek as a company was therefore illegally constituted and it is improper for the State to conduct business with a company that does not comply with laws of the State that on its own was sufficient grounds for the disqualification. The above submissions are supported by the findings of the Parliamentary Committee Report.

shareholders included Mr Chivayo and Mr Yusuf. There were also other minority shareholders. Intratrek, which had neither any knowledge nor experience with power projects, submitted a bid to construct a national project. One can therefore argue that the bid was not awarded on merit as the managing director in his own testimony indicated that he knocked on the doors of influential people, including former Ministers of Energy, the CEO of the then SPB and the Chief Secretary to Cabinet to persuade them to give the award to his company.[62] The basis of the argument was that local business people should be given preference over foreign investors. The Committee reached the conclusion that Intratrek did not have the technical or financial resources to establish a generation plant. Its financial and technical muscle was anchored on a foreign investor known as CHINT Electric.[63] It was also the Committee's view that Intratrek was merely a briefcase company being used as a front to secure and attract investment.[64] The benefit for the investor is tax exemptions for partnering with a local business.

2.4.2 The Contractual Agreement between ZPC and Intratrek

With the awarding of the tender to Intratrek, a contractual agreement was concluded with the ZPC. The total project cost was estimated at just over $183 (one hundred and eighty-three) million US dollars. One of the contentious issues in the contract relates to schedule 11 on pre-commencement activities. These activities were pegged at 6 (six)

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62 Hansard NA vol 44 No63 (31 May 2018) 16.

63 In an unrelated case to the Gwanda Solar Energy Project, it should be noted that an investigation undertaken by the Office of Integrity and Anti-Corruption of the African Development Bank found that CHINT Electric was engaged in a multitude of fraudulent practices, misrepresenting the company's expertise with assignments to meet qualifications. The findings resulted in the company's 36-month debarment making it ineligible to be awarded contracts under any project funded by African Development Bank or to be a subcontractor, consultant, supplier or service provider in the context of a project financed by the Bank. Such conduct and track record of a partner company for Intratrek makes Zimbabwe's projects more suspicious, since most of the projects cited include those awarded to the company in Zimbabwe.

64 It is submitted that the Committee arrived at this conclusion after considering Intratrek's company profile, financial and technical expertise. The company did not have the requisite past experience, which is usually taken into consideration when accessing bids.

million US dollars, of which ZPC was to contribute about 6 (six) million and Intratrek contributed the balance of 1 (one) million US dollars.[65]

ZPC was obliged to provide an advance payment to Intratrek on condition that a bank guarantee/performance bond shall be provided against this payment. In the course of oral evidence, the Committee was informed that a sum of USD5 644 130.80 (five million six hundred and forty-four thousand one hundred and thirty dollars and eight cents) for pre-commencement work was released by ZPC to Intratrek without a bank guarantee.[66] The entire amount was released from December 2015 to July 2016 over a six-month period. The activities on site were a far cry of the disbursements made and the deadlines set out in the contract when the Committee undertook an on-site inspection. ZPC officials acknowledged that on-site operations were not commensurate with payments.[67] Only two temporary housing structures and partial clearing of the ground had been performed on the site. There was not yet completed a proper access road, basic ablution facilities, communication network, electricity, water sitting and drilling and storage for which payments had been released.

The contract required that monthly progress reports shall be prepared and submitted to the employer. In this case, Intratrek was supposed to submit monthly reports either as hard copies or in electronic form to ZPC of the work done. It was common cause that this was not done at all, yet ZPC made payments blindly without due care about whether the money was being used for the contractually intended purpose. In some cases, a total of USD700 000 US (seven hundred thousand) was paid two times in one day, and in some cases, monies were released a few days apart. The manner in which the money was disbursed violates basic principles of public finance management. In terms of section 298(d) of the Constitution, public funds must be expended transparently, prudently, economically and effectively.[68] This should be read together with section 44(b)(ii) of the *Public Finance and Management Act* 11 of 2009, which

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65 This is based on the committee report after considering the submissions made by the various parties and officials.

66 Hansard NA vol 44 No63 (31 May 2018) 18.

67 The payment was done contrary to statutory provisions requiring a bank guarantee and also the work on site and progress was behind schedule despite Intratrek receiving payment.

68 Section 298(1)(d) of the *Constitution of Zimbabwe Amendment* (No. 20) Act, 2013.

requires a public entity's accounting officer to prevent excessive spending, fruitless and unsustainable expenditure, losses arising from criminal conduct and expenditure not in compliance with the public entity's operating policies.[69]

The Committee was of the view that Intratrek may have failed to get a bank guarantee because of the director's previous criminal conviction.[70] ZPC, as a national entity, has the responsibility of managing the generation of electricity in the country as outlined by legislation.[71] However, ZPC and its management failed in the evaluation, execution and monitoring of the project and up to the time of writing this dissertation, the project remains in limbo.[72]

2.5 Conflict of Interest

Conflict of interest is defined as a situation in which the personal or family interests of a public officer can benefit, directly or indirectly, from any behaviour on his or her part or from any decision he or she may make as a public officer.[73] Another grey area noted by the Committee was the involvement of the ZPC Board Chairperson in the Gwanda National solar project. It is alleged that he had a working relationship with Intratrek as he provided technical services to the company on separate power projects through his private company Terminal Engineering Private Limited. This presented a serious conflict of interest and a violation of the law applicable, which dictates that if a board member or a senior staff member;

> Knowingly acquires or holds a direct or indirect pecuniary interest in any matter that is under consideration by the board, shall forthwith disclose the fact to the entity's board.[74]

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69 Section 44(b)(ii) *Public Finance and Management* Act 11 of 2009.
70 Hansard NA vol 44 No63 (31 May 2018) 21.
71 Section 7(2) of the *Electricity* Act 4 of 2002.
72 ZESA Holdings is the energy producer operating under the Ministry of Energy and Power Development which operates a range of subsidiary companies with various power management, generation and communications specialties. ZPC is one of the subsidiaries and was formed as an investment vehicle in electricity generation in 1996 and became operational in 1999. It is authorised for the construction, owning, operating and maintenance of electricity generation stations. It can also oversee power generation programs.
73 Section 2 of the *Public Procurement and Disposal of Public Assets Act* 5 of 2017.
74 Section 34(1)(a) of the *Public Entities Corporate Governance Act* 4 of 2018.

The above provisions should be read together with section 186 of the *Companies Act* 47 of 1951, which states that such matters should be recorded in the minutes of the ZPC Board meeting. However, a copy of the minutes indicating such action could not be availed. By law, as an interested party, the ZPC Board chairman should have recused himself or declared his interests in matters related to Intratrek.[75]

In violation of the law, the accounting officer for the ZPC parent company released money to Intratrek without the approval of the ZPC board or holding company. It was also alleged that board members only became aware of the funds release from media reports. The implication of Section 78(1)(s) of the *Public Finance and Management Act* 11 of 2009 is that no public funds should be released without written instructions. If an accounting officer is pressured to release public funds by a Minister or Deputy Minister, section 14(1)(b)(ii) is applicable. He/she must report such conduct to the Accountant General, the Auditor-General and the Secretary to the Cabinet. This provision of the *Public Finance and Management Act* 11 of 2009 is supported by section 308(2) of the Constitution, which places a duty on every person who is responsible for the expenditure of public funds to safeguard the funds and to ensure that they are spent only for legally authorised purposes and amounts.

The release of the money was also in violation of the contractual agreement, which stipulates that funds for pre-commencement works should be released after a bank guarantee had been obtained.[76] In this regard, these where grounds to challenge the procurement project without resorting to the constitutional provisions on procurement as there was evidently a failure to observe standard procedure. It was also clear that the monies that were being paid to Intratek did not have board approval and there was no reason why the monies were released as instalments rather than a wholesome

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[75] The Daily news in an Article of 14 November 2018 reported;
> That the former Zimbabwe Power Company (ZPC) board chairperson Nyasha Kazhanje was hauled before the courts for allegedly concealing personal interest in a transaction with Intratek Zimbabwe, which is owned by jet setting Harare businessman Wicknell Chivayo. Kazhanje, who is also the director of Terminal Engineers, allegedly received $10 000 from Intratek and subsequently allegedly showed favour to Chivayo when his power deals with ZPC ran into trouble. Kazhanje reportedly failed to recuse himself from ZPC meetings where it was resolved not to terminate Intratrek's contract but pay its subcontractors despite failing to fulfil its obligation.

[76] Hansard NA vol 44 No63 (31 May 2018) 23.

payment. It is important to note that certain amounts of payment, especially involving amounts stipulated in procurement legislation, required board approval.

The Committee concluded that the board and management of ZESA Holdings did not have the enough details of the way the contract was awarded. The board and management were also not knowledgeable about the circumstances leading to the release of over USD5 (five) million to Intratrek without a bank guarantee.[77] This implies that the board and management failed to oversee the project being undertaken by their subsidiary company.

2.6 Political Interference in Procurement

The Committee believed there was political interference in the awarding of the project to Intratrek and in the release of public funds for the pre-commencement works without a bank guarantee.[78] In the same vein, there is a need for public officials to be principled and to be guided and there must be willpower to resist errant behaviour on the part of the top leadership. This law should be read together with the *Public Finance Management Act* 11 of 2009, particularly Section 51A, which advocates the separation of roles of Ministers and public entities.[79]

Investigation concluded that from the oral evidence adduced by members of the ZPC Board and Management, the Minister of Energy and Power Development, Dr Undenge, had direct communication with ZPC management on the project. He became a contact person for Intratrek and was purported to be the one who gave instructions on payments made to the company.[80] Such conduct casts the whole processes in a negative light and there is a need to understand the role of public officials in procurement. Political interference has been cited as a major concern in several government procurement programmes influenced by Ministers. Such conduct is at odds with the principle of politics administration dichotomy, which provides that Ministers are

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77 Hansard NA vol 44 No63 (31 May 2018) 23.
78 Hansard NA vol 44 No63 (31 May 2018) 25.
79 Section 51A of the *Public Finance Management Act* 11 of 2010.
80 However, a magistrate court on 10 December 2018 acquitted the former Minister of fraud allegations. Dr Undenge stood accused of awarding the tender to Intratrek without following prerequisite procedures and for ordering payment to the company after Intratrek failed to produce a bank guarantee.

mainly responsible for policy making and not implementation.[81] Therefore, concerns of unlawful impact on the public procurement system could be regarded as additional grounds for illegality in contract awarding or as additional grounds for exclusion of a candidate or a bidder, although not explicitly reflected on the award criteria. This is the mechanism by which illegitimacy is unlawful.[82]

2.7 Conclusion

This chapter laid bare the challenges in Zimbabwe's energy procurement sector by discussing the Gwanda National Solar project. It has demonstrated that much work needs to be done to improve procurement systems in order to attract investment and to kick start power generation projects. The primary objective of this review was to make the 2013 constitutionalisation of procurement effective, coupled with the already existing administrative law framework. This will ensure that procurement is transparent, fair, honest, and cost-effective for merit and results-based procurement. It must be noted that the research question on Zimbabwe is exploratory in nature as procurement has not been studied extensively in the jurisdiction. Much concern applies to the Zimbabwean scenario were several power projects have suffered a still birth. These projects would have had the capacity to generate more than 2000 MW, thereby depriving the country and the economy of an adequate energy supply.[83]

In summation, the core objectives of procurement can be grouped into five constitutional principles. This can further be expanded into value for money in the acquisition of required goods, works or services; integrity achieved by avoiding corruption and conflict of interest; accountability; equal opportunities and treatment for providers; fair treatment of providers; opening up public markets to international trade; and efficiency in the procurement process.[84] The Gwanda Solar energy project has failed to fulfil procurement objectives given that nearly seven years after the projected

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81 Musanzikwa 2013 *IJEFMS* 125.

82 Moukiou 2016 *EPPPL* 72.

83 De La Harpe *Public Procurement Law. A comparative analysis* the abstract notes;
> That public procurement can generally be used to achieve the socio-economic goals of a country. These goals must be achieved within a system of public procurement that complies with accepted principles for public procurement.

84 Ambre and Bardenhorst-Weiss 2011 http://www.ippa.org.

had been awarded, no progress had been made towards completion of the project. There is a need for transparency in the awarding of tenders. Tenders should be given to deserving companies irrespective of nationality and political affiliation. The *Procurement Act* 2 of 1999 in operation at the time failed to ensure compliance. The SPB, which was tasked with public procurement, failed to supervise procurement activities conducted by ZPC. It also failed to initiate investigations as provided by section 47 of the now repealed *Procurement Act* 2 of 1999. While constitutional entrenchment and the administrative law mechanism for public procurement is an important ingredient on their own, the measures are insufficient as a device for establishing, promoting and protecting public procurement.

CHAPTER 3 – AN ASSESSMENT OF THE EARTHLIFE JUDGMENT AND ITS IMPLICATIONS FOR ENERGY PROCUREMENT IN SOUTH AFRICA

3.1 Introduction

The discussion to follow reflects on the background of the nuclear energy procurement attempt by the government of South Africa. The aim of this chapter is to provide a summary of the regulatory environment applicable to public energy procurement in South Africa as informed by the *Earthlife* judgment. The discussion commences by outlining the background of the issues that were up for determination in the *Earthlife* matter. It is against this background that this paper analyses the pertinent conditions prevailing in this constitutionally enshrined government activity. South African legislation in the area of public procurement are also considered. The chapter provides an overview of the constitutional principles applicable to public procurement within the South African context. Each principle and its applicability to the matter under consideration are examined. The chapter concludes with an assessment of the implications of the court judgment on energy procurement. A major highlight of the court decision is its application of administrative law *vis-à-vis* procurement decisions.

According to De la Harpe, public procurement directly affects at least three stakeholders: the State in which procurement is funded; the citizens in whose interest procurement is undertaken and who indirectly fund procurement; and the private sector involved with procurement.[85] Public procurement also directly influences the economy of a country, and fundamental to public procurement are economic considerations. The goals of public procurement can be split into primary and secondary objectives. The first priority is to ensure good management and resources for public finances and the second objective is socio-economic benefits. This division presupposes the need for the specific procurement, the rate of expenditure and the form of goods and services required.[86] In the discussion to follow, the objectives of public procurement are

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85 De la Harpe *Public Procurement Law. A comparative analysis* 40.
86 De la Harpe *Public Procurement Law. A Comparative analysis* 41.

discussed. There are references to the Constitution*, Electricity Regulation Act* 4 of 2006[87], other applicable legislation and the administrative law tools giving effect to such objectives.

3.2 The Earthlife Judgment background

The case of the applicants evolved over three stages. The relief initially sought was to review and set aside the Minister's decision to sign the Russian IGA, the President's decision authorising the Minister's signature, and the Minister's decision to present the Russian IGA to Parliament under section 231(3) of the Constitution. Declaratory relief was also sought in relation to how the nuclear procurement process should unfold in relation to the issuing of determinations under section 34(1) of *ERA* and section 217(1) of the Constitution, which deal with the requirements for a fair procurement system for organs of state.[88] The applicants' case in this regard was largely based on the argument that the Russian-South African IGA[89] violated section 217(1) of the Constitution. This section requires that when the national sphere of government contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The applicants argued that, taken as a whole, the Russian IGA is sufficiently precise and dedicated to fall within the context of a "*goods and services*" contract, yet there was no procurement system in place that complied with section 217 in relation to the procurement of new generation nuclear capacity.

Some of the key issues raised in the court application included the failure to adhere to a lawful and procedurally fair and reasonable decision-making processes as envisaged by sections 3 and 6 of *PAJA*.[90] Related thereto were allegations of a lack of transparency

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87 Hereafter *ERA.*

88 [2017] ZAWCHC 50 para 7.

89 An Intergovernmental Agreement (IGA) is any agreement that includes or is reached in collaboration between two or more governments to resolve issues of mutual concern. Intergovernmental agreements with or between a wide range of governmental or quasi-governmental entities can be concluded. Governments use IGAs for collaborative planning, policy analysis, sharing of resources, joint planning commissions, and more.

90 [2017] ZAWCHC 50 para 14.

and public participation in the commencement of the process to procure nuclear power and any subsequent exercises of the Minister's powers.[91]

The lack of constitutional adherence in the tabling of the intergovernmental agreements[92] to Parliament was also at issue. In terms of the South African Constitution, an international agreement was required to pass through parliamentary approval.[93] As the agreement was purportedly an international agreement, this aspect is partially discussed as it was a ground for disputing the constitutionality of the procurement process. This entails that the agreement could not be lawfully tabled and made binding in terms of section 231(3). Section 231(3) requires that even if an international agreement is claimed to be the type of agreement that does not require parliamentary approval in terms of section 231(2). However, it must be tabled before Parliament within a reasonable time to be made binding.[94] The decision to facilitate, organise, commence with nuclear procurement generation attempt without complying with section 231(2)–(3) of the Constitution was therefore the subject of the court challenge.[95]

Earthlife raised many substantive and procedural grounds for reviewing the determination of section 34, which was finally upheld by the court. The most outstanding of these grounds and the findings of the court are outlined briefly below. Section 34(1) of the *ERA* deals with new generation capacity and any decision taken by the Minister in terms of this section must be approved by NERSA. After considering the applicable provisions of the Constitution, which entrenches the right to just administrative action, the court concluded that the determination pursuant to section 34 of the *ERA* constituted administrative action, which may be subject to judicial review. According to the court, NERSA's concurrence of the Minister's determination is a "vital link to the chain" that makes a determination pursuant to section 34 of the *ERA,* and if NERSA's concurrence did not meet the test for fair administrative action, then the chain

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91 *Earthlife Johannesburg and Another v Minister of Energy* (founding affidavit) para 6.
92 Hereafter IGA.
93 Section 231(2) of the *Constitution of the Republic of South Africa,* 1996.
94 [2017] ZAWCHC 50 para 95.
95 In terms of the IGA's, the Court found the Minister's decisions to table the IGAs before Parliament in terms of sec 231(3) of the Constitution to be unlawful and unconstitutional.

to reaching that determination was ineffective.[96] The court was of the view that NERSA did not follow a rational and fair decision-making process, which are key elements to a just administrative process, when it concurred with the Minister's decisions in relation to the section 34 determinations.[97] The court concluded that a rational and fair decision-making process would have been followed if NERSA made provision for public input so as to allow both interested and potentially affected parties to submit their views to NERSA before it took a decision on whether or not to concur with the Minister's proposed determination.[98]

Of concern and creating further confusion was the existence of two mutually inconsistent section 34 determinations. It did not contain the provisions that would amend, revise or withdraw the 2013 determination when the 2016 determination was published nor, according to the court, did it intend to do so. This resulted in two mutually contradictory section 34 determinations on the acquisition of new generation resources for nuclear power. An apparent inconsistency was that the 2013 determination designated the Energy Department as the procuring agency in the nuclear power program, while Eskom was designated as such by the 2016 determination. The court held that the coexistence of the determination of 2013 and 2016 would be highly problematic because of the many concerns it would pose in the minds of readers or interested members of the public. In this respect, the court had to determine whether the 2016 determination was invalid because it failed to specifically revoke or change the 2013 determination and whether it had to be set aside on that basis.[99]

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96 Jugoo and Ajoodha 2017 https://www.lexology.com/library/detail.

97 When procurement processes are ambiguous and arbitrary, usually there is a decrease in opportunities for companies to enter a sector. The same problem arises if firms can obtain "preferred status" by bribery of officials and potential entrants are unable to "play the rules of the game."

98 [2017] ZAWCHC 50 para 143.

99 Jugoo and Ajoodha 2017 https://www.lexology.com/library/detail.

3.3 The Law pertaining to Energy Procurement by Government in South Africa

3.3.1 Section 34 of the Electricity Regulation Act

In terms of public energy procurement regulation, under the *ERA* the Minister of Energy has the authority to commission new energy generation capacity.[100] However, there can be no escaping a competitive bidding process, or the prescripts of the Constitution as outlined in section 217(1), Treasury Regulations and the *Public Finance Management Act*.[101] Section 34(1)(e)(i) of the *ERA* echoes the same principles envisioned by section 217(1) of the Constitution in identical terms. It also requires that prior to the start of any procurement of new energy generation power plants the Minister must, in consultation with the National Energy Regulator of South Africa,[102] determine that new generation capacity is required, and that the electricity must be generated from nuclear power. Before NERSA can concur with such a decision of the Minster, it is obliged to undertake consultation with all the affected and interested parties. NERSA must therefore not rubberstamp the decision of the Minister but must reflect on the submissions of all the concerned parties before it concurs.

In respect of the nuclear procurement project, the requirements outlined in the *ERA* culminated in the most important public interest litigation case. The nuclear energy procurement case was set into motion by the government's pursuit of what would have been the largest procurement contract South Africa has entered into. The energy generation expansion programme was anchored in the country's electricity plan, the Integrated Resource Plan[103], which outlines South Africa's energy future until 2030. The IRP was the first integrated and participative plan for the future of the electricity sector.

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100 Section 34(1)(e)(i) of the *ERA* of 2006.
101 Martin and Fig 2015 https://za.boell.org.
102 Hereafter NERSA.
103 Hereafter IRP.

It is grounded in the energy white paper.[104] Generation of electricity from nuclear energy as espoused in the IRP culminated in the signing of agreements with several possible vendor countries. It is against this backdrop that the applicant in the *Earthlife* matter sought a review of the decisions to sign intergovernmental agreements on nuclear power between South Africa and Russia, the USA, and South Korea respectively. *Earthlife* sought an order that a fair public participation process is mandatory before the State can embark on the nuclear power procurement. Relief was also sought in relation to how the nuclear procurement process should unfold in relation to the issuing of determinations under section 34(1) of *ERA* and section 217 of the Constitution.[105] Therefore, considering the *Earthlife* court challenge, it is necessary to reflect on the applicable constitutional provisions and legislation and to comply with them.

3.3.2 Administrative law and its relationship to section 34 of ERA

The decision to award or not award a tender normally constitutes administrative action. It follows that the provisions of *PAJA* apply to the process.[106] In terms of section 33 of the Constitution and *PAJA*, which codifies the administrative law grounds of review, public procurement award decisions may be reviewed for lawfulness, reasonableness and procedural fairness. It also provides for the right to reason in favour of a person who had been adversely affected by an administrative action. The standard of reasonableness adds considerable potency to this enforcement mechanism.[107] The standard of review may range from threshold rationality review to proportionality or a standard quite close to it. Under this standard, judicial review entails consideration of

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93 The IRP was promulgated in March 2011. It refers to the long-term planning of power generation in South Africa, which includes power plants. The 2016 IRP update report did not undergo a public consultation process and the report was not presented for parliamentary approval. Therefore, the original IRP remains the main policy basis for the government's plans to expand nuclear power generation capacity however as of 22 August 2018 a new draft Integrated Resource Plan was published for public comment in the government gazette.

105 [2017] ZAWCHC 50 para 7.

106 *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) at paras 28–32.

107 Quinot 2011 *PPLR* 9.

the merits of the matter in some way or another. In such a case, the review functions of the court have a substantive as well as a procedural ingredient.[108]

Therefore, the review process provides the context within which to determine judicial review of government procurement decisions under *PAJA*. In each case, the requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will inform, enrich and contain the relevant grounds for review under *PAJA.* Section 6(2)(i) of *PAJA* provides that a competent court may review administrative action if "the action is otherwise unconstitutional or unlawful." Accordingly, the judicial review of administrative action contemplates reviewing decisions of organs of state on the basis that they are inconsistent with section 217 of the Constitution.

Even if the procurement decision is not administrative action in terms of *PAJA,* the decision can still be reviewed by means of constitutional review by the direct application of section 217. The facts of each case will decide any flaws in the procurement system's criteria, such as unfairness, inequity, lack of transparency, lack of competitiveness or cost-efficiency, which may contribute to procedural unfairness, irrationality, unreasonability or any other basis for review under *PAJA*.[109] *PAJA* is therefore applicable in many instances.[110] It provides for various grounds of review, ranging from lawfulness, reasonableness and procedural fairness, as was the case in the *Earthlife* court challenge.[111] In the case under review, the applicant contended that *PAJA* was applicable as the section 34 determination was an exercise of administrative action as envisaged by the *ERA*.[112]

In South Africa, public procurement decisions are subject to general principles of administrative law as such authorities are under a legal obligation to act in a lawful, reasonable and procedurally fair manner when taking public procurement decisions.

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108 Quinot 2011 *PPLR* 9.

109 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014) para 43.

110 Molver and Gwala *The Government Procurement Review* 274.

111 Section 6(2) of the *PAJA* 3 of 2000.

112 [2017] ZAWCHC 50 para 28.

South Africa has no central administrative body tasked with enforcing public procurement rules. There is however a distinction in the remedy regime between what can be called administrative enforcement mechanisms and judicial enforcement. Enforcement is undertaken through a combination of legal mechanisms scattered throughout the administration and remedies enforced in the normal courts. Since decisions on public procurement are considered administrative activity and are therefore subject to general administrative law, the strict rule that internal remedies must be exhausted before a court is approached for relief is applicable.[113]

3.3.3 Promotion of Access to Information Act

The *Promotion of Access to Information Act* 2 of 2000 is a relevant legislative provision that usually finds application in litigation related to public procurement. The Act gives effect to the constitutional right of access to any state-owned information and any information held by private bodies that is required to exercise or protect any rights. Public procurement is constitutionally enshrined and as such it is my submission that an interested party can invoke the provisions of this Act in enforcing procurement principles. The case under review alluded to the relevance of the instrument when the court noted that any decision of the NERSA and the reasons for the decisions must be available to the public, except for information that is protected in terms of the *Promotion of Access to Information Act* 2 of 2000.[114] It can be inferred from this provision that should government fail to avail relevant information for its procurement decision such conduct would be challenged.

3.3.4 Section 217 of the Constitution and the provisions of PFMA and PPPFA.

South Africa's regulation of public procurement is quite comprehensive. Nevertheless, the set of rules that could be said to constitute South African law on public procurement is far from consistent or consistently organised.[115] At the top is section 217(1) of the *Constitution of the Republic of South Africa*, 1996 which provides that:

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113 Quinot 2011 *PPLR* 3.
114 [2017] ZAWCHC 50 para 35.
115 Quinot 2011 *PPLR* 2.

> when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

These five constitutional principles provide the framework for the development of a coherent system of public procurement regulation.[116] While much ground has been covered towards the implementation of a coherent system through several key pieces of legislation, the regulatory regime remains highly fragmented. This is largely due to a plethora of statutory enactments that do not always clearly align and that focus on procurement in varying degrees. In addition, the requirements in section 217 of the Constitution are also directly applicable and courts can thus review procurement legislation or decisions on being fair, equitable, transparent, competitive and cost-effective. These requirements entail scrutiny upon review beyond the mere procedural dimensions of procurement decisions.[117]

The *Public Finance Management Act* 29 of 1999[118] regulates the management of government finances and gives effect to the provisions of section 217 of the Constitution.[119] The constitutional imperative as articulated by section 217 is affirmed in the *Public Finance Management Act* 29 of 1999 under section 38 (a) iii,[120] as read with Treasury Regulations 16 and 16A of the *PFMA,* which contain detailed provisions dealing with public procurement.[121] Provisions of the *PFMA* and particularly the Treasury Regulations[122] created under it, contain the detailed application of legislative provisions and thus stand at the core of public procurement law. These statutes outline contracting authorities' procurement processes, including guidelines on ads, award requirements, standard contract papers, adjudication and award procedures.[123]

Another applicable instrument is the *Preferential Procurement Policy Framework Act* 5 of 2000.[124] This accounts for the aim of the government to motivate historically disadvantaged individuals by providing them with preferential treatment in procurement

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116 Quinot 2011 *PPLR* 2.
117 Quinot 2011 *PPLR* 9.
118 Hereafter *PFMA*.
119 Bezuidenhoudt and Pilane *South Africa: Public Procurement2019* 210.
120 Section 38(a) of *PFMA.*
121 Bezuidenhoudt and Pilane *South Africa: Public Procurement2019* 210–216.
122 GN. 27388 of 15 March 2015.
123 Quinot 2011 *PPLR* 2.
124 Hereafter *PPPFA*.

activities. Two constitutional provisions that directly affect the use of procurement as a policy tool are equality and value for money. The Act enshrines the government's duty to grant preferential procurement to companies owned by historically disadvantaged people and to some government objectives. It also provides for exemptions to preferential procurement in certain sectors and industries.[125] According to Bolton, preferential procurement is used to funnel funds to different groups of economic actors as a wealth redistribution technique.[126] The provisions of this piece of legislation are supported by the *Preferential Procurement Regulations*. The regulations outline the implementation of the *PPPFA* and describe the preferential points system for evaluating tenders.

The legislation discussed above, and the Constitution are important legal instruments relevant to public energy procurement in South Africa. There is a constant interaction with the legal framework summarised above. It must be noted that the legislative provisions highlighted above are not exhaustive as several other cocktail legislative provisions find application from time to time. However, all instruments are anchored to advance the five constitutional principles. Failure to comply with the applicable law will result in the underlying procurement activities being unlawful and invalid.

The discussion now separately considers each constitutional principle and its impact on procurement. We thereafter consider legislation that found application in the nuclear procurement case, under consideration particularly provisions of *PAJA*. In the main, government officials must adhere to the requirements of applying a procurement system that is fair, equitable, transparent, competitive and cost-effective. However, the results of the procurement undertaken by government expose a disjuncture of theory and practice in how public procurement policy is implemented.[127]

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125 The purpose of the Act as briefly discussed above is not the focus of this dissertation. The Act is alluded to because of its applicability to procurement.

126 Bolton 2006 *JPP* 193.

127 Vabaza *A Review of the implementation of Government procurement policy* iii.

3.4 Procurement and the constitutional principles

The constitutional basis for public procurement in South Africa is articulated in section 217(1) of the supreme law.[128] Section 217(1) outlines five foundational principles in which all procurement activities must be anchored. In order to understand the constitutional framework, it is necessary to briefly discuss each of the five principles enshrined in section 217(1) and to apply the principles to the case study. However, it must be noted that the court did not venture to discuss their direct applicability to the *Earthlife* case.

3.4.1 Principle of Fairness

The first principle to be addressed is fairness. As an abstract concept, is difficult to define. However, it is trite law that fairness is often defined in terms of procedural fairness and substantive fairness.[129] The *PAJA* lays out the principles of administrative action that is procedurally fair. Such elements generally embody the well-known natural justice principles. Although procedural fairness is largely concerned with procedural safeguards and adherence to rules, the reasons for a decision are substantive fairness. This means that the decision must be reasonable, taking into account the circumstances of the case.

The question that arises from the set of facts under consideration is whether the government's activities regarding nuclear procurement can be considered to have been fair. According to Bolton, a fair procurement system is as follows:

> Government contracts should be widely advertised, all contractors should be familiar with the rules of the competition and all contractors should be afforded enough time to participate in the process.[130]

This entails that all service providers should be subjected to the same rules of the game when they are conducting business with government. This necessarily requires that no service provider should be favoured or prejudiced in the process. In practical terms, the

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128 The primary objective of the procurement system is to be fair, equitable, transparent and cost-effective.

129 According to Baxter "as a bare concept, fairness has no meaning, but the meaning accorded to fairness in any given situation will be a conception of fairness".

130 Bolton *The Law of Government Procurement* 48.

latter requirement means that everyone who conducts business with government must be treated equally.

Given that government procurement decisions have a significant effect not only on contracting parties but also on the general public and that section 217(1) has allowed such an interpretation, it is argued that equality in the sense of public procurement implies both procedural and substantive equity.[131] The nuclear energy procurement attempt processes were characterised by secrecy and improper decisions by the government. Thus, despite the court not applying the constitutional principles applicable to procurement, no legal argument would have justified the government's actions for failure to undertake a fair process. Despite the court not determining the conditionality of the energy procurement in terms of section 217, it is my submission that the South African and Russian intergovernmental agreement as a step towards procuring nuclear energy production, does not pass the constitutional muster of fairness.

3.4.2 Principle of Equity

As a constitutional value, equality is presented firstly in idealistic aims and secondly as a descriptive element of the kind of treatment that one should receive.[132] As far as the principle of equity is concerned, it is mainly addressed by several authors from the historic perspective of disparity that prevailed in South Africa prior to 1994. Bolton's view referring to the fair treatment of disparate groups in South Africa is instructive.[133] Equity places a duty on those responsible for the administration of the public procurement process to pay attention to procurement measures aimed at promoting access to business opportunities. Therefore, Bolton argues that the reference to equity in Section 217(1) can be said to be specifically intended to address inequalities and unfair discriminatory practices.

However, the issue of the equity requirement has been a subject of misrepresentation by some of the officials implementing the government procurement policy. Therefore, officials often wrongly apply the preference based on a wrong interpretation of the

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131 Sewpersadh and Mubangizi 2017 *PER / PELJ* 6.
132 Venter 2001 *PER/PELJ* 21/72.
133 Bolton *The Law of Government Procurement* 50–51.

public procurement policies. It is also apparent that equity does not only find application to groups, it can also be applied in the case under consideration. The government's favourable consideration of Russia meant that the principle of equity had not prevailed as on party had an upper hand over other parties wishing to bid for the eventual procurement tender. Interpreting the notion of equity in the nuclear case demands that all competent entities be treated equally without any distinctive advantages or favourable consideration to a participating party. In the circumstance of the case under review, the footing was not equal for countries that expressed an interest in bidding for the construction of South Africa's energy generation capacity.

In interpreting equity as contained in section 217(1) of the *Constitution*, De la Harpe is of the view that the general tone and purpose of section 217 and of the *Constitution* as a whole is relevant.[134] He notes that the use of public procurement through preferential treatment of historically marginalised South Africans to fix apartheid legacies may be appropriate. The procurement system in South Africa tended to support bigger and better-established entrepreneurs during the apartheid era.[135] The post-apartheid government recognised the value of public-sector procurement as an instrument of policy in the process of socio-economic transition by reforming the public procurement program. This is expressed in the *Constitution*, where section 217(2)(a)–(b) provides for preferential classes in the allocation of contracts and for the security or advancement of individuals. In this way, public procurement is used as a vehicle to effect socio-economic reform in South Africa. Broadly speaking, equality refers to the treatment of all suppliers in the same manner, subject to legally permissible exceptions.[136] The bottom line is it is imperative for bidders to compete on an equal footing.[137]

3.4.3 Principle of Transparency

The South African government concluded bilateral nuclear cooperation treaties with Russia, France, China, the United States, and Japan in September and November 2014.

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134 De La Harpe *Public Procurement Law. A comparative analysis* 281.
135 Bolton *The Law of Government Procurement* 52.
136 Mugadza *A legal analysis* 11.
137 Bolton 2014 *PER/PELJ* 2315.

Some of these agreements were submitted only to the Cabinet, the Sub-Committee on Energy Security, Parliament and the Treasury following a widespread public demand for transparency that was initially ignored.[138] In addition, it emerged that vendor parades where conducted in a clandestine manner. Prospective vendors demonstrated the types of technology offerings that could be expected from each vendor country if selected through a procurement process.[139]

Transparency requires clear rules and procedures to ensure compliance with such rules, such as the use of simple, impartial requirements, uniform appraisal criteria and standard bidding documents.[140]. The notion of transparency in public procurement was intended to conform with the public policy definition of government controls and balances in the utilisation of government resources and access to as much information as possible on procurement.[141] Government departments are required to advertise government business opportunities on departmental websites, notice boards, tender bulletins and local newspapers in order to promote transparency in public procurement. In this case the Energy department was involved. Bolton supports this stance and argues that the purpose of introducing an open system of public procurement is to enable everyone to challenge any procedures that have been followed during the awarding of a government contract.[142]

The principle of transparency promotes openness and the broader involvement of the public. However, as evident from the clandestine actions of the government as appears from the court application, there is a need for an improvement on transparency. There was no transparency in relation to the position or stages that government was pursuing, and this negatively affected the general perception of the promotion of governance in public procurement. Allowing the public to be active observers during the evaluation and adjudication stages in public procurement promotes transparency. Achieving this requires a paradigm shift in the policy implementation phase of public

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138 Martin and Fig 2015 https://za.boell.org.
139 Martin and Fig 2015 https://za.boell.org.
140 Arrowsmith *Public Procurement Regulation: An Introduction* 21.
141 Mugadza *A legal analysis 318*.
142 Bolton *The Law of Government Procurement* 54.

procurement to permit an approach that promotes transparency as envisaged by the Constitution.

Transparency is a precursor to competitive bidding and exposes the extent of political meddling in decision making when awarding contracts.[143] The interpretation of the constitutional principle of transparency is key in any evaluation of laws aimed at combating corruption in the public procurement sector, because transparency is universally recognised as being indispensable in the fight against corruption.[144] In addition to the scope of section 217(1), it is also important to understand the notion of transparency in the light of the right to access information as set out in section 32 of the *Constitution*. It should also be seen in the light of section 33 of the *Constitution*, which gives every person whose rights have been adversely affected the right to receive written explanations for administrative decisions. Finally, transparency must take account of the covert and hidden nature of corruption in procurement. In addition to ensuring that processes are open to scrutiny, a transparent procurement process would ensure that the actual reasons and underlying principles underlying decisions are fair, legal, reasonable and free of any further intent.

The secrecy surrounding Russia's relationship and the program's actual cost contradicts the transparency objectives. The nuclear program can be compared with the arms deal in terms of how the cabinet secretly conducted the process and how procedures and documents were classified as top secret raise suspicion.[145] However, government through the Department of Energy denied any allegations of secrecy, arguing that the documents had to be kept classified in order not to compromise the integrity of the process or confuse the public.[146] It is my submission that the above argument is without merit. The corruption arguments and lack of transparency from those opposed to the nuclear program were related to the program's unknown cost, lack of transparency in the procurement process, and international cooperation agreements with specific countries.

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143 Vabaza *A Review of the implementation of Government Procurement policy* 15.
144 Sewpersadh and Mubangizi 2017 *PER/PELJ* 7.
145 Rennkamp and Bhuyan 2016 https://www.wider.unu.edu.
146 Rennkamp and Bhuyan 2016 https://www.wider.unu.edu.

The actual cost of the project was never divulged, and reports on the estimated cost by the Stellenbosch and North-West universities have not been published. The Democratic Alliance's attempt in Parliament to gain access to technical reports on feasibility of the nuclear programme remained unanswered.[147] The details of the procurement programme were unclear. Suffice it to state that transparency generally requires openness and availability of information at each stage of the procurement process.[148]

3.4.4 Principle of Competitiveness

The *Competition Act* 89 of 1998 is a useful starting point for understanding the contextual meaning and content of the constitutional principle of competitiveness. The preamble explicitly states that past apartheid and other discriminatory laws and practices have resulted in disproportionate concentration of national economy ownership and control, poor regulation of anti-competitive trade practices, and unfair limits on total and free economic participation.[149] As the country's largest buyer of goods and services, government is uniquely positioned to foster and advance competition to build a more economically robust economy, as well as an environment that encourages complete and equal participation by all who wish to participate. Therefore, in this dual context, public procurement will seek to achieve competitiveness.

The principle of competition within the context of public procurement entails that more than one potential supplier or service provider be allowed to participate in advertised work of government. This requires the officials who discharge the procurement function to conduct analysis and develop a strategy that will enable maximum competition. Procurement competition must allow the supplier and a buyer to have a level of trust and partnership. According to the results on the study of case studies, the latter may still be problematic in the procurement of the public sector. That climate cannot be generated by some government officials when they participate in policies that benefit one service provider over others. Bolton believes that one of the competitive

147 Rennkamp and Bhuyan 2016 https://www.wider.unu.edu.
148 Mugadza *A legal analysis* 11.
149 Preamble of the *Competition Act* 89 of 1998.

advantages is that an entity that uses competitive procedures is in a position to compare prices, quality and can choose to contract with the party that offers the best value possible.

Realising value for money is a requirement for complying with a competitive public procurement system. The aim of competing in the business sense is to get value for money.[150] Accordingly, this is linked to the principle of cost-effectiveness and good governance. However, there should be a balance. Price alone should not be the sole factor in selection as this can potentially compromise on quality and the ability of suppliers to do the job. When interpreting what constitutes competitive pricing, the government should also take into consideration issues of quality. The right of public participation as argued in the case by the appellants entails that the public should be made aware of what constitutes a reasonable price. This can potentially make it difficult to collude for purposes of defeating competition, as reasonableness of prices will be determined upfront.

The commercial nature of competition implies that there should be an opportunity for a wide range of suppliers to bid for government work, and the government should then select the contractor whose bid represents the best value for money option.[151] Public procurement thus encourages competition, leading to an economy in which customers benefit from goods and services of superior quality. It is therefore argued that procurement decisions must be calibrated to represent the economic nature of competition in order to fulfil the concept of competitiveness. Competitiveness generally refers to the openness of the procurement method to allow as many suppliers as possible to compete for the tender.[152] In light of the above, the Russian and South African procurement steps fall short of a competitive procurement initiative.

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150 Bolton *The Law of Government Procurement* 40.
151 De La Harpe *Public Procurement Law. A comparative analysis* 287.
152 Mugadza *A legal analysis* 11.

3.4.5 Principle of Cost-effectiveness

Competition and cost-effectiveness are intertwined and integrated in large part, as both values include value for money.[153] In De la Harpe's opinion, a cost-effective action can be defined as cost-effective or efficient.[154] While the cost of not using a competitive system may be higher, however, the intervention itself may be more effective in preventing delay in the longer term from further running costs. The danger lies in the misuse of such procedures and the unjustified reluctance to use rational approaches under the pretext of emergency situations that should have been expected well in advance of practice. This constitutes a negation of the principle of cost-effectiveness.

As a principle of good governance, a cost-effective public procurement system is one that considers the effective and efficient use of procurement processes from the time the need for procurement is identified to the time when performance should be measured. Therefore, the cost-effectiveness requirement imposes a duty on officials involved with procurement to conduct an analysis of the value chain during the procurement of goods and services in the public procurement sphere.

De la Harpe argues that a program is cost-effective when quality, timing and price outcomes are predictable and require fewer resources to handle and track the procurement process effectively.[155] The lowest tender may not always be the best option in this regard, as competition is intertwined with cost-effectiveness. A commodity with longer service life or lower maintenance costs could be more cost-effective than its cheaper equivalent.

In conclusion public procurement actions must be underpinned on principles of fairness, equity, transparency, competitiveness and cost-effectiveness. Hence legislation governing public procurement and its implementation must therefore promote these principles. The principles are the primary yardsticks against which all procurement processes and decisions must be measured. In order to pass constitutional scrutiny, a public procurement system in South Africa must reflect the five constitutional principles.

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153 Bolton *The Law of Government Procurement* 40.
154 De La Harpe *Public Procurement Law. A comparative analysis* 289.
155 De La Harpe *Public Procurement Law. A comparative analysis* 290.

Not all procurement decisions will reflect all five principles; but the public procurement system, as a whole, must reflect the principles.[156]

The major bone of contention of nuclear procurement that many critics cited was the cost of the project. Cost-effective consideration is one of the principles applicable to procurement that is enshrined in the constitution. An argument on costs was advanced in the court application based on a variety of cost estimates available publicly and the lack of cost assessment for the South African programme. The costs per kilowatt of nuclear power from a new plant varied from different sources and placed a high or low cost scenarios (between USD1 500 and USD8 000).[157] This is indicative of the fact that the procurement of nuclear energy was not cost-effective and a conclusion of non-compliance to the constitution could have been reached on the basis of the projected cost to the national purse. The cost was not feasible and would have burdened the South African taxpayer for years. Procurement should be cost-effective since goods and services also have to be delivered. Procurement should also imply quality goods at a price that is most beneficial to the government.

3.5 Implications of the Earthlife judgment on the future of energy procurement in South Africa

The court dismissed the Minister's argument that the section 34 determinations only amounted to "encased policy directives" that are excluded from *PAJA*. The Court specifically found that various indicators such as the legislative source of the Minister's power, the far-reaching effect of the determinations and the external legal binding effect not only on NERSA but also on other stakeholders, indicate the administrative nature of these determinations. Therefore, a fair public participation process had to precede this determination.[158] The court also found that NERSA's role constituted administrative action and NERSA could not simply rubber stamp the decision. The Court

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156 Sewpersadh and Mubangizi 2017 *PER/PELJ* 9.

157 Between the period 2013–2015 taking the lowest and the highest price estimates for the nuclear build programme of 9.6 GW, prices ranged between US$14.4 billion and US$76.6 billion. The National Treasury collects annual revenue of roughly ZAR780 billion/US$46 billion

158 Public participation can be any process that involves the public directly in decision-making and considers the input of the public in making that decision. Access, fair process, voice, dialogue, recognition and legitimacy are ensured by effective public participation.

emphasised that it was crucial that public participation had to take place considering the far-reaching consequences of these section 34 determinations, not only with regard to the estimated expenditure of one trillion rand, which would ultimately be for the public's account, but also the impact on the allocation of state resources.[159]

Although it poses the risk of undermining executive autonomy and privileges, the involvement of courts to limit executive conduct is appropriate.[160] However, the courts must strive to comply with the principle of judicial restraint. Constitutional adjudication in public procurement is instrumental in guaranteeing substantive and procedural preconditions for appropriate decision making by the Executive and Parliament. It is commendable that the court considered the importance of the principle of separation of powers. Thus, not emasculating the Executive in conducting its operations. However, they did make it clear that the executive must abide by the constitution and its conduct is subject to challenge and review.[161]

The judgment is a cautious one ever mindful of the need to respect the powers of the various branches of government.[162] It does set the tone for any future procurement activities by putting the brakes on a process that prima facie would have been in violation of constitutional procurement principles. Judicial review through administrative conduct remains a potent tool for the judiciary. However, it is controversial in that unelected judges possess the power to undo the decisions of the branches that are theoretically the most responsive to the people.[163] In this matter the court was of the view that to consider the unconstitutionality of the procurement attempt in terms of section 217(1) of the Constitution would be premature. They will only exercise judicial review when constitutional principles are sufficiently clear for resolution. Bolton is of the view that it is as a rule preferable in cases of non-compliance with procedural

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159 Botha date unknown www.cfcr.org.za.

160 In his article *The Doctrine of Constitutional Avoidance: A Legal Overview* Nolan states;
> that a Court that is overly aggressive in its exercise of judicial review or simply abuses that power risks losing its legitimacy and, with that, invites political and cultural backlash that can undermine the role of the judiciary in our system of government.

161 [2017] ZAWCHC 50 para 143.

162 [2017] ZAWCHC 50 para 119.

163 Nolan 2014 www.crs.gov.

formalities to deal with them in a discretionary manner.[164] The approach taken by the court in this regard finds support with authors like Bolton.

The court was of the opinion that making a ruling based on section 217(1) non-compliance would be premature. The court held that it was neither necessary nor desirable to address this ground of review in these proceedings. It further held that doing so could well offend against the doctrine of the separation of powers and could be an instance of the court interpreting an international agreement when it would be appropriate for it to exercise judicial restraint.[165] In this regard the findings in relation to the nature of the Russian IGA were made solely for the purposes of determining whether the Agreement was one that should have been put before the legislature in terms of section 231(2) or 231(3) of the Constitution.

The court laid out several reasons for its avoidance of making a definitive ruling on procurement principles. These reasons where framed as follows: the applicants' argument in this respect should not be entertained at this stage due to the nature of the further relief they seek in relation to the Russian IGA, namely, that the decision to table it under section 231(3) be reviewed and set aside.[166] It also held that if the executive had chosen to table the Agreement before Parliament in terms of section 231(2), a process permitting debate on the agreement will have ensued with a view to its approval or disapproval by Parliament. It may well also be the focus of a parliamentary process of public participation. The outcome of this process could not be foreseen or anticipated. In those circumstances it would be undesirable if the Court were to declare that certain of its provisions are inconsistent with the Constitution and, more specifically, section 217. The court implored that its position is not to suggest that in future, if the need arises, the Court will lack jurisdiction to deal with such a question.[167]

The court stopped short of declaring the steps towards nuclear procurement unconstitutional in terms of the five foundational principles applicable to procurement.

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164 Bolton 2014 *PER/PELJ* 2348.
165 [2017] ZAWCHC 50 para 135.
166 [2017] ZAWCHC 50 para 146.
167 [2017] ZAWCHC 50 para 135.

In recognition of the principle of separation of powers, the Court exercised judicial restraint at this stage and declined to consider further relief sought by the applicants in relation to the Russian IGA. The court in this regard affirmed that separation of powers is a judicially developed rule or settled practice. There are, however, exceptions to the rule where the potential violation of the Constitution would require immediate intervention the court would intervene and grant appropriate relief.[168] Intervention would occur in exceptional cases, if substantial relief once the process had been completed cannot redress the conduct in question. The court felt it premature to declare unconstitutional the government conduct in terms of section 217, but it did find that the actions of government where ripe in terms of tabling the agreement before Parliament and hence declared the actions to be in violation of section 213 of the Constitution.

However, it is my submission that the conduct of government included steps towards a concrete procurement plan and the court should not have left open whether government had adhered to constitutional precepts in its preparatory work. Bolton is of the view that there are three stages in procurement, namely the planning stage, the process of procurement, and the contract maintenance or contract administration stage.[169] A definitive pronouncement by the court would have strengthened the need for constitutional compliance even in the planning stages of procurement procedures. However, the court effectively put the brakes to the process and noted that Parliament's role had been usurped as they were only used as an instrument to rubber stamp the agreement. The decision to proceed with procuring these nuclear power plants and to conclude such procurement was done without the necessary statutory and constitutional decisions having been lawfully taken.[170]

3.6 Conclusion

This chapter dealt with the domestic regulatory framework for energy procurement and a discussion of each constitutional principle applicable to procurement. It is now

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168 *Minister of Finance v Paper Manufacturers Association* (567/07) [2008] ZASCA para 18.
169 Bolton *The Law of Government Procurement* 9.
170 *Earthlife Johannesburg and Another v Minister of Energy* (founding affidavit) para 4.

apparent from the above that the government took questionable steps in their drive for electricity generation from nuclear energy. It is generally accepted that effective legal remedies should be available in the case of the breach of a legal duty by a procuring entity.[171] In public energy procurement this will, among other things, ensure that a procurement regime is fair, equitable, transparent and cost-effective. In total the court held the nuclear procurement steps unconstitutional in respect of section 213(3)[172] despite not undertaking an extensive analysis of the procurement steps in terms of section 217, which the court held inappropriate at that stage.

However, the court challenge achieved its intended purpose. If the government wants to pursue its nuclear ambitions the following would be needed in terms of the court ruling: (a) a renewed valid integrated energy plan (IEP)/integrated resource plan (IRP) process based on accurate and relevant information, combined with meaningful public participation; (b) adjustment of the outcome of the IEP/IRP process, also considering the impact of the national energy efficiency strategy; revisiting of the environmental impact assessments (EIA) and public participation by people affected by the designated nuclear sites; and approval of the nuclear procurement process by treasury[173]and a fair, transparent, competitive and cost-effective procurement process.

171 Roos and de la Harpe 2008 *PER/PELJ* 2.
172 [2017] ZAWCHC 50 para 146.
173 Du Preez 2017 https://www.fin24.com.

CHAPTER 4 – COMPARATIVE ANALYSIS OF PROCUREMENT OF ENERGY IN SOUTH AFRICA AND ZIMBABWE

4.1 Introduction

This chapter does a comparative analysis of public energy procurement in the South African and Zimbabwean jurisdictions. The emphasis is on the application of administrative law in energy procurement in light of the section 34 determination in South Africa. The chapter discusses factors affecting the proper undertaking of public energy procurement in Zimbabwe in comparison with South Africa.

4.2 Findings and observations from the comparable jurisdictions of South Africa and Zimbabwe

Key observations from the study are that public energy procurement cannot function in a vacuum, it is informed by the needs of several stakeholders. More should be done to ensure that legislative and constitutional procurement objectives are observed and implemented at every stage.[174] Public energy procurement remains largely ignored as evident from the challenge to access scholarly literature addressing the subject in relation to Zimbabwe. There is limited research on public energy procurement in Zimbabwe. Due to the dearth in research on public energy procurement, studies do not provide detailed information on public energy procurement as the focus is on the broader procurement challenges. The limited number of studies on public energy procurement in Zimbabwe warrants more research on a country whose public energy procurement activities continue to face challenges and are evidently becoming more corrupt.[175] A study of the role of the now defunct SPB *vis-a-vis* the legal framework surrounding it concluded that the procurement law was vague and had too much political interference, leading to discretionary behaviour.[176] This research provides information that contributes to the research gap that exists given the challenges

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174 Botha date unknown www.cfcr.org.za
175 Dzuke and Naude 2015 *JTSCM* 1.
176 Sandada and Kambarami 2016 *AUDA* 44.

highlighted by other researchers who have examined public energy procurement in jurisdictions such as South Africa.

4.2.1 Constitutionalisation of public procurement section 217 of the South African Constitution and section 315 of the Zimbabwean Constitution

The constitutionalisation of public procurement affords it a preeminent status and protection from the courts. South Africa has several notable procurement-related litigations. The basis for the litigation is mainly grounded in administrative law. The litigation is attributable to the constitutionalisation of public procurement. The extensive South African procurement caselaw can inform the Zimbabwean experience as it has persuasive authority. The constitutionalisation of procurement in Zimbabwe has gained significant traction as exhibited by the alignment of procurement legislation in line with section 315 of the Constitution.

The *Earthlife* judgment indicates that legislative requirements are the starting point for the application of procurement practices, which are essential to the public sector. In the South African context, Parliament has developed a legislative framework to represent the constitutional status of public procurement throughout procurement procedures and state organs decisions. The South African Constitution stipulates in section 217(1) that organs of state must contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The essence of public procurement legislation is to define and enforce those procedures that will result in a productive and efficient outcome while respecting the public nature of the process and the participants ' duty of fairness.[177]

The judgment highlights the vital role of administrative law in energy procurement as the rationale for setting aside procurement steps undertaken by the government was largely informed by the irregular section 34 determinations. Decision making in terms of section 34 is within the ambit of administrative law.[178] Litigation on public procurement disputes is common in South Africa, and as noted in *South African Post Office v De*

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177 Mazibuko and Fourie 2017 *AJPA* 107.

178 Jugoo 2017 https://m.engineeringnews.co.za.

Lacy,[179] cases concerning tenders in the public sphere are coming before the courts with disturbing frequency. The court's concern highlights the deep-rooted public procurement issues. Recourse to courts in disputes over public procurement can be classified into three main areas, including interim relief, judicial review and claims for damages.[180] The *Earthlife* judgment reaffirms the notion that a good procurement system features stakeholder participation and can be a practical tool for carrying out effective public fiscal management. Public procurement is a complex function that involves a series of practices and government actions that interact with public policy.[181]

Overall, the rationale for constitutionalising procurement is that it elevates procurement and gives constitutional status to the adherence of its principles so that anyone who acts contrary to these principles is not merely in breach of extant law but is in breach of the Constitution. It is hoped that constitutionalisation, as in South Africa, will give Zimbabwean courts wide powers to review procurement decisions, ensure that the procurement principles contained in the Constitution replace any contradictory legislation and may be designed to prevent the procurement process from being manipulated by procurement entities.[182]

The South African legal system for public procurement is based on constitutional principles. The legislation gives rise to a decentralized method of public procurement. The related procurement authorities are left with a significant degree of policy enforcement to formulate a scheme within the guidelines set out in the Constitution, the PFMA, the legislation and the notes of practice. Lack of or inadequate legislation on public procurement may lead to a system that is vulnerable to corruption, hindering market competition. This has a direct impact on public expenditures and therefore public resources Compliance with procurement procedures remains a vital accomplishment, whereby government can achieve sustainable economic growth of quality. Literature revealed that while the government has made progress with the implementation of legislative frameworks to strengthen compliance with procurement

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179 *South African Post Office v De Lacy* (19/08) [2009] ZASCA 45 para 1.
180 Quinot 2011 *PPLR* 3.
181 Mazibuko and Fourie 2017 *JPA* 107.
182 Williams-Elegbe 2015 *PLJ* 17.

processes and also to improve service delivery, it is necessary to note that there is still a lot needs to be done to translate what is advocated in this paper into action.[183]

In the past two decades, African countries have undertaken a number of reforms of their public financial management, particularly its procurement systems. The reform programs has provided comprehensive administrative and legal framework for public procurement. New institutions such as the public procurement authority and the appeals and complaints panel have been set up to formalise and improve procurement performance. A well-functioning procurement system is the one that is governed by a clear legal framework establishing the rules for transparency, efficiency, and mechanisms of enforcement, coupled with an institutional arrangement that assures consistency in overall policy formulation and implementation.[184]

Political interference with the procurement process is also a big challenge to the successful implementation of public procurement reforms. A good number of politicians think that they have the right to intervene in the procurement procedures leading to capricious procurement decisions. It is not uncommon in most African countries for politicians to influence the tender process, insisting that particular contracts are awarded to individuals or companies of their choosing.[185]

Public procurement constitutionalisation in Zimbabwe will likely result in improved financial management, transparency, and fairness among government agencies. The constitutionalisation has necessitated the setting-up of a new legal framework for dealing with public procurement and other procurement related issues. Institutions and structures have been established to ensure that systems are effectively managed and consolidated. The pressing problem of the lack of political will by politicians to commit fully to the reforms is among the myriad of challenges bedevilling the successful implementation of the reforms in line with the Constitution.[186]

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183 Zitha, Sebola and Mamabolo 2016 *JPAD* 72.
184 Dza, Fisher and Gapp 2013 *PAR* 51.
185 Dza, Fisher and Gapp 2013 *PAR* 53.
186 Dza, Fisher and Gapp 2013 *PAR* 54.

Although corruption or the perception of corruption is high in both countries the focus of this research is on the impact of procurement constitutionalisation in Zimbabwe as informed by the South African experience.

4.2.2 Transparency and access to information

In Zimbabwe, the lack of transparency in the conduct of public energy procurement is a contributing factor to the failure of public energy procurement projects. Research has highlighted that transparency in procurement is a challenge within public sector procurement. This is attributed to bureaucracy and the failure to adopt innovative technology and the absence of training in public procurement.[187] This can be mitigated by developing an effective monitoring and evaluation tool and creating incentive programmes to motivate good performance. Also, institutions of higher learning and other service providers should equip students and practitioners with appropriate skills and knowledge through the development of technological systems that ensure sustainable procurement.[188]

Transparency in public energy procurement can be achieved through e-procurement, which entails finding ways and means of employing information and communication technology to address the issues of improper and irregular public energy procurement.[189] Zimbabwe can strengthen its energy procurement by adopting e-procurement and setting up a government public procurement database that would be accessible to the general public. The adoption of e-procurement can potentially introduce changes that encourage efficiency, effectiveness and accountability in the public procurement sector. This improves the management of public finances, transparency and accountability of government procurement. The *Public Procurement and Disposal of Public Assets Act* 5 of 2017 envisages the possibility of e-procurement. Under the interpretation clause of the Act, e-procurement is defined as the procurement of goods construction works or services through internet-based information technology.[190] However, the Act falls short by not adopting mandatory e-procurement

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187 Dzuke Public *Procurement: Panacea or Fallacy* 205.
188 Ambre and Bardenhorst-Weiss 2011 http://www.ippa.org.
189 Rajah 2015 *JGRCS* 11.
190 Section 2 of the *Public Procurement and Disposal of Public Assets Act* 5 of 2017.

or requiring its progressive adoption as section 43 gives the impression that the use of e-procurement is at the discretion of PRAZ. The use of e-procurement is subject to any e-procurement policy laid down by the authority.[191] As it stands, there is currently no e-procurement policy in place in Zimbabwe.

The legislation that regulates public procurement in South Africa does not make specific reference to e-procurement. However, the *Electronic Communications Transaction Act* 25 of 2002[192] provides for electronic transactions to enable electronic access to communications and transactions, to provide for human resource development in electronic transactions, and, most importantly, to encourage the use of e-government services in sections 27 and 28 of the Act.[193] The purpose of the Act is to promote the use of e-government services and electronic transactions between private and public entities. Therefore, e-procurement is broadly contained in the provisions of *ECTA.* It is encouraging to note that the South African National Treasury established an e-tender portal, which is a positive step towards digitising and eventually internationalising South Africa's procurement capabilities.[194]

It is essential for Zimbabwe's procurement legislation to provide for mandatory legislation aimed at the adoption of e-procurement. Regulating e-procurement by means of legislation will go a long way in not only ensuring legal certainty, but also ensuring that transparency and competition are promoted.[195] It will further ensure that a cost-effective process is followed. It is important that legislation enacted to regulate e-procurement gives mandatory effect to the constitutional values applicable to procurement. Several challenges inhibiting e-procurement are apparent. The three main reasons for the slow adoption of e-procurement are that governments have been slow to put in place the necessary capacity required. Secondly, there is a lack of information

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191 Section 43 of the *Public Procurement and Disposal of Public Assets Act* 5 of 2017.
192 Herein after *ECTA*.
193 Anthony 2018 *Law democr Dev* 44.
194 Anthony 2018 *Law democr Dev* 47.
195 Anthony 2018 *Law democr Dev* 47.

technology infrastructure and mass internet access. Thirdly, there are antiquated administrative cultures in government entities.[196]

Implementing e-procurement can potentially reduce administrative and procurement personnel costs and improve communication through easy access to information. This entails that tender documents and information are always available and can be updated on a regular and timely basis.[197] Furthermore, governments will be able to identify regular players, which promotes transparency and contracting with reliable entities with an established track record. Zimbabwe has the necessary legislative framework on public procurement, which seeks to promote openness and transparency. It is, however, hampered by the conduct of actors who participate in the activity.[198]

The nuclear procurement by government represents the antithesis of transparency as no details of the events where provided in the public domain. The Government referred to an obsolete IRP2010 without any hint of what happened to the IRP2010-2013 update report or, indeed, the IEP of the country under review in accordance with the IRP2010.[199] In violation of the principle of transparency and unknown to the public, the Energy Department reported that the procurement framework had been finalised by it and other relevant stakeholders. Critics opposed the nuclear program due to the lack of accountability in the policy process and the possibility of corruption.

4.2.3 Parliamentary oversight vis-a-vis judicial oversight and the role of civil society

The findings of this research also indicate that the challenges Zimbabwe's public procurement process faces detract from delivery and commencement of energy procurement projects. The involvement of the then SPB in all activities in the public procurement process resulted in significantly long and inefficient decision making. There is also a lack of proper training and knowledge of the public procurement policies, procedures and legal requirements.[200] The majority of the challenges in the public procurement process that detract from efficiency emanate from the public procurement

196 Anthony 2018 *Law democr Dev* 40.
197 Anthony 2018 *Law democr Dev* 42.
198 Quinot and Arrowsmith *Public Procurement Regulation in Africa* 215.
199 Martin and Fig 2015 https://za.boell.org.
200 Dzuke *Public Procurement: Panacea or Fallacy* iv.

legal framework, which centralised the procurement authority with the SPB.[201] Reforms in the legal framework being undertaken to devolve procurement authority to the procuring entities and for the SPB to assume a monitoring and oversight role of supervising the procuring entities and policy issues are commendable.[202] With the 2013 Constitution, a new procurement regime came into effect in 2017. PRAZ, the successor of the SPB, has assumed more of an oversight role rather than being a key player in public procurement. It is hoped that the efforts of the World Bank and assistance provided to the Zimbabwean government in retooling procurement systems will enable transparent, accountable and effective public energy procurement.[203]

Several intergovernmental agreements served as groundwork for vendor countries that would eventually be considered for the proposed nuclear energy generation procurement in South Africa. Nevertheless, the text and context of the Russian agreement was materially different from that of any of the other countries involved. Therefore, the presentation of the intergovernmental agreements to Parliament, in some instances years after there where agreed upon, was meant to sanitise the Russian agreement. This conclusion is founded on the premise that two of the agreements were not placed before Parliament within a reasonable time frame as per constitutional requirement, and a number of other agreements where subsequently entered into and tabled to Parliament. Parliament simply rubberstamped the agreements. In terms of section 213(2), Parliament has the duty to interrogate international agreements before they become binding. As such Parliament should be able to hold the Executive to account on its decisions on energy procurement.[204]

It is unhelpful that the validity of the project award to Intratrek has not been brought before the courts. It is only through the Parliamentary Committee proceedings that the matter has been subjected to the court of public opinion. The project remains in effect without any meaningful progress on the ground. It is also disturbing to note that the focus of the Gwanda project has been on an individual director of the company

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201 Dzuke *Public Procurement: Panacea or Fallacy* iv.
202 Dzuke *Public Procurement: Panacea or Fallacy* iv.
203 Hasan 2017 http://blogs.worldbank.org.
204 [2017] ZAWCHC 50 para 96.

involved. There is no search for a broader understanding and evaluation of the procurement discourse in Zimbabwe. Despite the Parliamentary Committee report containing adverse findings, the Speaker of Parliament is on record indicating that it was not for Parliament to suspend or challenge the energy procurement project. Parliament was only empowered to make recommendations to the parent ministry overseeing the energy portfolio. The Zimbabwean parliamentary oversight system should be strengthened in order to adequately monitor, investigate, enquire into and make recommendations relating to any aspect of the legislative programme, budget, policy or any other matter it may consider relevant to the government department concerned. Crafting a legislative framework with penalty provisions for failure and a requirement for mandatory compliance with recommendations of parliamentary oversight committees would ensure that the committee proceedings and recommendations are taken seriously. Parliament as a whole or through its committees must be able to approach the courts to ensure that their recommendations are adopted. As held in Earthlife, the Executive must be accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. As such the applicants had standing in relation to these issues, either acting in their own interests or in the public interest, and this affirms the importance of parliamentary oversight.[205]

4.2.4 Public participation in energy procurement

Section 34 of the *ERA* creates room for public participation on any decision related to the expansion of energy generation capacity. Failure to undertake extensive consultation as mandated by the Act resulted in the court declaring the conduct of NERSA to be inconsistent and rendering its concurrence with the Minster's decision null and void. At the forefront of the *Earthlife* court challenge were civil society organisations. This shows the impact of both public participation and civil society participation in public energy procurement. When proper public consultation did not take place, civil society turned to the courts and successfully challenged the conduct of the Executive.

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[205] [2017] ZAWCHC 50 para 93.

The study also noted the absence of a court challenge of the Gwanda Solar project despite the legal mechanisms being available to potentially have the award set aside. Under the *Public Procurement and Disposal of Public Assets Act* 5 of 2017, mechanisms that are applicable to challenging procurement include Part X of the Act, which contains provisions for challenging procurement proceedings in general.[206] The previous *Procurement Act* 2 of 2000 was in effect at the time of the award of the Gwanda solar energy project. Part IV and Part V of the Act contained provisions applicable to challenging procurement procedures. However, none of these provisions where called on to have the project scrutinised by a court of law.[207]

Notwithstanding the allegations noted and conclusions reached by the Parliamentary Committee, the project remains in effect. Mechanisms available to challenge the solar energy procurement included approaching the Administrative Court as decisions on procurement activities constitute administrative decision making. However, no concerned and affected individual or civil society group has attempted to have the matter reviewed or set aside by the courts. This calls for individual and civil society incentive, which is crucial for promoting public interest litigation. This is evident from the South African jurisdiction, as is discussed in the recommendations section.

4.2.5 Conflict of interest and undue political interference

In both jurisdictions several senior officials and political leaders have been implicated in several procurement indiscretions.[208] The Zimbabwean case study highlights the conflicted nature of public officials and political interference. This pattern on its own undermines compliance to procurement rules and regulations. Lack of transparency and non-compliance is mainly fuelled by political interference emanating from politicians, influential stakeholders and senior management. Such interference has resulted in low levels of performance, high levels of corruption, failing contracts, variations in contract prices and non-adherence to procurement regulations. Public entities have on numerous

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206 Section 73–77 of *the Public Procurement and Disposal of Public Assets* Act 5 of 2017.

207 Sections 39–44 of the *Procurement Act* 2 of 2000.

208 Notable example from South Africa is a corruption investigation that found former police chief General Bheki Cele and a government minister were involved in property deals that were 'improper, unlawful, and amounted to maladministration'.

occasions been singled out on allegations relating to irregularities in procurement processes and procedures.[209] There is a need for strong institutions of governance with respect to the public energy procurement process, independent institutions capable of creating checks and balances. The *Earthlife* judgment reaffirms that state institutions must not rubber stamp executive decisions, as was the case with NERSA's concurrence with the Minister's section 34 determination. Unlike Zimbabwe, South Africa has strong institutions of governance of the public energy procurement sector.[210] The politicisation of government services is a factor that has hamstrung government functionaries, independence and ability to exercise professional discretion in Zimbabwe. The Committee noted in its report of the possibility of a political force in awarding the bid to Intratrek.[211]

4.3 Conclusion

Overall, the key takeout from the study is that strengthening a nation's public energy procurement capacities has the potential to be of significant benefit. Failure to do so, on the other hand, can severely affect the energy welfare of a nation and socio-economic growth prospects. It is generally accepted that public procurement of energy can be used to enhance the socio-economic status of a country. These targets must be met in the context of a system of public procurement that meets the standards set for public procurement.[212]

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209 Sandada and Kambarami 2016 *AUDA* 44.
210 De la Harpe "The use of civil activism in combatting corruption in public procurement" 8.
211 Hansard NA vol 44 No63 (31 May 2018) 25.
212 De La Harpe *Public Procurement Law. A comparative analysis* ii.

CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

In light of the findings and observations noted above, this chapter draws conclusions and offers recommendations that have the potential to develop and strengthen public energy procurement. Using a comparative approach, the study draws lessons from the procurement constitutional and legislative framework of South Africa with a view to identifying lessons that Zimbabwe can learn. The study concludes with a discussion of the results for future research.

5.2 Final Conclusions and Recommendations

5.2.1 The role of civil society and the media in the procurement cycle

This section seeks to address the failure to take legal measures that challenge the validity of the Gwanda project. Civil activism in South Africa has attracted attention to the corruption in the nuclear energy procurement attempt and related public interest litigation cases. Civil society in the context under discussion refers to individuals and a number of formal and informal interest groups and organisations that vary in their degree of formality, power and independence of the state.[213] From the forgoing discussion of South African nuclear energy procurement, the role of civil society can be at the forefront of challenging non-compliance with applicable legislation. It is therefore important to encourage activism that consists of efforts to promote, impede, or direct specified interests, usually with the desire to make improvements or perceived improvements in society.[214] Forms of activism can range from writing letters, the use of social media, political campaigning, boycotts, strikes, demonstrations, the use of different forms of art, and the use of the courts through public interest litigation.[215] Zimbabwean civil society and media can learn much from the South African experience, especially with regard to public interest litigation. The media has the role of informing

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213 De la Harpe "The use of civil activism in combatting corruption in public procurement"3.
214 De la Harpe "The use of civil activism in combatting corruption in public procurement"3.
215 De la Harpe "The use of civil activism in combatting corruption in public procurement"3.

and educating the general populace whose taxes are often used to undertake procurement initiatives. The public are the stakeholders in the procurement chain.

South Africa is an example of what De la Harpe describes as civil society in a low intensity lawfare to combat irregular, unlawful and corrupt procurement, especially by the elite. He postulates that this lawfare is bound to escalate with the nuclear procurement initiatives and with corruption, especially if it continues unabated.[216] Notably, the level of civil activism and lawfare by civic organisations in public energy procurement is negligible in Zimbabwe. As a result, questionable conduct in government procurement has gone unchallenged. Civil society should take the initiative in the fight against corruption and other procurement irregularities through public interest litigation. The role of the media is at the centre of civil involvement but needs specific reference.[217]There clearly is a need for civil activism, and ways must be found to incorporate it in the public procurement regime. For this purpose, one can look at examples from jurisdictions like South Africa.

Civil oversight of public procurement should be incorporated at all stages of the supply chain management regime of government to achieve state-civil society synergy to combat procurement irregularities. *Earthlife* a civil society organisation was at the forefront of litigation with respect to the South African case under review.[218] However, much more be achieved through cooperation between state officials and civil society than through aggressive positioning.[219] Such incorporation should not limit the use of other forms of civil activism to address unlawful and irregular public procurement. It should be noted that in many instances were questions are raised on government procurement practices, it is attributed to a third force at work that, for allegedly sinister purposes, want to discredit the system. Civil activism can be the third force in the solar project as in nuclear procurement to successfully combat irregular decision making.[220] If unchallenged, procurement practices may potentially bankrupt the state.

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216 De la Harpe "The use of civil activism in combatting corruption in public procurement" 7.
217 De la Harpe "The use of civil activism in combatting corruption in public procurement" 3.
218 [2017] ZAWCHC 50 para 2.
219 De la Harpe "The use of civil activism in combatting corruption in public procurement" 12.
220 De la Harpe "The use of civil activism in combatting corruption in public procurement" 12.

5.2.2 Blacklisting and pursuing criminal sanction against officials/companies found to have violated procurement laws

Scholars have defined criminal measures differently, depending on the disposition of the scholar.[221] In this study, criminal measures aimed at combating public procurement non-compliance are defined as common law measures or measures related to regional and international conventions. One solution that has been suggested to counter public procurement corruption is to harmonise the criminal measures to curb public procurement corruption.[222] Public procurement corruption as defined earlier fits under criminal conduct; hence the use of criminal measures to punish and prevent it. The use of the criminal justice system to combat public procurement corruption has been common practice for a very long time. In most jurisdictions, criminal measures are used mainly for punishment. In the process of punishment, the hope is that it would serve as prevention. Whether or not the use of the criminal justice system has been successful to fight public procurement corruption is difficult to measure, particularly in developing countries. However, if the use of criminal measures as de facto anti-corruption measures were effective, one would have witnessed a decrease in the incidence of public procurement corruption in developing countries.

Apart from criminal sanction, the imputing of liability on firms and multinational companies involved in public procurement corruption is another possible measure, like the case with the African Development Bank (AFDB) against CHINT Electrical for being involved in underhand dealings in acquiring tenders.[223] The imputing of liability on CHINT Electric means that the company is ineligible to be awarded contracts under any AFDB financed project or to be a subcontractor, consultant, supplier or service provider of an otherwise eligible firm in the context of an AFDB financed project.[224] Adopting an approach like that of the AFDB would potentially deter firms and individuals from engaging in underhand dealings in government procurement if accompanied with consequences.

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221 Mugadza *A legal analysis* 73.
222 Mugadza *A legal analysis* 74.
223 African Development Bank 2018 https://www.afdb.org.
224 African Development Bank 2018 https://www.afdb.org.

However, under criminal law, you cannot impute criminal liability to a corporation due to the legal definition of corruption and questions of culpability. Generally, a corporation cannot be said to be culpable for the purposes of corruption and it may be difficult to apportion criminal liability to the employees of the corporation who may have committed the corrupt act for the benefit of the corporation, especially if the corrupt act is complicated. It is most often the case that corruption cases in the public procurement regime are complicated. In most developing countries, the culpability of corporations for public procurement corruption liability is still a difficult issue. Therefore, Zimbabwe can introduce legislation that allows for the culpability of corporations in cases of public procurement corruption. There are some public procurement corruption cases where it is more expedient to hold the corporate liable rather than individual employees, directors and shareholders. It is imperative that sanctions and punitive measures for those who subvert procurement law must become commonplace. South Africa should make use of its National Treasury restricted suppliers list to curtail deviant entities from further participation in government energy procurement projects.[225] Similarly, Zimbabwe should activate its restrictive measures against deviant procurement actors to ensure that only entities with an established record are able to conduct business with the government in relation to public energy procurement.[226]

5.2.3 Strengthening administrative law mechanisms

Administrative law measures employed in fighting public procurement corruption are defined as measures permitted under the exercise of executive discretion. The procurement entities are governed by administrative law, which is part of the public law. Administrative law applies to government procurement, specifying the scope of government powers, how those powers should be exercised and the implications of the abuse of powers.[227] In short, state bodies have to act within their legal and legislative capacities. They cannot fetter their discretion, and people affected by administrative decisions must have a chance to be heard.

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225 Bezuidenhoudt and Pilane *South Africa: Public Procurement2019* 214.
226 Section 99 of the *Public Procurement and Disposal of Public Assets* 5 of 2017.
227 Bolton "Overview of the Government Procurement System in South Africa" 359.

For the purposes of this study, administrative measures for combating public energy procurement irregularities are defined as control or punitive measures that can be invoked by authorised procurement official(s) or bodies against acts of private entities in their individual capacity or as legal entities.[228] Administrative measures are targeted at corrupt or irregular procurement practices. Public procurement in most countries is a combination of both private law and public law.

The awarding of a public tender in essence means that the government (represented by the procuring entity) or an organ of state that is a public body enters into a contract with a bidder, who in most cases is a private party. The procurement entities are governed by administrative law, which is part of the public law.[229] The application of administrative law as a remedy for irregular procurement is more pronounced in South Africa compared to Zimbabwe, as highlighted by the *Earthlife* judgment and caselaw relating to public procurement. In Zimbabwe, the specialised Administrative Court has been in existence since 1976. However, its impact and relevance for public procurement is negatable or underreported. There is a need to educate the general populace and particularly civil society on remedies available to bring irregular procurement procedures under scrutiny.[230]

5.2.4 Contract performance monitoring and the role of the PRAZ

In the Zimbabwean case study above, it was found that while the participating procuring entities have their own initiatives for contract monitoring, the SPB played no role in contract performance monitoring. PRAZ should play an active role in contract performance monitoring as it is the custodian of the supplier lists and has an oversight role over the implementation of public procurement.[231] Failure to monitor contract performance results in non-completion and/or late completion of government projects.

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228 Mugadza *A legal analysis* 75.

229 Mugadza *A legal analysis* 77.

230 Feltoe is of the opinion that the designation of the Administrative Court as the appeal court of decisions by procuring entities has meant that appeals are speedily disposed of.

231 The current *Public Procurement and Disposal of Public Assets Act* 5 of 2017 has rectified the anomaly where the SPB would act as a procurer on the one hand and as the supervisor of procurement by entities on the other. PRAZ which replaced the SPB has a purely supervisory role.

Contractors go unpunished while citizens are denied a service.[232] This is the case with the Gwanda solar energy project. If monitoring of contract performance was in place, the prevailing *status quo* would have been avoidable. In South Africa the level of monitoring and auditing procedures and the institutions that ensure compliance with the public procurement regime are commendable. The use of standard terms and conditions of contract, transparency, the public availability of both the rules governing the public procurement process and the procurement opportunities are also lacking in Zimbabwe.[233]

5.2.5 The need for independent state institutions

The role of Parliament relative to international agreements with a focus on energy procurement is reaffirmed by the judgment and it is pertinent to note that a good procurement system features stakeholder participation and can be a practical tool for carrying out effective public fiscal management. The need for independent state institutions that exercise their mandate, such as the role of NERSA in energy procurement, is confirmed by the court judgment in the South African context. NERSA must not rubberstamp the decision of the Minister but must undertake extensive consultation with interested and affected parties before concurring with a decision for the expansion energy generation capacity. It can potentially inform the Zimbabwean experience if the government departments involved in the public procurement chain are able to perform their roles and duties in terms of the law without undue influence. In the Gwanda solar energy case, the then SPB played a conflicted role. The hope is that the newly constituted PRAZ with its oversight role can play a positive role in the monitoring and implementation of public energy procurement and will be able to carry out its mandate independently. The separation of operational procurement from the regulators and enforcers of procurement legislation will likely yield positive results for the public energy procurement projects.

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232 Dzuke and Naude 2015 *JTSCM* 8.
233 De la Harpe 2014 *JLSD* 93.

Section 54 of the current Zimbabwean procurement Act provides for the establishment of the Special Procurement Oversight Committee,[234] whose mandate is to review certain especially sensitive or especially valuable contracts. Such contracts are defined as those that have or may have a significant effect on the national economy or the economic interest of the State or in the State's foreign and international relations. Public energy procurement is an activity that affects the economic interest of Zimbabwe. As such SPOC should assess future energy procurement contracts in the interest of promoting constitutionalism. The SPOC is empowered under the Act in respect of defective procurement proceedings, either to refer the matter back to the procuring entity for corrective action or to terminate procurement proceedings and order fresh procurement proceedings.[235] Its functions and exercise are within the ambit of administrative law. It is also empowered to direct PRAZ to initiate investigations in terms of Part XIII of the Act. If state institutions are afforded the space and independence to perform their mandate, these measures will prevent and dictate irregular procurement.

It is important for government institutions and functionaries to abide by the law and to exercise due diligence with regard to all public energy procurement projects. The controversy surrounding the Gwanda National Solar Project must be addressed by drawing on the South African comparison. A comparison teaches us that the judiciary can play a pivotal role in enforcing procurement fundamentals. Zimbabwe also needs political buy-in and strong governance to overcome bottlenecks with respect to planning, licensing and financing stages of public energy procurement projects.[236] The procurement process needs more public exposure and only through transparent processes and outcomes will government feel compelled to account for and be able to justify its procurement decisions.

5.3 Conclusion

This paper has examined the public energy procurement of Zimbabwe and South Africa. It has noted that the earlier constitutionalisation of procurement in South Africa can

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234 Hereafter SPOC.
235 Section 54(10) (i–iii) of the *Public Procurement and Disposal of Public Assets Act* 5 of 2017.
236 African Development Bank Report 2014 39.

potentially inform the Zimbabwean jurisdiction, where a Constitution was only adopted in 2013. While the South African experience is not an antidote for the energy procurement challenges experienced in Zimbabwe and South Africa still grapples with similar procurement challenges, its courts have proved to a be a bulwark against irregular procurement. The impact of administrative law has been far-reaching in this regard. The study is not exhaustive in that the implementation and results achieved in South Africa are greatly affected by the differences in the socio-political environment, fundamental economic conditions, the technological environment of the respective countries, and the laws governing procurement.[237] Some of the things that may explain the absence of a court challenge as previously discussed include a lack of robust civil activism as civil society organisations initiated the court challenge in South Africa. The politicised nature of public energy procurement is a key factor as the Intratrek director is perceived to be politically connected. There is generally no individual incentive and lack of academic research on procurement in the country.

This research is of paramount importance as it can help public procurement practitioners identify challenges and design an efficient and effective public procurement system. The results of the study research can help policy makers discover how they can implement the policy on public procurement to ensure transparency and adherence to proper procedures. The academic contribution of the study lies in the fact that it adds to the body of knowledge on public energy procurement literature by developing and testing a conceptual framework on efficient public procurement. Zimbabwean scholars should emulate South African academics who have taken positive steps to address, inform and enrich the public procurement debate within their jurisdiction.

The world today can be described as a global village. This means that Zimbabwe's public energy procurement system no longer functions in isolation. Therefore, its public procurement laws should be aligned with other countries' laws and business practices to reap the benefits of globalisation. The field of public energy procurement is a field justifying continual research in order to capture new trends and new developments.

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237 Dzuke and Naude 2017 *JTSCM* 1.

This study thus contributes to practice in public energy procurement and suggests how the process could be improved to enhance service delivery. Public procurement of energy and related trade disciplines are expected to be even more relevant for global economic growth and development in the future than they currently are. Past estimates have indicated that global government procurement spending accounts for as much as 15–20% of GDP.[238] In addition, infrastructure investment in emerging market economies such as Zimbabwe, especially in the procurement of public energy, is expected to be a major driver of economic growth in the years to come. Research on public procurement in Zimbabwe is stagnant, unlike the upward trajectory in South Africa. This presents a stumbling block for a proper understanding and improvement of public procurement regulation, unlike in South Africa where it is now recognised as a separate field of study. Generally, lack of consistent government priorities and commitment; complex decision-making; poorly defined sector policies; weak regulatory frameworks; poor risk management; low government policy credibility; limited transparency; and lack of competition are some of the main reasons for the failure of public procurement.[239]

238 Asian Development Bank 2013 www.adb.org.
239 Bidfell 2017 *PWMP* 40.

Bibliography

African Development Bank 2014 *GPP*

African Development Bank "Comprehensive Review of the Bank's Procurement Policy and Procedures" 2014 *GPP* 1-25

Ambe 2016 *RJBM*

Ambe IM "Public Procurement Trends and Developments in South Africa" 2016 *RJBM 277–290*

Ambre and Bardenhorst-Weiss 2012 *JTSCM*

Ambre IM and Bardenhorst-Weiss JA Procurement Challenges in the South African Public Sector 2012 *JTSCM* 242–257

Anthony 2018 *Law democr Dev*

Anthony A "The use of e-procurement in South African public procurement law: Challenges and prospects" 2018 *Law democr Dev 39–47*

Anthony 2018 The legal regulation of construction procurement

Anthony A The legal regulation of construction procurement as a relational construct in South Africa (LLD- Thesis Stellenbosch University)

Arrowsmith *Public procurement regulation*

Arrowsmith S Public procurement regulation: An introduction. EU-Asia Inter University Network for Teaching and Research, In Public Procurement Regulation, 2010 5–20. http://www.nottingham.ac.uk/pprg/.

Baxter 1979 *SALJ*

Baxter LG "Fairness and Natural Justice in English and South African Law" 1979 *SALJ* 607–639

Bezuidenhoudt and Pilane *South Africa Public Procurement 2019*

Bezuidenhoudt L and Pilane B *South Africa Public Procurement 2019* in Burrows E, McNeill E, LLP Ashurst (eds)The International Comparative Guide to Public procurement 11th ed (Global Legal Group 2019) 210–216

Bildfell "Global Corruption: Law, Theory and Practice"

Bildfell C "Global Corruption: Law, Theory and Practice" in Bildfell C *Public Procurement and Corruption* (Gerry Ferguson 2017) 11/2-11–49

Bildfell 2017 *PWMP*

Bildfell C "P3 Infrastructure Projects: A Recipe for Corruption or an Antidote?" 2017 *PWMP* 34–57

Bolton 2006 *JPP*

Bolton P "Government procurement as a policy tool in South Africa" 2006 *JPP* 193–217

Bolton 2009 *PER/PELJ*

Bolton P "The Committee system for competitive bids in local government" 2009 *PER/PELJ* 57–168

Bolton *The Law of Government Procurement in South Africa*

Bolton P *The Law of Government Procurement in South Africa* (LexisNexis Butterworths Durban 2007)

Bolton 2014 *PER/PELJ*

Bolton P "Disqualification for non-compliance with public tender conditions" 2014 *PER/PELJ* 2314–2354

Bolton "Overview of the Government Procurement System in South Africa"

Bolton P "Overview of the Government Procurement System in South Africa" in

Thai KV (ed) International Handbook of Public Procurement (Auerbach Boca Raton 2009) 357–375

Chigudu 2014 *JGR*

Chigudu D "Public procurement in Zimbabwe: Issues and challenges"2014 *JGR* 21–26

De La Harpe Public Procurement Law, A comparative analysis

De La Harpe S Public Procurement Law, A comparative analysis (LLD Thesis University of South Africa 2008)

De La Harpe The use of civil activism in combating corruption in public procurement

De La Harpe S The use of civil activism in combating corruption in public procurement (1–12 Noordwes-Universiteit Potchefstroom 2016)

De La Harpe 2014 *JLSD*

De La Harpe S "Harmonising public procurement in the SADC" 2014 *JLSD* 90–109

Dza, Fisher and Gapp 2013 *PAR*

Dza M, Fisher R and Gapp R "Procurement Reforms in Africa: The Strides, Challenges, and Improvement Opportunities" 2013 *PAR* 49-57

Dzuke Public Procurement: Panacea or Fallacy

Dzuke A Public Procurement: Panacea or Fallacy - A Case of Public Service Delivery in Zimbabwe (LLD Thesis University of Kwazulu-Natal 2015)

Dzuke and Naude 2017 *JTSCM*

Dzuke A and Naude M J A "Problems affecting the operational procurement process: A study of the Zimbabwean public sector" 2017 *JTSCM* 1–13

Dzuke and Naude 2015 *JTSCM*

Dzuke A and Naude M JA "Procurement challenges in the Zimbabwean public sector: A preliminary study" 2015 *JTSCM* 1–9

Feltoe *A Guide to Administrative and Local Government law in Zimbabwe*

Feltoe G *A Guide to Administrative and Local Government law in Zimbabwe* 4th ed (Harare Zimbabwe: Legal Resources Foundation 20)

Fourie 2015 *PMF*

Fourie D "Procurement in the South African public service: a reflection of the ethical and legislative framework" 2015 *PMF* 38–45

Mugadza Combating corruption in public procurement in developing countries

Mugadza WT Combating corruption in public procurement in developing countries: A legal analysis (LLD- Thesis North-West University 2018)

Munzhedzi 2016 *JTSCM*

Munzhedzi P H "South African public sector procurement and corruption: Inseparable twins?" 2016 *JTSCM* 1–8

Vabaza A Review of the Implementation of Government Procurement Policy

Vabaza L A Review of the Implementation of Government Procurement Policy (Master of Management in Public Policy University of the Witwatersrand 2015)

Venter 2001 *PER/PERLJ*

Venter F "Utilizing constitutional values in constitutional comparison" 2001 *PER/PERLJ* 20/72–41/72

Sewpersadh and Mubangizi 2017 *PER / PELJ*

Sewpersadh P and Mubangizi JC "Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong" 2017 *PER / PELJ* 2–31

Sugudhav-Sewpersadh Corruption and the law

Sugudhav-Sewpersadh P Corruption and the law: an evaluation of the legislative framework for combating public procurement corruption in South Africa (LLD Thesis University of KwaZulu-Natal 2015)

Musanzikwa 2013 *IJEFMS*

Musanzikwa M "Public Procurement System Challenges in Developing Countries: The Case of Zimbabwe" 2013 *IJEFMS 119*–127

Lowry Achieving Justice Through Public Participation

Lowry A L Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities (Syracuse University 2013)

Molver and Gwala *The Government Procurement Review*

Molver A and Gwala M *The Government Procurement Review* 3rd ed (Law Business Research Ltd, London 2015) 261–276

Molver and Noeth "South Africa"

Molver A and Noeth G "South Africa" in Herbert C et al (eds) *The Government Procurement Review* 5th ed (Law Business Research Ltd, London 2017) 212–228

Moukiou 2016 *EPPPL*

Moukiou CP "The Principles of Transparency and Anti-Bribery in Public Procurement" 2016 *EPPPL* 72–87

Roos and de la Harpe 2008 *PER/PELJ*

Roos R and de la Harpe S "Good governance in public procurement: A South African case study" 2008 *PER/PELJ* 2–47

Sandada and Kambarami 2016 *AUDA*

Sandada M and Kambarami P The "Determinants of the Compliance to Public Procurement Policy Requirements among Public Enterprises in Zimbabwe" 2016 *AUDA* 43–57

Sugudhav-Sewpersadh P *Corruption and the Law*

Sugudhav-Sewpersadh P Corruption and the Law: An Evaluation of the Legislative Framework for Combating Public Procurement Corruption in South Africa (University of KwaZulu-Natal, South Africa 2015)

Sugudhav-Sewpersadh 2017 De Rubus*DR*58

Sugudhav-Sewpersadh P "South Africa/Russia nuclear power deal: A mockery of the constitutional procurement principles" 2017 De Rubus*DR*58

Rajah 2015 *JGRCS*

Rajah N "E-government in Zimbabwe: An overview of progress made and challenges ahead" 2015 *JGRCS* 11–15

Quinot 2011 *PPLR*

Quinot G "Enforcement of procurement law from a South African perspective" 2011 *PPLR* 193–206/1–15

Quinot and Arrowsmith Public procurement Regulation in Africa

Quinot G and Arrowsmith S Public procurement Regulation in Africa (Cambridge University Press 2013)

Williams-Elegbe 2015 *PLJ*

Williams-Elegbe S "A comparative analysis of public procurement reforms in Africa: challenges and prospects" 2015 *PLJ* 11–32

Zitha, Sebola and Mamabolo 2016 *JPAD*

Zitha HE, Sebola MP and Mamabolo MA "Compliance to procurement processes deviant behaviour and effects on service delivery in the public sector" 2016 *JPAD 59-76*

Case law

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014)

Earthlife Africa Johannesburg and Another v The Minister of Energy and *others* [2017] ZAWCHC 50; 2017 (5) SA 227 (WCC)

Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others [2007] ZASCA 165; 2008 (2) SA 481 (SCA)

Minister of Finance v Paper Manufacturers Association (567/07) [2008] ZASCA 86

South African Post Office v De Lacy (19/08) [2009] ZASCA

Legislation

Constitution of the Republic of South Africa, 1996

Constitution of Zimbabwe Amendment (No. 20) Act, 2013

Companies Act 47 of 1951

Competition Act 89 of 1998

Electricity Act 4 of 2002

Electricity Regulation Act 4 of 2006

Electronic Communications Transaction Act 25 of 2002

National Energy Regulator Act, 40 of 2004

Public Audit Act 25 of 2004

Procurement Regulations, Statutory Instrument 171 of 2002

Promotion of Access to Information Act, 2 of 2000

Promotion of Administrative Justice Act 3 of 2000,

Public Entities Corporate Governance Act 4 of 2018

Public Finance Management Act 11 of 2010

Public Finance Management Act 29 of 1999

Public Procurement Act 2 of 1999

Public Procurement and Disposal of Public Assets Act 5 of 2017

Public Procurement and Disposal of Public Assets (General) Regulations Statutory Instrument 5 of 2018

Government publications

GN 27388 of 15 March 2015

GN 34263 OF 6 May 2011

Report of the Auditor-General for the Financial year ended December 3 2017 State Enterprises and Parastatals

Internet sources

African development Bank 2014 https://www.afdb.org.

African development Bank 2014 https://www.afdb.org/en/news-and-events/transforming -africas-proc..... accessed January 2019

African Development Bank 2018 https://www.afdb.org

African Development Bank 2018 https://www.afdb.org/en/news-and-events/integrity-in-development-projects-african-development-bank-debars-chint-electric-for-36-months-for-fraudulent-practices-18078 accessed February 2019

Ambe & Badenhorst-Weiss 2011 http://www.ippa.org/jopp/download

Ambe, I.M. & Badenhorst-Weiss, J A. 2011 A review of procurement practices in the South African public sector. Available from: http://www.ippa.org/jopp/download/vol12/Book/Chapter%2016_Ambe_Weiss.pdf accessed 09 January 2019

Anon 2019 https://www.world-nuclear.org

Anonymous 2019 https://www.world-nuclear.org/information-library/country-profiles/countries-o-s/south-africa.aspx accessed April 2019

Asian Development Bank 2013 https://www.adb.org

Asian Development Bank 2013 https://www.adb.org/publications/trade-and-procurement-effective-public-purchasing-and-market-access accessed 13 August 2019

Botha date unknown www.cfcr.org.za

Botha C date unknown http://www.cfcr.org.za/index.php/docs-case-discussions?download=772:breaking-down-the-nuclear-procurement-judgment-earthlife-africa-johannesburg-and-1-other-v-the-minister-of-energy-and-5-others accessed 13 February 2019

Business Reporter 2017 https://www.herald.co.zw

Business Reporter 2017 https://www.herald.co.zw/parly-has-no-power-to-cancel-solar-project/ accessed 06 June 2018

Du Preez 2017 https://www.fin24.com/Economy/nuclear-judgment-what-government-now-needs-to-do-20170427

Du Preez E 2017 https://www.fin24.com/Economy/nuclear-judgment-what-government-now-needs-to-do-20170427 accessed August 2018

Fabricus 2014 https://oldsite.issafrica.org/about-us/iss-weekly/iss-weekly-issue-132-2014

Fabricus 2014 https://oldsite.issafrica.org/about-us/iss-weekly/iss-weekly-issue-132–2014 accessed 17 August 2018

Hasan 2018 http://blogs.worldbank.org/nasikiliza/jobs/modernizing-public-procurement-in-zimbabwe-one-step-at-a-time

Hasan 2018 http://blogs.worldbank.org/nasikiliza/jobs/modernizing-public-procurement-in-zimbabwe-one-step-at-a-time accessed 6 January 2019

Jugoo 2017 https://m.engineeringnews.co.za

Jugoo A 2017 https://m.engineeringnews.co.za/article/a-nuclear-set-back-for-south-africas-nuclear-procurement-process-2017-05-03/rep_id:4719/company:fasken-martineau-2016-06-29 accessed 18 August 2019

Martin B and Fig D 2015 https://za.boell.org/2015/08/05/final-report-findings-african-nuclear-study

Martin B and Fig D 2015 https://za.boell.org/2015/08/05/final-report-findings-african-nuclear-study accessed 19 February 2019

Nolan 2014 https://fas.org/sgp/crs/misc/R43706.pdf.

Nolan A 2014 The Doctrine of Constitutional Avoidance: A Legal Overview https://fas.org/sgp/crs/misc/R43706.pdf accessed 15 June 2018

Rennkamp and Bhuyan 2016 https://www.wider.unu.edu

Rennkamp B and Bhuyan R 2016 The social shaping of nuclear energy technology in South Africa https://www.wider.unu.edu/sites/default/files/wp2016-19.pdf accessed 14 June 2018

Parliament of Zimbabwe 2018 https://www.parlzim.gov.zw

Parliament of Zimbabwe 2018 https://www.parlzim.gov.zw/national-assembly-2018-vol-44-no-31 accessed 01 August 2018

Parliament of Zimbabwe 2018 https://www.parlzim,gov.zw

Parliament of Zimbabwe 2018 https://www.parlzim.gov.zw/national-assembly-hansard/national-assembly-hansard-31-may-2018-vol-44-no-63 accessed 12 June 2019

Scribante 2017 https://www.lexology.com

Scribante A 2017 South Africa: High Court Rules on South African New Nuclear Build https://www.lexology.com accessed 16 December 2018

Sugudhav-Sewpersadh 2017 S www.derebus.org.za

Sugudhav-Sewpersadh P 2017 South Africa/Russia nuclear power www.derebus.org.za accessed 28 November 2018