MIDLANDS STATE UNIVERSITY

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INTERROGATING THE SCOPE AND EXTENT OF PUNITIVE MEASURES IN THE PUBLIC PROCUREMENT LEGAL REGIME OF THE ZIMBABWEAN ENERGY SECTOR

BY

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APPROVAL FORM

The undersigned certify that they have read and recommended to the Midlands State University for acceptance a dissertation entitled: “Interrogating the scope and extent of punitive measures in the public procurement legal regime of the Zimbabwean energy sector” by Tafadzwa Nathaniel Gonditii in partial fulfilment of a Bachelor of Laws Honours Degree.

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DECLARATION

I, **TAFADZWA NATHANIEL GONDITII**, do hereby declare that this dissertation is a result of my own investigation and research, save to the extent indicated in the acknowledgement, references and comments included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree at any other university.

SIGNATURE ……

DATE ……..

DEDICATIONS

To my beloved parents without whose unwavering support I would have faltered.

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Contents

CHAPTER 1: INTRODUCTION

1.1. Introduction

Public procurement refers to the acquisition of goods, services and works by a procuring entity using public funds[1]. Globally, public procurement occupies a key role in service delivery and performance of government departments and public entities. Over and above the fiduciary obligation of a particular government administration to deliver goods and services to citizens, public procurement is essential for the execution of public contracts[2]. For most developing countries, especially in Africa, public procurement is a critical yardstick in measuring government efficiency. This is because governments in these countries are the major drivers for economic growth and development, and perhaps the most important determinant in the acquisition and consumption of public services[3]. In Zimbabwe the current laws regulating public procurement, particularly tender awarding, have been nothing short of scandalised by the behaviour and conduct of public officials and institutions responsible for them. This is due to the rampant corruption marring the tender system, particularly in the energy sector, where various scandals have been reported inextricably tying senior government officials to graft in this sector. As a result this has caused the government to lose millions of dollars in revenue each year.

The energy sector is essential to Zimbabwe's trade, industry and societal development. Its proper regulation or lack thereof has grave impacts on any efforts by the country to effectively turnaround the economy and to achieve sustainable growth. For instance, Zimbabwe's electricity power requirements are partly fulfilled through local generation supplemented by 35% (300MW) imports from neighbouring countries that include South Africa, Mozambique, Zambia and the Democratic Republic of Congo[4]. The country is experiencing a crippling energy crisis, largely due to poor maintenance of the existing ageing plant presumably worsened by delays in replacement of obsolete spares among other factors. This has forced the

[1]Dzuke, A. & Naude, M.J.A. (2015), '*Procurement challenges in the Zimbabwean public sector: A preliminary study'*, Journal of Transport and Supply Chain Management 9(1), Art. #166, 9 pages. http://dx.doi. org/10.4102/jtscm.v9i1.166

[2] Ibid.

[3] J Tsabora *"*Public Procurement in Zimbabwe: Law, Policy and Practice*"* (2014)*, African Public Procurement Law Journal*, 1

[4] ZESA Holdings National Centre Statistics Office

government to expedite funding of the country's power generation projects[5]. As such, a lot of money is invested into this sector and it is in the public interest that it be properly regulated.

The Zimbabwean energy sector has been a nest for excessive corruption and this has led to various public scandals. These scandals came into being as a result of relaxed rules of punishment with regards to tender related offences. An example is the debacle involving the Zimbabwe Electricity Transmission and Distribution Company (ZETDC) and a local company by the name Revma (Pvt) Ltd. In that case, the managing director of ZETDC is alleged to have authorised Revma supply a prepaid billing platform and meters without going to tender and therefore the State Procurement Board was not involved. Poor quality prepaid meters were therefore installed at an inflated cost of US$ 6 000 000.00 instead of US$ 560 000.00 and the government lost millions in the process[6]. Other recent scandals include the 200 million dollar Gwanda solar project wherein dodgy tycoon and convicted fraudster Wicknell Chivayo was unprocedurally paid US$5 million without a bank guarantee[7].

The proper legal regulation of the tender awarding procedures therefore becomes exceedingly important considering the abovementioned corruption and the inherent general interest that the public has in the proper regulation of public procurement. In order to address this, there is a new bill before the Parliament called the Public Procurement and Disposal of Public Assets Bill which aims to curb such malpractices as corruption and to promote good governance.

A very important aspect of a procurement system is its punishment or sanctions regime in general, and the extent to which it punishes deviant behaviour and consequently deter criminality. The sanctions of a legal regime are the teeth that are responsible for punishing errant and criminal conduct, thereby maintaining integrity of the system and ensuring effectiveness and successful outcomes. It is important to note that in procurement systems, the criminal actors are corporate entities, and thus, the extent that sanctions should go in meting punishment must be balanced with the need to ensure that the system continues functioning. Thus civil penalties must be balanced delicately with criminal sanctions for purposes of shaping

[5] ZESA Holdings National Centre Statistics Office (n 4 above)
[6] '*ZESA in US$6m Scandal'* Financial Gazette 12 July, 2014
[7] *"$5m Tender Scam: Minister in U-turn"* The Herald 2 May, 2016

behaviour and deterring criminal conduct. Finally, the extent to which these two classes of penalties apply, and should be applied is determined by the nature of the sector, and its importance to Zimbabwe's economic system.

1.2. Background to the Study

In Zimbabwe public procurement is governed by statute and this includes the Constitution[8], the Procurement Act[9] and its Regulations among other statutes. According to Tsabora J[10], "*The Zimbabwean Constitution goes some distance towards determining public procurement objectives that the public procurement system should aspire to achieve*". In addition he further goes on to say that the Equality clause in section 56 of the Constitution further guarantees equal opportunity and fairness. The section prohibits unfair discrimination on several grounds like nationality, race, colour, place of birth, etc. However, section 56 grants the government leeway to implement other social goals through procurement policy that could *prima facie* appear to be favouring particular groups over others. This is where the Indigenisation and Economic Empowerment Act[11] comes into play. The object of this Act, among other goals, is recognizing, supporting and empowering newly emerging suppliers and contractors who were hitherto not involved in the procurement system. Such a policy is not substantively inconsistent with section 56.

More importantly, section 315 (1) of the Constitution also governs the field of public procurement. It provides that:

> "An Act of Parliament must prescribe procedures for the procurement of goods and services by the state and all institutions and agencies of government at all levels, so that procurement is effected in a manner that is transparent, fair, honest, cost effective and competitive".

The relevant Act in line with the above provision is the Procurement Act[12] (the Act) which is supplemented by its Regulations. This statute regulates procurement by the state and state enterprises and by bodies corporate which are wholly owned or controlled by the state. In terms of application, the Act applies to all procurement entities, defined in section 1 to mean the State Procurement Board, any Ministry,

[8] Amendment No.20 of 2013
[9] Chapter 22:14
[10] J Tsabora (n3 above) 5
[11] Chapter 14:33
[12] Chapter 22:14

department or other division of the Government, any statutory body that engages in procurement; or any local authority or person declared under subsection 2 to be a procuring entity. It is clear from this definition that the Act applies to, and affects procurement by arms or organs or institutions of government, or those subsidiary bodies that carry out procurement on behalf of these governmental institutions. Essentially, the Procurement Act regulates procurement of both central and local government[13].

The procurement process at local government level is governed by the local authorities themselves and tendering is regulated by their constitutive Acts namely the Urban Councils Act[14] and the Rural District Councils Act[15]. The minimum amount above which the local authorities must call for tenders is regulated by the Minister of Local Government[16]

The Procurement Act is administered by the Minister of Finance who has, in terms of the Act, made the Procurement Regulations[17] and the Procurement (Administration Fees) Regulations[18]. In terms of section 33(3) of the Act, the Minister can prescribe requirements in the Regulations by reference to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.

A vital institution which is created in terms of the Act is the State Procurement Board (SPB) which is governed by Part II of the Act. The SPB is a body corporate whose functions are listed in section 5 of the Act and they include conducting procurement on behalf of procuring entities, supervising procurement proceedings, investigating etc. Part IV of the Act regulates the procedures and proceedings of public procurement. There is a distinction made in terms of form and nature of procurement proceedings for goods and construction on one hand, and for services on the other. In essence, however, the form and method is almost similar for procurement of both goods and services and construction, and for services[19]. However section 33 (1) provides that the actual tendering and bidding proceedings and final evaluation are the subject of Procurement Regulations

[13] J Tsabora (n 3 above) 7
[14] Chapter 29:15
[15] Chapter 29:13
[16] In terms of section 211 of the Urban Councils Act and section 79 of the Rural District Councils Act.
[17] Procurement Regulations 2010, Statutory Instrument 171 of 2002 as amended
[18] Procurement (Administration Fees) Regulations 2010, Statutory Instrument 171A of 2010
[19] See section 30 of the Act

Another relevant statute is the Prevention of Corruption Act. If a supplier contravenes section 3 of the Prevention of Corruption Act[20] the procuring entity shall reject any tender, bid or proposal made by the supplier. If the same offences are discovered after the conclusion of the procurement contract, then the contract shall be void[21]. Furthermore, section 41 provides the debarment punishment meted out by the SPB. A supplier may be declared ineligible to participate in procurement proceedings with the state for a period of not more than 3 years. Section 48 lists procurement offences as including deliberate misrepresentation of material facts in tenders, bids or proposals, and collusion between suppliers relating to quoting of prices in tenders, bids or proposals[22]. An offender of this section shall be liable to a fine not exceeding level 8 or to imprisonment of not more than 2 years or both.

The Procurement (Administration Fees) Regulations also prescribe penalties for certain acts. Each of the following acts by a procuring entity attracts a penalty of US$800: unauthorised extension of a contract; failure to follow tender procedures; application to cancel tender procedures; and the late submission of an evaluation report.[23]

Of importance is a bill before the Parliament, the Public Procurement and Disposal of Public Assets Bill, 2016. This Bill seeks to repeal the Procurement Act and abolish the SPB and in its stead it will establish the Procurement Regulatory Authority of Zimbabwe which is not a procuring entity in itself but will regulate procurement by designated procuring entities like government ministries. The bill is also aimed at ensuring vales like fairness, transparency and honesty and it is aimed at eradicating the excessive executive control over the SPB and to better regulate the tender awarding procedures in Zimbabwe thereby minimising corruption.

The punitive regime created by this legal framework is of interest since it determines the success or effectiveness of the procurement system. This research is essentially interested in the teeth of this punitive or sanctions regime, and proceeds on the basis that without sufficient legal sanctions that can bite, the legal regime will be unable to

[20] Chapter 9:16
[21] Section 39(2)
[22] Section 48 (a) and (b).
[23] Schedule to the Procurement (Administration Fees) Regulations 2010

arrest the major ills characteristic of ineffective, corruption ridden procurement systems.

1.3. Objectives

- To provide an overview of the public procurement legislation in Zimbabwe particularly applicable to the energy sector.
- To assess the nature of civil and criminal penalties available in public procurement systems generally
- To investigate the applicable criminal and civil penalties in Zimbabwe's public procurement regime, particularly relevant to the energy sector.
- To evaluate the South African approach to punishing public procurement misconduct in the energy sector
- To give recommendations aimed at ensuring an effective public procurement system in relation to criminal and civil penalties.

1.4. Problem Statement

In order to inspire business confidence in public procurement, the civil and criminal penalties of a public procurement system must be adequate, sufficiently deterrent and important in shaping behaviour of corporate actors in the system. The major legal problem is that the Zimbabwean public procurement system appears to have very relaxed, too cautious and ineffective sanctions regime, thereby failing to arrest corruption and other ills bedevilling ineffective procurement regimes. It must be pointed out that a lax penalty regime that is not deterrent enough facilitates rampant corruption in the awarding of tenders by none other than those who are supposed to uphold the law. It is the function of the law, through the Procurement Act, to provide stricter measures to prevent the wanton disregard of the law through corruption. This thesis investigates and explores the real problem underlying the penalty regime of Zimbabwe's public procurement regime, and the contribution such regime has had in the fight against corruption.

1.5. Literature Review

The regulation of tender awarding procedures or public procurement by the government is a matter of great public importance. In its broadest definition, the function of procurement captures the entire process from the identification of the

goods or services needed, through the course of identifying a supplier, to the maintenance (performance, administration and cancellation) of the contract concluded between the contracting authority and the supplier[24]. Unlike analogous commercial transacting in the private sector, public procurement is often governed and thus structured by specific detailed rules-the distinct field of law called public procurement law or public procurement regulation[25]. Quinot and Arrowsmith[26] are of the view that public procurement law is now an established field in the developed world. There are thriving research and teaching programmes in law schools in Europe and the United States of America in public procurement law and ever expanding volume of literature on the topic. In stark contrast, there are no comparable programmes on the African continent, and the literature dealing with public procurement law in Africa is almost negligible in comparison.

An important, and often prominent, objective of public procurement regulation is to combat corruption. Curbing corrupt practices such as the payment of bribes in exchange for the award of contracts has become another major aim of public procurement regulation[27]. It is often said that corruption is more of a problem in public sector procurement than in private sector procurement, because of factors such as (in some countries) low wages and the structure of government[28]. Such is exactly the case in the regulation of government procurement in the energy sector in Zimbabwe.

In Zimbabwe, the flagrant abuse of the procurement system is largely due to the fact that there is hardly any consistent enforcement of the rules and regulations. The procurement entities pretend to comply with procurement procedures while in actual fact compromising the spirit of the rules. The public officials and their accomplices severely compromise the systems because they have no fear of retribution if ever it comes. What is prevalent is advertising bids for a very short time so that just a few

[24] Arrowsmith, S "The Law of Public NA Utilities Procurement*"* (2005), 2nd Ed 1
[25] Quinot, G and Arrowsmith, S *"*Public Procurement Regulation in Africa*"* (2013),1
[26] See note 25 above
[27] See note 25 above.
[28] Trepte, P *"Regulating Procurement: Understand the Ends and Means of Public Procurement Regulation"* (2004) p74-77, Oxford University Press, Oxford.

potential bidders get the opportunity and this reduces competition against their favourites who might have known about the coming advert well in advance[29].

Some of the biggest concerns in public procurement on Africa are a perceived lack of transparency, accountability and fairness in procurement, or what can collectively be termed integrity in the procurement process[30]. There are many studies and reports that have pointed to this overarching concern with integrity as of primary importance in reforming African public procurement systems[31].

However, other scholars are of the view that transparency alone is not adequate to combat corruption in public procurement. According to Williams-Elegbe, S[32], the clandestine nature of procurement corruption makes discovery extremely difficult. Although transparency in public procurement may make it more difficult to conceal improper practices, transparency alone is insufficient to uncover procurement corruption, especially where the perpetrators have gone to great lengths to ensure that corrupt activity cannot be discovered. This scholar further provides that the other means by which corruption in public procurement may be discovered is through audits, investigations and reporting mechanisms[33].

In Zimbabwe, public procurement is dominated by procedures and guidelines meant to ensure a fair process that provides value for money. In real practice, these guidelines tend to provide opportunities for abuse and malpractice for some procurement officials[34]. In addition, literature has shown that, the most successful procurement systems are those that provide bidders a legal basis to challenge the actions of public procurement officials when they breach rules. Like in Zimbabwe, Hunja argues that one consistent weakness in most developing countries appears to be the lack of an entity within government that is charged with overall responsibility to ensure that the system is properly functioning. He contends that the lack of an entity that has oversight responsibilities creates serious gaps in the enforcement of rules and regulations. In Zimbabwe, the most difficult challenge to install such an

[29] Chigudu, D *"*Public Procurement in Zimbabwe: Issues and Challenges*"* (2014) Vol 3 Issue 4 *Journal of Governance and Regulation* 25.
[30] Quinot, G *"A comparative perspective on supplier remedies in African public procurement systems"*
[31] Odhiambo, W and Kamau, P "Public Procurement: Lessons from Kenya, Tanzania and Uganda*"* (2003), *OECD Development Centre:* Working Paper No. 208.
[32] A perspective on corruption and public procurement in Africa
[33] Ibid.
[34] Chigudu (n 30 above) 21.

oversight body may be the lack of political will at the highest levels of government to significantly overhaul the existing system and capacitate the Anti- Corruption Commission[35].

1.6. Research Methodology

This research will adopt a desktop study as the primary research methodology. Desktop study refers to secondary data or data which can be collected without field survey. This will include searching the library and the internet. The research will also employ a descriptive methodology in describing the principles underlying public procurement regulation in Zimbabwe particularly in the energy sector. Some chapters of this dissertation will interrogate the effects of corruption on public procurement and the effectiveness of the penalties subscribed in order to prevent it. This dissertation will also adopt a doctrinal analysis wherein all the laws governing public procurement in Zimbabwe will be analysed. Other primary and secondary sources will be used including internet sources, newspaper articles, journal articles, international instruments and textbooks. A comparative analysis shall be carried out to compare the penalty regime of other jurisdictions, though not in detail but in passing.

1.7. Chapter Synopsis

Chapter 1

This chapter is devoted to giving an introduction, background to the study, statement of the problem, outlining the research objectives, overview of the literature or current legal framework on the subject, the research methodology as well as a synopsis of chapters.

Chapter 2

This chapter will provide an assessment of the nature of civil and criminal penalties in public procurement systems generally.

Chapter 3

This chapter will investigate the applicable criminal and civil penalties in the Zimbabwe public procurement regime, particularly relevant to the energy sector.

[35] Ibid.

Chapter 4

This chapter will evaluate the South African approach to the punishment of public procurement misconduct in the energy sector.

Chapter 5

This chapter will conclude the dissertation and give recommendations to ensure an effective public procurement system in relation to criminal and civil penalties.

CHAPTER 2: PUNISHMENT MECHANISMS IN PROCUREMENT LAW

2.1. Introduction

Public procurement systems all over the world are bedevilled by various ills like corruption, fraud, bribery and collusion. These in turn lead to costly and inefficient public procurement processes which cause the government to haemorrhage vast amounts of money in revenue every year. In order to combat these ills or vices, public procurement systems provide for both civil and criminal penalties and these penalties usually have dual functions of preventing and/ or punishing public procurement corruption with little regard to rehabilitative aims. This chapter will outline civil penalties like debarment, anti-corruption agreements (integrity pacts) and monetary contractor penalties, to mention just a few. Criminal sanctions in public procurement include specific prohibition of offences like fraud, bribery or corruption provided in procurement legislation for instance the Procurement Act[36] in Zimbabwe. Conviction is usually accompanied by payment of a fine or custodial sentences in the case of natural persons.

2.2. Civil Penalties

2.2.1. Debarment

Debarment is sometimes interchanged with exclusion and it comes about as a result of various offences in procurement. As a consequence of being found guilty of corruption, fraud and various other offences, firms and individuals can be debarred from participating in future public tenders[37]. Such consequences will not only reduce governments' risk of entering into contracts with corrupt or in other ways dishonest suppliers, but may also have a preventive impact on players' propensity to be involved in certain offences in the first place. While debarment has gained significant terrain in the last decade, particularly as a device in the fight against corruption, the rules differ across jurisdictions and international organizations[38].

The debarment or suspension process is intended to protect the government and citizens, from unscrupulous or unreliable contractors. Through the suspension and

[36] Chapter 22:14
[37] Hjelmeng, E and Soreide, T "*Debarment in Public Procurement: Rationales and Realisation*" (2014)in G. M. Racca and C. Yukins "*Integrity and Efficiency in Sustainable Public Contracts" (*2014*)* 1
[38] See note 37 above.

debarment process, the government may suspend contractors from further government work, or debar them for specific periods of time, generally up to three years. The government suspends or debars contractors if, based on serious past acts, it appears that the contractors lack the ethics, performance record or internal controls required of a government contractor. Although suspension and debarment technically cover only prospective government contracts, not current work, as a practical matter the shock and infamy of suspension or debarment can quickly drive government contractors (especially small contractors) out of business[39]. This therefore means that the debarment or suspension penalty attracts negative publicity and in the case of smaller contractors or suppliers, they cannot survive such. Consequently, these suppliers have to be on their best behaviour and avoid any misconduct thus promoting integrity in public procurement.

An example of giant companies dodging debarment or suspension penalties is the 2014 Brazil corruption scandal. This case involved a large number of suppliers to the national oil company Petrobras having been involved in corrupt schemes, with parts of their bribes being channelled to Brazil's political elite and both Brazilian and foreign suppliers were implicated. These suppliers had formed a cartel, and according to the country's public procurement regulations, they should have all be debarred. However, the government's demand for infrastructure and other construction services required exemptions from the rules[40]. Another example is the 2014 debarment of British Petroleum (BP) in the aftermath of the Deepwater Horizon accident and oil spill. According to a press release[41] released by BP, it entered into an administrative agreement with the US Environmental Protection Agency "resolving all matters related to the suspension, debarment and statutory disqualification of BP following the Deepwater Horizon accident and oil spill. As a result of the agreement, BP is once again eligible to enter into new contracts with the US government, including new deepwater leases in the Gulf of Mexico". This shows that debarment is a serious sanction and energy companies will always try to avoid it.

[39] Yukins, CR *"Suspension and Debarment; Rethinking the Process"* (2004)
[40] Soreide, T and Auriol, E "An Economic Analysis of Debarment" (2017) 7
[41] Dated 13 March 2014 and titled *"BP reaches administrative agreement with EPA resolving suspension and debarment"*

According to Elegbe[42], debarment usually includes disqualification for three kinds of behaviour- past violations that are unrelated to public procurement; disqualifying a bidder from a particular procurement process for the breach of the rules of that process; disqualifying a supplier from future public contracts for past procurement violations. The rationale for using this tool to fight corruption in public procurement is three-fold. First, it supports the anticorruption policies of a government, second it is punitive, and third, it is preventative, as it may protect the government from corrupt or unethical contractors[43].

This punitive measure is usually modelled in two ways, that is, the judicial model and the administrative model. The judicial model is one where the exclusion is part of the penalties imposed during a criminal trial for corruption. This necessarily means that the court plays an active role in the imposition of this penalty. On the other hand there is the administrative model where exclusion is imposed by a procurement official at the stage of prequalifying bidders or evaluating tenders[44].

2.2.2. Integrity Pacts

These are enforceable anti-bribery pledges overseen by an empowered independent monitor. Integrity pacts lend added credibility to the procurement process through enhanced transparency and accountability. These pacts are intended to accomplish two primary objectives, being to enable companies to abstain from bribing by providing assurances to this effect and to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement[45]. Beyond the individual impact on the contracting process in question, integrity pacts and their consequences within contracting systems are also intended to create confidence and trust in the public decision-making, a more hospitable investment climate and public support for the government's own procurement, privatisation and licensing programmes[46]. In early 2017 leaders form ten major oil and gas operators in Brunei including Brunei Shell Petroleum, Brunei LNG and BSM signed an Energy Industry

[42] Williams, S "Debarment*"* (2008) *Economics of Corruption*
[43] Williams (n 42 above) 12.
[44] Williams (n 42 above) 12
[45] *"The Integrity Pact*" Transparency International India, 2005
[46] Kostyo, K "Handbook Curbing Corruption in Public Procurement" (2006) *Transparency International* 56

Business Integrity Pact and they pledged and committed to the Summarised Principles such as prohibition of bribery etc[47]

Integrity pacts are made up of various elements which include, but are not limited to:

- An agreement between a government department and potential government contractors to submit tenders for a public sector project.
- And undertaking by the principal suppliers/bidders that their officials will not demand or accept any bribes, gifts or payments of any kind, with appropriate disciplinary, civil or criminal sanctions in case of violation.
- A statement by each bidder that he has not paid, and will not pay any bribes in order to obtain or retain a government contract.
- An undertaking by each bidder to disclose all payments made in connection with the contract in question to anybody (including agents and other middlemen as well as family members of officials).
- Bidders are advised to have a company code of conduct that clearly rejects the use of bribes and it must provide a pre-announced set of sanctions for any violation by a bidder of its statement of undertaking including loss of contract, forfeiture of the bid, liability for damages or debarment.
- Alternative dispute resolution mechanisms like arbitration and mediation.

Integrity pacts establish contractual rights and obligations of all the parties to a procurement process and thus eliminates uncertainties as to the quality, applicability and enforcement of criminal and civil legal provisions in a given country. This means that applying the integrity pact concept can be done anywhere without the normally lengthy process of changing the local laws[48].Transparency opens the procurement process to more stakeholders which ultimately makes the procurement system both stronger and sounder.

2.2.3. Monetary Penalties

Another civil remedy that can be applied to the supplier or contractor is the imposition of a fine. These monetary penalties can be imposed for violations of

[47] Begawan B S, "*Signing of Brunei Energy Industry Integrity Pact*" (2017)
[48] Begawan (n 47 above).

sound procurement principles like transparency and integrity and the aim is to punish the wayward behaviour of the contractor and deterring any future misconduct in the process. As an example, violation of the Procurement Integrity Act[49] in the United States of America through offences like disclosing or obtaining bid information or accepting bribes can be punished through civil penalties. As such, each knowing violation by an individual of any of the four key provisions of the Procurement Integrity Act may result in civil penalties up to $50,000 per violation and administration actions. In the case of corporations, they can be fined up to $500,000 per violation plus twice the amount of compensation an organization received or offered for the prohibited conduct.[50]

However, while in principle administrative fines could be made to have significant impact, they often are insignificant (primarily due to a fairly low ceiling on fines and the limited moral impact of an administrative fine versus a criminal conviction) and thus are not respected as effective sanctions[51].

2.2.4. Cancellation or Termination of the Procurement Contract

A procurement contract, just like any other type of contract, can be terminated or cancelled in the right legal circumstances as punishment for unlawful or unethical behaviour. In the field of public procurement, a contract can be cancelled by the procuring entity if the bidder has committed various set offences. However such cancellation must be done lawfully and in consequence of breach of pre-set offences that can lead to rescission of the contract. An example is the use of bribes to obtain or retain a government contract or even collusion for instance in Zimbabwe, a tender by the Zimbabwe Electricity Supply Authority (ZESA) to appoint aggregators for the resale of pre-paid electricity units attracted more than 40 bidders who were willing to cash in on the vending business. However, ZESA could only accommodate 4 aggregators and allegations emerged that during the bidding process that companies that were earmarked to win the bid had been pre-determined by corrupt officials from both ZESA and the State Procurement Board and that one of the bidders, Revma,

[49] Procurement Integrity Act of 1988, 41 U.S.C.A.
[50] "Procurement Integrity: What You Need to Know As A Federal Employee" (2016), United States Environmental Protection Agency available at http://www.epadatadump.com
[51] Kostyo (n 46 above) 54

was also an adjudicator. In the subsequent uproar, the erstwhile Minister of Energy Dzikamai Mavhaire cancelled the tender under PBR 1695 of December 19, 2013[52].

Other jurisdictions provide for guidelines to termination of public procurement contract in cases of criminal behaviour like the Philippines which has Guidelines on Termination of Contracts[53]. These guidelines "aim to promote fairness in the termination of procurement contracts and to prescribe contract conditions and measures to enable government to protect its interests"[54]. Further, the guidelines also provide for termination of different types of contracts and the circumstances in which the termination can be done.

2.2.5. Denial of Access to Government Contracts

This measure is an administrative remedy that is characterised by the government restricting corrupt firms or persons access to public sector contracts. These restrictions are either temporary or permanent and they differ from debarment/ suspension in that they are administrative while debarment is predominantly judicial in nature. This means that the government can have recourse to these measures without the need to approach a court of law. According to Elegbe[55] such measures are utilised by procurement systems in developing and developed countries, and may be used to deny corrupt persons access to contracts for procurement or non-procurement-related violations. Similar measures which have the effect of denying access to government contracts are those which deny corrupt persons registration on qualifying lists for government contracts.

2.3. Criminal Penalties

Most countries outlaw bribery and other forms of corruption and impose criminal sanctions for instance in the Philippines it is criminalised through the Anti-Graft and Corrupt Practices Act[56] and in Sri Lanka through the Bribery Act[57].

Regulatory measures against corruption in procurement regulation are those, which are mandatorily imposed through legislation. In public procurement, the most obvious of these are criminal sanctions for bribes. Although the prohibitions against

[52] "*Government cancels ZESA tender*" Sunday Mail 21 June 2014
[53] GPPB Resolution No. 018-2004 dated December 22, 2004, Annex "A"
[54] See note 53 above.
[55] S Williams-Elegbe "A Perspective on Corruption and Public Procurement in Africa" (2013) 14
[56] Republic Act No. 3019 (Anti-Graft and Corrupt Practices Act)
[57] Chapter 26

bribery may not be situated within the procurement legislation, it is usually a criminal offence for a public official to accept bribes or other inducements in the exercise of his public function. The prohibition against bribery is frequently accompanied by severe punishments including custodial sentences and other punishments[58]. For instance, a corrupt public official, in addition to a fine or custodial sentence that may be imposed during a criminal trial, will invariably also lose his employment and in some jurisdictions may also forfeit his pension and related benefits[59].

Many of the major industrial countries have established the concept of criminal liability of legal persons or corporations. Other countries should be challenged to adopt the concept of criminal liability of legal persons or at least to make their administrative fines system so as to allow truly effective, proportionate and dissuasive sanctions.

Many jurisdictions outside Africa have followed the example set by the United States of America[60] and criminalised overseas bribery. This means that where an individual is found to have bribed a foreign public official, such a person would be liable to conviction in his home state. South Africa is the only African country to have criminalised foreign bribery[61] and did so in order to accede to the OECD Anti-Bribery Convention.

2.4. International Law

Anti-corruption measures on the international and multi-lateral plane can be divided into binding international instruments such as treaties and conventions, soft law instruments such as OECD recommendations and UN General Assembly resolutions and declarations[62].

The first of these instruments that is relevant to procurement corruption is the OECD Anti-Bribery Convention[63] whose main obligation is provided in Article 1 as obliging states to take necessary measures to outlaw international bribes in their national

[58] Unpublished: S Williams-Elegbe "*Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measure*s" Unpublished LLD Thesis, University of Nottingham, (2011) 35
[59] See G. Becker and G. Stigler, "Law Enforcement, Malfeasance and Compensation of Enforcers" (1974) Vol 3 *Journal of Legal Studies*, 1-19
[60] This was done through the enactment of the Foreign Corrupt Practices Act 1977
[61] Through the Prevention and Combating of Corrupt Practices Act 12 of 2004, s.5.
[62] Elegbe (n 58 above) 15
[63] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 2011

legislation. In addition, Article 3 of this convention provides for the sanctions to be imposed and in terms of Art 3(1), foreign bribery shall be punishable by “effective, proportionate and dissuasive criminal penalties”. At the same time, where these are not applicable, “legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”.

In addition, the United Nations Convention against Corruption also provides for measures to combat corruption and it is relevant to public procurement. Section 9 requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption[64].

In Africa there are the Southern Africa Development Community Protocol against Corruption of 1980 and the African Union Convention on Preventing and Combating Corruption. The object of these conventions is to promote and strengthen measures to prevent and combat corruption in Africa. This is because they deal with acts of corruption that might be peculiar to Africa.

2.5. Conclusion

Civil penalties are generally more preferable when it comes to sanctioning public procurement misconduct and corruption as opposed to criminal penalties. This is due to the fact that civil penalty provisions are founded on the notion of preventing or punishing public harm for example debarment and in the case of civil monetary penalties, they play a key role in regulation as they may be sufficiently serious to act as a deterrent (if imposed at a dissuasive or inhibitive level) but do not carry the stigma of a criminal conviction. This in turn leads to the development of commerce and thus increasing business confidence in the energy sector. It is the researcher`s opinion that energy sectors worldwide should adopt civil remedies instead of criminal sanctions because the energy sector is central to socio-economic activities and should thus be properly regulated and incentivised. In addition, civil remedies are

[64] United Nations Guidebook on Anti-Corruption In Public Procurement and The Management of Public Finances,2013

preferable because they also assist in better ensuring compliance for instance debarment may lead to calamitous consequences for suppliers and thus they would ordinarily avoid procurement misconduct in order to avoid this punishment thereby strengthening the integrity of the procurement system.

However, for all the advantages that accrue to civil penalties there are also drawbacks that militate in favour of criminal penalties. For instance the imposition of a fine on a large corporation may be ineffective because such fines, if they are not sufficiently deterrent, can be absorbed to become part of operating expenses thus rendering the sanction useless. An example is the energy industry behemoth British Petroleum (BP) which was fined for the Deepwater Horizon oil spill in 2009. Criminal sanctions therefore become necessary to sufficiently punish and deter such behaviour.

CHAPTER 3: PUNISHMENT MECHANSIMS IN THE ZIMBABWEAN PROCUREMENT SYSTEM

3.1 Introduction

In Chapter Two both civil and criminal punitive measures were discussed in general. Such measures apply to public procurement systems worldwide but they are not necessarily uniform in their application or they may rank differently in terms of application, depending on the jurisdiction in question. This chapter will provide an analysis of the civil and criminal penalties applicable to procurement misconduct and corruption in Zimbabwe. Consequently, this necessitates an investigation of the applicable procurement legislation including the Procurement Act, the Procurement Regulations and other relevant statutes. These regulate procurement and the sanctions they provide will be analysed in the context of the energy sector in Zimbabwe.

3.2 Civil Penalties

3.2.1 Debarment

The primary statute regulating government procurement in Zimbabwe is the Procurement Act[65]. This Act provides for civil penalties that are available to the procuring entity in the case of transgression by the supplier or contractor. In this respect, section 41 provides for the debarment penalty. In terms of this section, if a supplier contravenes section 48 of the Act or any provisions of the Prevention of Corruption Act[66], or where the procurement contract is cancelled because of fraud on the part of the supplier, then the State Procurement Board is empowered to declare the supplier ineligible to participate in procurement proceedings with the State or any statutory body for a period not exceeding 3 years. This section also attempts to comply with the rules of natural justice and affords the supplier the right to make adequate representations to the SPB before the decision to debar is made[67]. Additionally, all bids or concluded contracts involving the relevant supplier shall be void[68].

Debarment is very much a part of the Zimbabwean procurement enforcement mechanisms and the fact that it is part of our system shows an attempt to ensure a sound procurement system. However the efficiency of the enforcement of this penalty is another matter. Section 41 provides that the maximum period of

[65] Chapter 22:14
[66] Chapter 9:16
[67] See section 41(2) of the Procurement Act
[68] See section 41(5) of the Procurement Act

debarment is three years and the researcher is of the view that this period of debarment is not long enough to sufficiently deter corrupt suppliers or contractors. This is so especially in light of the importance of public procurement to the economic well-being of the nation as a whole. According to Dzuke, A and Naude, MJA[69], globally, public procurement occupies a key role in service delivery and performance of government departments and public entities. Over and above the fiduciary obligation of a particular government administration to deliver goods and services to citizens, public procurement is essential for the execution of public contracts. Shaw and Totman are of the view that if the suspension and debarment standards and procedures administered by one jurisdiction are too general or imprecise, they can fail to reflect the context and nuances of that jurisdiction's specific procurement system, political structure, and culture[70].

Additionally, debarment may not be effective in the case of mega corporations that have numerous subsidiary companies for instance petroleum industry giants Puma Energy and Redan Petroleum in Zimbabwe which were taken over by Dutch commodities giant Trafigura[71]. This means that if one company or supplier is debarred, then the same parent company can simply instruct another subsidiary to make a bid for the same contract thus rendering the debarment penalty ineffective. Furthermore, the corrupt supplier can simply grease the right palms and escape the debarment or suspension altogether. All this points to an ineffective debarment and suspension system in Zimbabwe which is in urgent need of reparation.

3.2.2 Monetary Penalties

The procurement system in Zimbabwe also makes use of civil monetary penalties as a way of punishing misconduct and corruption. This sanction is provided for in Section 48 of the Procurement Act[72] and it is to the effect that if a supplier or their agent misrepresents any material fact in a bid or tender proceedings or where they enter into a collusive agreement with other suppliers, they "shall be guilty of an

[69] Dzuke, A. & Naude, M.J.A. 'Procurement challenges in the Zimbabwean public sector: A preliminary study' (2015), *Journal of Transport and Supply Chain Management* 9 (1), Art. #166, 9 pages. http://dx.doi. org/10.4102/jtscm.v9i1.166
[70] Shaw , SA and Totman, JC "Suspension and Debarment: strengthening integrity in international defence systems" (2015) *Transparency International UK* 35
[71] *"Foreign giants take over fuel sector"* Zimbabwe Independent 11th August 2015
[72] Chapter 22:14

offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment".

The fines as provided for in the Standard Scale of Fines[73], are to the effect that a level eight fine is equivalent to ZW$25 000 or US$ 500 and it can be imposed on both natural and juristic persons. This is because when individuals commit criminal acts, they frequently act in the interest of, or even at the direct behest of, companies. Experience shows that only if companies themselves can be held liable and accountable for such criminal acts, they will undertake measures to curb corruption and manage their staff accordingly[74].

In terms of severity, the five hundred dollar sanction is too frail in the sense that it is too low such that there is no deterrence at all and firms and individuals can engage in acts of bribery and collusion without any apprehension. This therefore means that the public procurement system will always be plagued by corruption as long as the existing state of affairs, in terms of fines, is still extant. The only part of section 48 that is likely to give pause to would-be corrupt individual suppliers is the imprisonment sentence. In terms of this section, a supplier can be imprisoned for a period not exceeding two years. This may serve as some form of deterrent to individuals but however, it will not be imposed on corporations given their juristic nature and as a result, these sanctions are not very effective and they need to be amended in order to protect the integrity of the procurement system.

Civil penalties in Zimbabwe are not only applicable to the supplier or bidder but they can also equally apply to the procuring entity. This is evident from the Procurement (Administration Fees) Regulations which also prescribe penalties for certain unprocedural acts. Each of the following acts by a procuring entity attracts a penalty of US$800: unauthorised extension of a contract; failure to follow tender procedures; application to cancel tender procedures; and the late submission of an evaluation report[75].

[73] As substituted by the Finance Act, 2009 (No. 3 of 2009) with effect from 23rd April, 2009.
[74] Kostyo, K "Handbook Curbing Corruption in Public Procurement" (2006) *Transparency International* 56
[75] Schedule to the Procurement (Administration Fees) Regulations 2010

3.2.3 Cancellation of the Procurement Contract

This is a punitive measure that is preordained to punish the supplier for various offences that relate to procurement. Christie[76] is of the view that the act of cancellation, which is also sometimes described as acceptance of the repudiation, rescission and (less felicitously) repudiation, may be performed by the innocent party themselves, without the assistance of the court. However a court can also be approached to order the cancellation of a contract and the desirability of having an order for cancellation so that the status of the contract is not in doubt is well recognised[77]. In the context of public procurement, a procuring entity (the SPB in this case) can resort to this remedy *mero motu* or it can approach the court for a cancellation order.

In Zimbabwe, the State Procurement Board is entitled, in terms of section 46 of the Procurement Act, to carry out an investigation if it considers that such an investigation is necessary or desirable for the purpose of preventing, investigating or detecting a contravention of the Act or any other law. If the Board is satisfied that the Act or any other law has been contravened, it can order the cancellation of the procurement contract in terms of section 47 (2) (b) of the Act. This therefore means that a procurement contract can be cancelled by the procuring entity for offences like misrepresentation, fraud, corruption, bribery etc. The phrase "or any other law" means that the contract can be cancelled for breach of other relevant laws that are not necessarily contained in specific procurement legislation for instance the Rural District Councils Act[78] or the Criminal Law (Codification and Reform) Act[79].

This penalty is an effective deterrent against procurement misconduct in Zimbabwe because it not only encompasses offences contained in the Procurement Act or its Regulations, but it also provides for cancellation of the contract for breach of other relevant laws as well. In the energy sector, this remedy has been effectively used in Zimbabwe as can be seen from the examples of cancelled tenders/contracts due to corruption. An example is the cancellation of the tender awarded to PowerTel Zimbabwe by the Zimbabwe Electricity Transmission and Distribution Company (ZETDC) in 2014. This was despite the fact that these two entities are sister

[76] R H Christie "*The Law of Contract in South Africa*" 4th Ed, (2001) 625
[77] *Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A) 560-561*
[78] Chapter 29:13
[79] Chapter 9:23

companies and in any event, the tender was unprocedurally awarded. Due to these and other factors like technical irregularities, the tender was twice cancelled by the SPB in August 2012 and was only re-flighted in September 2013 through the SPB[80].

3.2.4. Denial of Access to Government Contracts

This is an administrative remedy that is characterised by the government restricting corrupt firms or persons access to public sector contracts. In Zimbabwe, the Procurement Regulations provide for this punishment in terms of Regulation 32 which relates to unsatisfactory work or conduct by suppliers. This remedy can be resorted to in various circumstances for instance if the SPB is satisfied that execution of a government contract is unsatisfactory, where a bribe has been paid or where the supplier acts fraudulently or in bad faith in relation to any government contract. Where a supplier has been found guilty of the above, the Board, in terms of Regulation 32, may direct that no tender from that person shall be considered for a period of at least five years.

Again, this punitive measure may be circumvented in the same way that debarment is skirted by big money companies especially in the energy sector. This can be done through the use of subsidiary companies or even shell companies by using them as alternative bidders. Since there is no law specifically prohibiting such conduct (and even if there was, it would be almost impossible to enforce owing to a number of impediments like identifying them, for starters) these companies can get away with murder thus there is need for law reform in order to reinforce this remedy.

3.3. Criminal Penalties

Criminal prosecution is also one of the remedies or punishments that accrues to the errant supplier who is convicted of certain procurement offences like bribery, fraud or corruption in terms of the Procurement Act. Additionally, there are other relevant pieces of legislation that are applicable besides the Procurement Act, for instance the Criminal Law (Codification and Reform) Act. The SPB is empowered by section 46 of the Act to carry out investigations in order to prevent, investigate or detect a contravention of the Act or any other law. Any person who is found guilty of hindering an investigator in the exercise of his functions “shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six

[80] “*ZESA prepaid tender scandal deepens”* The Independent, 26 May 2017

months or to both such fine and such imprisonment."[81] Such imprisonment is imposed through judicial mechanisms.

Furthermore, the Procurement Act also provides for specific offences that relate to procurement and in terms of section 48 if a supplier knowingly misrepresents any material facts in relation to a tender or enters into a collusive agreement, they shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

As indicated earlier in Chapter Two, prohibitions against bribery and other forms of procurement corruption may not be exclusively contained in the procurement legislation itself. This means that there are other statutes that are relevant to procurement as far as criminal punishment of procurement misconduct is concerned. In terms of section 170 of the Criminal Law (Codification and Reform) Act, bribery is proscribed and is punishable by a fine not exceeding level fourteen (or 3 times the value of any bribe) or alternatively imprisonment of not more than 20 years. This sanction is commendable for providing a deterrent imprisonment term but however, in practice, it is yet to be passed on anyone thus the guilty are just fined and released. This therefore means that in practice there is no effective penalty against bribery though in theory the penalty is stiff enough.

With regards to criminal conviction vis-a-vis debarment, the conviction of an individual does not necessarily mean automatic debarment from the procurement system. The debarment punishment can be meted out for procurement offences or any other related offences and thus if a supplier is convicted for an offence like fraud, they can be debarred from participating in government contracts on that basis alone. However the debarment is not automatic upon conviction, it has to be imposed through further administrative action by the procurement authorities. An example is the situation involving controversial businessman Wicknell Chivayo who is a convicted fraudster but however his company Intratek (Pvt) Ltd was allowed to participate in public tender proceedings like the Gwanda Solar Project notwithstanding the conviction. This means that the effect of conviction is not

[81] See section 46(6) of the Act

automatic debarment but rather it provides the basis upon which administrative debarment can be done.

Section 174 provides for criminal abuse of duty as a public officer which is another offence that is relevant to public procurement. In terms of this section, this offence is committed when a public officer in the exercise of his duty intentionally does anything that is contrary to his duty as a public officer for the purpose of showing favour or disfavour to any person. Any person found guilty of this offence shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both[82].

In **State v Mangoma**[83] the erstwhile Minister of Energy and Power Development Mr Elton Mangoma was charged with the abovementioned offence and the state alleged that he ordered his subordinates to procure fuel from a South African company in breach of the provisions of the Procurement Act and its regulations. It was specifically alleged that he contravened s 174 (2) of the Criminal Law (Codification and Reform) Act and that in his capacity as the Minister and therefore a public officer he directed the Acting Chief Executive Officer of PetroTrade to purchase five million litres of diesel from NOOA Petroleum (Pty) Ltd without going to tender in order to show favour to NOOA whilst showing disfavour to approved companies duly Gazetted. However he was discharged at the close of the state`s case but the significance of this case to public procurement is that it shows the importance of the energy industry in Zimbabwe such that even the responsible Minister may be prosecuted for alleged procurement misconduct.

3.4. Anti-Corruption Mechanisms

The principal organisation tasked with the eradication of corruption in both government and private sectors is the Zimbabwe Anti-Corruption Commission. It is a constitutional body provided for in terms of Chapter 13 Part I of the Constitution[84] and is established in terms of the Anti-Corruption Commission Act[85] whose aim is to "provide for the establishment of the Anti-Corruption Commission in order to combat

[82] See section 174 (1)(b) of the Act
[83] HH 74/11
[84] Amendment No 20 of 2013 sections 254-257
[85] Chapter 9:22

corruption, and to provide for matters connected with or incidental to the foregoing"[86]. The objectives of this Commission, as provided for in section 11, include, inter alia, promoting the investigation of serious cases of corruption and fraud and making proposals for the elimination of corruption in the public and private sectors.

The functions of the Commission are enumerated in section 12 of the Act and those most relevant to public procurement include sections 12(a), (e) and (g) which read:

1. to monitor and examine the practices, systems and procurement procedures of public and private institutions;
2. to receive and investigate any complaints alleging any form of corruption;
3. to assist in the formulation of practices, systems and procurement procedures of public and private institutions with a view to the elimination of corrupt practices.

Additionally, the Commission has very wide powers which are set out in section 13 of the Act. For instance the Commission can exercise its powers concurrently with those of the police and in exercising these powers it shall be governed by the relevant provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which govern the police. This therefore means that the Commission is in no way inferior to the police and it can carry out its own independent investigations into matters of procurement corruption. Furthermore, the Commission also has the power to cause the prosecution, through the Prosecutor General`s office, of any person who is reasonably believed to have committed offences that involve corruption[87]. In this regard, the Commission can recommend the prosecution of those who engage in procurement corruption which prosecution will be done in terms of the CPEA.

In as far as the powers of the Commission are involved, they are akin to those of the police and the fact that they can be exercised concurrently with those of the police means that even where the police refuses or fails to investigate a matter of corruption, the commission can take up the mandate unto itself and carry out the investigation and recommend prosecution of the offender. In any event, the Commission is more equipped to deal with these matters of corruption because

[86] Short Title of the Act
[87] See part 7 of the Schedule to section 13 of the Act

dealing with corruption and incidental matters thereto is its sole mandate and in pursuance of this, there are various tools that are used to achieve this goal for instance conducting investigations or formation of special committees in terms of section 16 of the Act. All this points to the purported effectiveness of the Anti-Corruption Commission.

Additionally, the Prevention of Corruption Act[88] is another statute that is aimed at the eradication of corruption in Zimbabwe, including corruption in the energy sector. This Act is to be construed as additional to other statutes that are meant to prevent and punish corruption for instance the Criminal Law Codification and Reform Act. This therefore means that it is a complementary statute, in terms of section 17. Section 6 of this Act is to the effect that if a person engages in activity that is likely to prejudice the State through corruption and other means, the Minister can declare that person to be a specified person. Such declaration must be done in the national interest and must be by publication in the Gazette. As earlier on referred to in Chapter 2 the energy sector is pivotal to the economic well-being of a state and therefore it should be properly regulated, including its procurement system. Consequently, a person who engages in procurement corruption in the energy sector must be declared a specified person because it is in the national interest, given the extreme significance of the energy sector. The effect of being declared a specified person is that a person will be blacklisted and cannot be allowed to take part in government contracts until they have been cleared by the relevant authorities.

3.5. Penalties under the Proposed Public Procurement and Disposal of Public Assets Bill

The penalty regime under the new proposed bill on procurement and disposal of public assets can be said to be a near regurgitation of both civil and criminal penalties that occur under the Procurement Act and its Regulations. This is in light of the fact that these sanctions are similar to the ones that occur in the previous Act for instance the proposed bill provides for civil remedies like cancellation of the procurement contract for collusion, a position that also occurs under the Act. Debarment is also provided for in terms of section 72, section 98(2)(f) and section 99 and the maximum period for debarment is 3 years, as is provided in the Act.

[88] Chapter 9:16

Moreover, the proposed bill also provides for termination of the procurement contract as a punitive measure in terms of section 87(d) as read with section 89. Criminal penalties are also provided for as a punitive measure for the same offences as before and the severity of this sentence has not changed at all under the proposed bill. For instance, procuring entities are required by section 72(5) to report misconduct like bribing and corruption to the police for prosecution. Furthermore, section 97(4) also criminalises the hindrance of an investigation that is launched at the behest of the Authority and anyone found guilty of this offence shall be liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

Perhaps the only novel feature that has been introduced by the proposed bill is the aspect of liquidated damages for delay. These damages are payable where a procurement contract provides that the contractor is liable to pay an agreed percentage of the contract value for delay in the performance due under the contract. This therefore means that it can only be resorted to in instances where it is contractually provided for. This penalty is laudable in that it is novel and it adds on to the various civil punishments that can be meted out on contractors

3.6. Conclusion

The legislative framework on public procurement in Zimbabwe seeks to promote various concepts like openness, transparency, value for money and fair treatment of suppliers, the ultimate aim being to create a pulsating public procurement system free of corruption and other vices. Accordingly, the punitive system as provided in the Procurement Act and other relevant statutes is very important towards achieving this end. This means it should be vibrant enough to deter any misconduct and at the same time it should not be too harsh so at to hinder business enterprises. Punitive mechanisms (civil and criminal) under both the prevailing legislation and the proposed bill are generally lukewarm and thus can be taken advantage of for instance the debarment and prosecution remedies are tepid penalties which are not effective at all. Thus, the energy sector in Zimbabwe is critically affected by the dimness of these punishments and this also damages the economy by extension since the energy sector is pivotal to the economic wellbeing of a state.

CHAPTER 4: THE SOUTH AFRICAN APPROACH

4.1. Introduction

The previous chapters provided a general and Zimbabwean perspective on punitive mechanisms that characterise the public procurement regime. In order to get a broader view of general punitive mechanisms, this chapter focuses on the South African public procurement system, with specific reference to punitive mechanisms in South Africa's energy sector. It further provides an assessment of whether or not these sanctions are effective.

4.2. The South African Energy Sector

In 2011, the South African government launched Rounds 4 and 4.5 of its Renewable Energy Independent Power Producer Procurement Programme (REIPPPP) calling for an additional 6,300MW of independently produced renewable energy[89]. The REIPPPP is an unprecedented, world-class procurement programme launched by the government's Department of Energy in August 2011 with the audacious goal of producing 17,800 MW of renewable energy by 2030. To date, the REIPPPP has facilitated the introduction of 92 independent power producers (IPP) to the South African energy sector, with generation capacity in excess of 6,327MW. Investments in renewable energy under the REIPPPP programme have been approximately 53.4 billion rand[90]. While the REIPPPP has served as an important pillar for the transformation of the South African energy sector – through the introduction of large-scale renewable energy to the sector – it is only but one pillar of the South African government's energy transformation strategy, which was born in the 1998 White Paper on Energy Policy and given legs in the government's Integrated Resource Plan 2010 (the Integrated Resource Plan)[91].

Further, in 2015 the South African government further launched, and received bids, for its 2,500MW Coal Baseload IPP Procurement Programme; called for expressions of interest for proposed gas-to-power projects, and advanced discussions around the development of the country's shale gas capacity, additional nuclear energy

[89] L Fontana et al, "*The Energy Regulation and Markets Review-Edition 5* South Africa (2016)
[90] www.moneyweb.co.za/news/africa/tallying-benefits-sas-renewable-energy-programme/ (accessed 12 September 2017)
[91] *'Integrated Resource Plan for Electricity 2010–2030'* published in Government Notice 34263 in Government Gazette No. 9531 on 6 May 2011

generation capacity and further procurement of electricity from cross-border generators[92]. Furthermore, energy regulation in South Africa is governed by three regulators being the National Energy Regulator (NERSA)[93] which regulates electricity, piped gas and petroleum pipelines industries, the National Nuclear Regulator (NNR)[94] which regulates nuclear energy and the Petroleum Agency of South Africa (PASA)[95] which regulates petroleum exploration and production[96].

Armed with various statutes like the Nuclear Energy Act, the Gas Act and the Petroleum Pipelines Act and their regulations and notices etc, these regulators have expansive powers of control over the energy sector[97]. These elaborate structures that are put in place for the effective regulation of the energy sector show just how important it is to the South African economy. Coupled with the notion that South Africa`s public procurement market is estimated to account for approximately 21.77% of the country`s Gross Domestic Product[98], the proper regulation of public procurement in the all-important energy sector is very crucial. Such regulation includes functional and effective punitive measures that should be imposed in cases of misconduct in procurement relations. This chapter provides an analysis of both civil and criminal measures.

4.3. Civil Remedies

4.3.1. Debarment

Debarment is an administrative remedy available to a government that prevents or disqualifies contractors from obtaining new government contracts, or acquiring extensions to existing contracts, for breaches of law or ethics[99]. In South Africa, this administrative remedy is provided for in the Regulations to the Preferential Procurement Policy Framework Act[100]. In terms of the Regulations, if a tenderer commits offences like submitting false information regarding its BBBEE status level of contributor, local production and content, or any other matter required in terms of the Regulations which will affect or has affected the evaluation of a tender, or where

[92] See note 91 above
[93] Established under the National Energy Regulator Act, 2004
[94] Established under the National Nuclear Regulator Act, 1999
[95] Established under the Mineral and Petroleum Resources Development Act 28, 2002 (MPRDA)
[96] Fontana (n 89 above)
[97] Fontana (n89 above)
[98] P Bolton "*The Regulatory Framework For Public Procurement in South Africa*" (2013) 3
[99] Williams S *Debarment: Economics of Corruption* (2008)
[100] Act 5 of 2000

a tenderer has failed to declare any subcontracting arrangements, the organ of state is provided with a number of remedies against such conduct and debarment is one of them. Regulation 14(1)(b)(i) provides that the organ of state must give the tenderer an opportunity to make representations within 14 days as to why they should not be debarred and this provision is concomitant with the rules of natural justice which provide that every person must be given the right to be heard before an adverse decision is taken against them.

The National Treasury is the debarring entity and in terms of Regulation 14(3)(a) it must

> "after considering the representations of the tenderer and any other relevant information, decide whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years"

In the case of **Chairman, State Tender Board and Another v Supersonic Tours (Pty) Ltd**[101] the State Tender Board resolved to restrict the company and its directors from obtaining any business from an organ of state for a period of 10 years. It did so purporting to act pursuant to the powers conferred on an organ of state by reg 15. Although the decision was an administrative act within the meaning of Promotion of Administrative Justice Act, the Court held that an 'incorrect' claim for preference does not, without more, permit reliance on reg 15(1) (and consequently, also upon reg 15(2)).

Debarment is therefore an infinitely more serious punitive measure in the South African public procurement system than it is in the Zimbabwean system. This is due to the 10 year period of debarment which is markedly harsher compared to the 3 years that are provided in terms of Zimbabwean legislation. This therefore means that energy companies are more likely to be deterred by this sanction because it is more serious and more importantly because if they are debarred from doing business with government departments, they will lose business for a much longer period. Thus they will be put out of business and as a result, contractors are more likely to observe upright procurement standards and practices.

[101] 2008 (6) SA 220 (SCA)

4.3.2. Monetary Penalties

The South African public procurement system also makes use of financial penalties as a way of punishing procurement misconduct like corruption, fraud and bribing among other types of misconduct. Tenderers or contractors can be penalised for the unauthorised subcontracting of a tender. This is in terms of Regulation 14(1)(c)(ii) which provides that if the procuring entity concludes that the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 percent of the value of the contract.

In addition, suppliers can also be fined for certain contraventions of the Broad Based Black Economic Empowerment Act[102]. This Act provides for the economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio economic strategies. These strategies include, but are not limited to preferential procurement[103]. In terms of section 9(1) of this Act, the Minister may in order to promote the purpose of the Act, by notice in the Government Gazette issue codes of good practice on black economic empowerment (BEE).

This BBBEE Act has been historically taken advantage of through what is called "window dressing" or "fronting practices". Broadly, fronting refers to the practice of black people being signed up as fictitious shareholders in essentially "white" companies. A common example of fronting is where companies start a new black economic empowerment company (BEE) which does precisely the same as the existing company but all the work is channelled through the BEE vehicle. The turnover and the work is still done by the existing "non-BEE company" and most of the profits are taken away by the company[104]. Another example is where a company is black-owned (50%+) but the shares are allocated on an earn out basis or are deferred ordinary shares. Thus, when dividends are paid, the black owned company which is still a shareholder, only gets a small percentage of the profit[105].

[102] Act 53 of 2003, hereinafter referred to as the BBBEE Act
[103] S P L R De La Harpe "*Public Procurement Law: A Comparative Analysis*", Unpublished LLD Thesis, University of South Africa, (2009) 329
[104] P Bolton "Government Procurement as a Policy Tool in South Africa" (2006), Vol 6 *Journal of Public Procurement* 212
[105] Bolton (n104 above) 214

As at August 2017, the Broad-Based Black Economic Empowerment (BBBEE) Commission initiated investigations against 17 firms for possible fronting practices. The commission is investigating several different aspects of the companies in terms of their compliance with or violation of the BBBEE Act, including certain BBBEE transactions; schemes; trusts; ownership and management control requirements; BBBEE certificates' validity; and tenders issued to noncompliant companies. The companies the commission aimed to probe included MTN Group; Nokia Solutions and State-owned Eskom[106].

To combat misconduct, the South African Department of Trade and Industry is also in the process of drafting codes of good practice on empowerment which will assist to combat fronting practices[107]. Only companies that comply with the codes will be awarded contracts whereas companies that resort to fronting to secure contracts will be guilty of fraud which will render invalid the contract awarded to it. Another penalty applicable to this offence is that a firm may be fined up to 10 per cent of its annual turnover and be banned from contracting with government and public entities for 10 years. This 10% financial penalty can be considered to be steep enough so as to deter any misconduct that can occur in the energy sector. This is because 10% of a company`s annual turnover is a lot of money and suppliers are not likely to engage in misconduct for fear of this penalty. The South African position is therefore more punitive than the Zimbabwean one.

4.3.3. Termination of the Procurement Contract

This is also another civil remedy that is available to the procuring entity in the event that a supplier has committed any offence that is related to procurement. It entails that the termination/cancellation must be done lawfully and in consequence of breach of pre-set offences that can lead to rescission of the contract, for instance a contract can be cancelled for bribery or corruption. The State, through the procuring entity, can resort to administrative law rules in exceptional circumstances where it wants to cancel a contract in the public interest because it fetters the future exercise

[106] "*BBBEE Commission initiates investigation into 17 companies for possible fronting*" (2017) available at http://www.engineeringnews.co.za/ (accessed 14 September 2017)

[107] Code 000: Framework for the Measurement of Broad Based Black Economic Empowerment, Statement 001: Fronting Practices and Other Misrepresentation of BEE Status- available at http://www.dti.gov.za/bee.2NDPHASE.htm (accessed 20 August 2017)

of discretion[108]. According to Quinot[109], a number of recent judgments in public tender disputes South African courts have pointed to the expenditure of public funds as a relevant factor when classifying public tender decisions as administrative and hence subject to public law regulation[110]. Another example of termination of a contract at the instance of the state is what occurred in February 2017 when Eskom, a State owned power company, announced a decision to terminate six coal transportation agreements after certain contractors were found to have flouted regulations following an investigation as part of its ongoing campaign to ensure clean governance[111].

The Preferential Procurement Regulations 2017 provide for termination of the tender in Regulation 14(1)(c)(i)(aa) which is to the effect that if a procuring entity concludes that a supplier provided false information in relation to tender proceedings, the state organ can terminate the contract in whole or in part.

The State is allowed to terminate a tender contract where it justifies that it is in the public interest to do so and in addition to this, termination may also be done in terms of the Regulations. In Zimbabwe termination of the contract at the instance of the procuring entity is resorted to for offences against the Procurement Act or for contravention of any other law. This means that the scope of offences that can result in the cancellation of a tender is very wide owing to the wide interpretation that can be given to the words "any other law". At the same time, the South African state organs are also given a very wide discretion in terms of termination because a contract can be terminated in terms of the Preferential Procurement Regulations or where it is in the public interest. "Public interest" is a very wide term thus the state is given sufficient flexibility in terms of interpreting it. As a result, one can conclude that both systems are very flexible when it comes to termination of the procurement contract, though the flexibility is achieved through very different means.

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[108] P Bolton "Government Contracts and the Fettering of Discretion-A Question of Validity" (2004) 19 *South African Public Law* 90

[109] G Quinot "State Commercial Activity" (2009) 100

[110] See *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere [1997] 2 All SA 548 (SCA), Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA)*

[111] "*Eskom cancels six coal transport contracts"* (2017) available at https://www.iol.co.za/business-report/energy/eskom-cancels-six-coal-transport-contracts-7633165 (accessed 27 September 2017)

4.3.4 Denial of Access to Government Contracts

This remedy is an administrative action that is characterised by the government restricting corrupt firms or persons access to public sector contracts. In South Africa this is provided for in terms of Regulation 14(1)(c)(i)(aa) of the Preferential Procurement Regulations 2017 and it provides that if a procuring entity concludes that a supplier provided false information in relation to tender proceedings, the state organ can disqualify the tenderer. This therefore means that where for example an energy company deliberately misrepresents material facts in order to obtain a tender, the procuring entity can disqualify the company on that basis alone.

Furthermore, the National Treasury of South Africa is enjoined to maintain and publish on its official website a list of restricted suppliers and this provision is in terms of Regulation 14(3)(b) and it is termed "blacklisting". Blacklisting in South Africa is done in terms of sections 26 and 28 of the Prevention and Combating of Corrupt Practices Act[112] wherein the National Treasury is enjoined to keep a list of blacklisted individuals and companies in the Tender Defaulters Register.

The purpose of the Register is to alert the public sector to the identities of people or enterprises convicted of corrupt activities in relation to contracts or tendering, as well as to prevent them from supplying goods or services to government for a period of time[113]. Before people or companies can be listed on the Tender Defaulters Register, they must be convicted of corruption relating to state contracts or tenders. Over and above this, the court must make a special order directing that the convicted person or company's particulars be placed on the Tender Defaulter's Register. Under section 28 of the Prevention and Combating of Corrupt Activities Act, 2004, the court is empowered to direct that the convicted person's particulars, the sentence and conviction be endorsed on the Register. If a company is convicted of corruption, the court may order that the details of the company and any partner, manager, director or any other person exercising control over the company, who knew or should have known of the corruption, be endorsed on the Register[114]. After the court has made such an order, the clerk or registrar of the court will forward the order to the Registrar

[112] Act No. 12 of 2004
[113] Corruption Watch "*Understanding Treasury`s Tender Blacklist*" (2012) available at https://www.corruptionwatch.org.za /understanding-treasurys-tender-blacklist/ (accessed 02 October 2017)
[114] Corruption Watch (n 113 above)

of the Tender Defaulters Register in the Office of the National Treasury, who must then place the names on the Register.

Additionally, once a person or company is placed on the Tender Defaulters Register, the consequences are that:

- National Treasury may terminate any existing agreement with the defaulter;
- The State may recover any damages from the defaulter incurred as a result of the corruption;
- The defaulter cannot tender for or be awarded another procurement contract for as long as they remain on the Register, which period is determined by National Treasury but must be between 5 and 10 years.

Punitively, the South African position on denial of government contracts as a remedy to procurement misconduct is almost the same as the Zimbabwean one. This is in light of the fact that both systems require a minimum period of debarment of 5 and 3 years respectively. However, the South African system has an important component which is foreign to the Zimbabwean system and it is the Tender Defaulters Register. Theoretically, this anti-corruption mechanism is an integral part of circumventing procurement misconduct because government departments are obliged to avoid doing business with these persons thus there is less corruption. In this sense, South Africa has a better system as far as denial of access to government contracts is concerned. Be that as it may, just like any other system the blacklisting system is not without its shortcomings for instance, while it is provided for by legislation, it is not very effective. This is due to a host of factors that include the difficulty of detecting corruption, underreporting, weak investigative structures and a lack of political will[115].

4.3.5 Damages

A procuring entity can claim for damages from a contractor in instances where pecuniary loss has been suffered as a result of the contractor`s actions like fraud, corruption and misrepresentation. A claim for damages can be instituted in terms of Regulation 14(1)(c)(i)(bb) of the Preferential Procurement Regulations wherein the organ of state may, where applicable, claim for damages from the tenderer. These

[115] Corruption Watch (n 113 above)

damages can only be claimed in circumstances where the conduct causing the damages was unlawful, this therefore means that a legal duty must be owed. An example of circumstances where a state entity can claim damages from a tenderer is where the tenderer intentionally misrepresents its BEE status in order to attain advantages that are the preserve of Historically Disadvantaged Individuals (HDIs). This was deliberated on in the case of **Viking Pony Africa Pumps (Pty) Ltd & Anor v Hidro-Tech Systems (Pty) Ltd**[116] wherein the Supreme Court of Appeal held that corruption in the tender process is endemic and the court also had the chance to deliberate on the interpretation and application of reg 15(1) with particular reference to the duty imposed on an organ of state to act against a person who has obtained a preference by fraud.

4.4. Criminal Sanctions

Sanctions of a criminal nature can also be imposed for various offences in public procurement and they also form part of the South African procurement system. As alluded to earlier, contravention of the BBBEE Act through offences like "fronting" or "window dressing" also attracts criminal sanctions. An example is the March 2014 scandal wherein Eskom is alleged to have controversially awarded a R4 billion tender to State owned Chinese company Dongfang after it was alleged that one of the three final tenderers General Electric had submitted a fraudulent black empowerment certificate to Eskom[117]. Such conduct attracts criminal liability on the company and on the directors in their personal capacities.

The BBBEE Act is specifically designed to address the legacies of the past through the medium of public procurement. Public procurement is used by the government in this regard to achieve a collateral objective, namely that of rectifying the imbalances created by the past apartheid policies[118]. This therefore means that a contravention of this Act is an affront to the proper administration of justice thus any offence deserves a criminal penalty. Consequently, any individual who is found guilty of contravening this Act through "fronting" may be liable for a fine or imprisonment of up to ten years.

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[116] (175/09) [2010] ZASCA 23 (25 March 2010)
[117] S Hofstatter, "*How Dongfang won R4bn cooked Eskom tender*" (2017) available at https://www.businesslive.co.za/bd/companies/energy/2017-06-26-how-dongfang-won-r4bn-cooked-eskom-tender/ (accessed 10 October 2017)
[118] De La Harpe (n 103 above) 330

Furthermore, criminal sanctions are also provided for offences that are listed in the Prevention and Combating of Corrupt Practices Act[119]. Section 13 of this Act lists the various offences that relate to procuring and withdrawal of tenders for instance bribery and collusion. Section 26 further provides that any person who is convicted of offences relating to tenders, among other offences, is liable to a fine or maximum life imprisonment if they are sentenced by the High Court or to a fine or maximum 18 years imprisonment if sentenced by a regional court or to a fine or maximum 5 years if sentenced by the magistrates court.

These are very severe penalties for corruption offences that relate to procurement thus they are theoretically deterrent to would be offenders. Nonetheless, what is provided for theoretically does not always tally with what happens practically meaning that though the sentences are adequately provided for in the legislation, the courts have never, to date, imposed severe penalties like life imprisonment for offences like corruption and bribery. In any event, even the Tender Defaulters Register itself is not being utilised to its full effect for example at the present moment, the Register for Tender Defaulters[120] contains not even a single convicted person or company. Such a situation is unfathomable given the rampant corruption that has marred the heavily decentralised South African procurement system.

4.5. Conclusion

The South African public procurement system provides loftier standards when it comes to the castigation of public procurement misconduct. This is so especially when regard is had to both civil and criminal remedies that subsist in that system. Conversely, the Zimbabwean measures still have a long way to go on the effectiveness plane as evinced by the marked inferiority when juxtaposed against their South African equivalents. As an example, debarment mechanisms in South Africa are far superior to the Zimbabwean set up in terms of implementation and effectiveness and as a result they inspire suppliers to follow upright procurement practices thus avoiding debarment altogether. The punitive regime in Zimbabwe must therefore be modelled according to the South African system though that is not to say the South African system is not without its deficits.

[119] Act 12 of 2004
[120] Available at the official National Treasury website at http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf (accessed 19 October 2017)

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Summary of Findings and Observations

The aim of this thesis has been to provide an analysis of the quality of the punitive measures that exist in the Zimbabwean public procurement legal system with particular reference to the energy sector. The energy sector was chosen specifically due to the over-abundance of scandals that have rocked this sector leading to the loss of government revenue and finances to corrupt suppliers. An analysis of the enforcement measures was necessitated by the undisputable economic importance attached to the energy sector in Zimbabwe and globally. To this end, a comparative analysis of the South African energy sector was done in order to provide a regional context to the study and also to measure the Zimbabwean standards in punishing public procurement misconduct against those of South Africa.

In Chapter One a general introduction to the concept of public procurement was given as well as a background to the study whereby all the laws that govern public procurement in Zimbabwe were stated all the way from the Constitution to the rules and regulations of various Acts of Parliament.

Chapter Two set out to provide an assessment of the nature of civil and criminal penalties that prevail in public procurement systems generally. Punitive mechanisms like debarment, damages and financial penalties were defined as well as criminal sanctions that are applicable. In Chapter Three, these punitive mechanisms were then analysed in the context of the Zimbabwean energy sector and the major observation was that these mechanisms were very lax and lacked punitive force necessary for the deterrence of transgression.

Chapter Four of this dissertation provided a scrutiny of the South African approach to the punishment of various offences that relate to procurement. The research made the observation and conclusion that the South African public procurement system provides more deterrent standards when it comes to the punishment of public procurement misconduct. This is owing to, among other things, stiffer penalties provided and also to comprehensive and elaborate enforcement structures in place. This therefore means that there are lessons to be learnt from the South African public procurement system on both the legislative and practical/enforcement fronts.

Juxtaposed against the strength of the South African punitive regime in the public procurement sector, and the general but sometimes unappreciated importance of the energy sector to the economic well-being of a nation, the need to ensure preventive and effective punitive measures in the Zimbabwean energy sector is very crucial. In that vein therefore, it becomes imperative to outline recommendations aimed at enhancing the punishment mechanisms in Zimbabwe's public procurement legal regime.

5.2. Recommendations

5.2.1. Amendment of Laws

All laws and regulations that provide for punitive mechanisms and punishment standards in public procurement must be revisited and amended in order to give them more deterrent force. The Procurement Act, its Regulations and other relevant statutes provide lukewarm punitive measures when it comes to punishing public procurement offences like fraud, bribery etc. As a result, corruption in the energy sector is rampant and the country is haemorrhaging millions of dollars in revenue every year due to the weak mechanisms that exacerbate corruption for instance debarment is only for a meagre three years and fines are pegged at $500 maximum. The same sorry situation goes for the proposed Public Procurement and Disposal of Assets Bill which is more or less a replica of the Procurement Act and its regulations as far as the punitive regime is concerned. The research therefore recommends that a review and amendment of all the relevant laws that relate to punishment of public procurement offences be carried out for example the Procurement Act and the Prevention of Corruption Act. Such amendment should be done to provide stiffer penalties so as to deter corruption and other activities that are detrimental to the efficient functioning of the public procurement system.

5.2.2. Establishment of a Specialist Commercial Court

Various countries like Morocco, France and Egypt have come up with the idea of establishing specialist commercial courts that have qualitative jurisdiction over commercial disputes and are aimed at ensuring the speedy disposal of such matters. The realm of public procurement falls under the ambit of commercial law and thus procurement matters would ordinarily fall under the jurisdiction of these specialist commercial courts which should be manned by specially qualified judges who

specialise in commercial law. Furthermore, the procedures that are applicable in these specialist courts are more simplified than those applied in ordinary civil courts and this is one of the major reasons for establishing these courts. With regards to procurement, these courts are better placed, due to their commercial expertise, to provide the most appropriate punishment when the rules of procurement have been breached. It is therefore recommended that Zimbabwe establish such a court in order to better control punitive measures in the public procurement sector.

5.2.3. Establish a Blacklisting System for Corrupt Practices

Corruption being one of the plagues that haunt the procurement system should be fought at every turn. Various measures have been proposed and implemented in other jurisdictions for instance the establishment of a blacklisting system. Such system is used to impede convicted firms and individual suppliers from obtaining government contracts because of their corrupt practices. A blacklist register is maintained in which all procurement related *persona non grata* are listed and the nature of the corruption or offence is immaterial as far as the blacklisting of an individual is concerned.

With regards to public procurement, blacklisting is an effective tool due to the stigma that it causes and it is recommended that Zimbabwe adopt this measure as a way of regulating procurement misconduct.

5.2.4. Electronic Governance

Just like any other field worldwide, public procurement has not been immune from the inevitable reach of technological progression. Modernisation of public procurement in this day and age is vital in terms of regulating public procurement misconduct especially corruption. The South African approach to blacklisting is one such example. The National Treasury of South Africa is enjoined to publish on its website a Tender Defaulters Register which contains a list of all the corrupt individuals and companies who are banned from obtaining government contracts. Such a list serves as a warning to would-be procuring entities to steer clear of such persons. In Zimbabwe, no such technological initiatives in the field of public procurement exist and it is recommended that the Zimbabwean government procurement system should embrace electronic measures like the publishing and maintenance of a website in which all corrupt individuals are named and shamed.

5.2.5 Political Commitment

The author is of the view that the laxity of the punitive measures in the public procurement system is attributable to lack of political willingness to rectify the matter on the part of the responsible authorities. Given the importance of public procurement as mentioned earlier on, it is pertinent that its proper regulation be always prioritised especially in the energy sector. Procuring entities and responsible authorities sometimes engage in irregular practices like the awarding of unadvertised tenders, or the authorities are sometimes bribed in order to award a tender to a certain supplier. As a result of this, the executive and political bigwigs benefit from such arrangements and are therefore unwilling to see them terminated.

More so, in the event that it is inevitable that a supplier has to be punished, the sanction imposed will be trifling and ineffective since the suppliers are in cahoots with the authorities at the procuring entity. In any event, some of the sanctions are administrative thus they are at the discretion of the procuring entity and only subject to review by the Administrative Court. It is therefore recommended that the government, through the relevant ministry, should carry out awareness campaigns to awaken the public to the importance of public procurement to the economy and the importance of preventing corruption through rigorous preventive and punitive measures. This is very important especially in a country like Zimbabwe where public sector corruption is leading to the loss of millions of dollars every year.

5.2.6. Accounting and Audit Requirements

As a measure of corruption control, suppliers can be legally obliged to make disclosures of their financial positions in a bid to ensure accountability and transparency. Strict financial controls by the procuring entities and the state can be imposed on corrupt suppliers instead of imposing stringent conventional punishments like debarment or financial penalties. It is the author`s contention that such measures are recommended in the interests of business flexibility because other measures like debarment and cancellation of contracts lead to disruption of business flow and consequently delays and expensive inconveniences in the procurement process.

5.3. Conclusion

It is apparent from the above discussion that the public procurement system in Zimbabwe is one that is compliant with the very basic and minimalist standards with regards to the punishment of procurement offences. This is because the measures that subsist in the system are weak and ineffective thus the energy sector, being one of immense importance, is negatively affected. This thesis focused on the energy sector in particular because it is integral to the Zimbabwean economy hence the punitive regime in this sector must be rigorous so as to deter or minimise any misconduct. The importance of the energy sector is also demonstrated by the array of corruption scandals that have rocked the country in recent years, some of them even involving government ministers, thus showing that the sector is very lucrative and loosely regulated hence it is consequently prone to corruption. In the result, various recommendations aimed at bolstering the abovementioned measures were suggested in this research, and it is hoped that implementation of such measures may go a long way towards creating an effective deterrent system that appropriately promotes the objectives of an effective public procurement regime.

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