THE UNIVERSITY OF THE WESTERN CAPE

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PUBLIC-PRIVATE PARTNERSHIPS AS ENABLERS OF INVESTMENT AND INFRASTRUCTURE DEVELOPMENT IN AFRICA: A SOUTH AFRICAN PERSPECTIVE

A mini-thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws (LLM) in International Trade, Investment, and Business Law

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DECLARATION

I, **NATASHA CHISWA**, declare that the thesis titled **'Public-Private Partnerships as Enablers of Investment and Infrastructure Development In Africa: A South African Perspective'** is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College, or other institution of learning for any academic or other awards.

NATASHA CHISWA

This mini-dissertation has been submitted for examination with my approval as Supervisor.

Professor. Riekie Wandrag

2023

DEDICATION

I dedicate this thesis to the unforgettable memories of those whose profound impact has shaped my life.

To my late great grandmother, ***Olipha Dube***, the matriarch who gave life to my beloved grandmother, Esnath. Your absence is deeply felt, yet your legacy lives on.

To my late grandfather, ***Ebenezer Fungai Nyabinde Chirwa***, who fought courageously until his last breath, thank you for the priceless life lessons you taught me.

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ACRONYMS AND ABBREVIATIONS

AfDB - African Development Bank

AfCFTAcfta - African Free Continental Trade Area

ATI - Access to Information

AU - African Union

BBEE - Broad-Based Black Economic Empowerment

BEE - Black Economic Empowerment

BOT – Build Operate Transfer

CSF – Critical Success Factors

DA - Democratic Alliance

DBSA - Development Bank of Southern Africa

DIT - Department of Trade and Industry

DBFOM - Design-Build-Finance-Operate-Maintain

EIA - Environmental Impact Assessment

FDI – Foreign Direct Investment

GTAC - Government Technical Advisory Centre

ICA - Infrastructure Consortium of Africa

IDA - Infrastructure Development Act

IPA - Investment Promotion Act

ITT - Interdepartmental Task Team

KeRRA - Kenya Rural Roads Authority

KZN – KwaZulu-Natal

LVSR - Low Volume Sealed Roads

MFMA - Municipal Finance Management Act

NP- National Party

NTSA - National Treasury of South Africa

OECD - Organisation for Economic Co-operation and Development

OGP - Open Government Partnership

PDMO -Public Debt Management Office

PFMA - Public Financial Management Act

PFI - Private Finance Initiatives

PIDA - Programme for Infrastructure Development in Africa

PMO - Project Management Office

PPIAF - Public-Private Infrastructure Advisory Facility

PPP – Public-Private Partnership

PPPU - Public-Private Partnership Unit

REC - Regional Economic Communities

RFQ - Request for Qualifications

RVR - Rift Valley Railways

SANRAL - The South African National Roads Agency SOC Ltd

SDG – Sustainable Development Goals

SMEs - Small and Medium Enterprises

TRAC - Trans African Concessions

TR – Treasury Regulation

UN – United Nations

UNCAC- United Nations Convention Against Corruption

UNCTAD - United Nations Conference on Trade and Development

VfM - Value for Money

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CHAPTER ONE

INTRODUCTION

1.1 Research Background

Governments in sub-Saharan Africa cannot afford the enormous challenge of creating world-class infrastructure to satisfy the rise in citizen demand and maintain and update the current infrastructure assets.[1] This is a result of the financial limitations, subpar operations, and poor management that plague the majority of publicly owned and run utilities.[2] Infrastructure development is a key factor in productivity and long-term economic growth.[3] It substantially contributes to improving living standards, reducing poverty, and realizing sustainable development goals.[4]

There has been very little infrastructure development in developing countries, particularly in sub-Saharan Africa where it is most required.[5] This is because investments in the current infrastructure are dominated by the public sector. Attracting investment is difficult since the public sector continues to struggle with issues including corruption, political instability, and money laundering.[6] The need for infrastructure is increasing, yet finding public infrastructure financing is getting harder[7] and the global financial crisis is placing pressure on public budgets.[8] Every year, infrastructure spending in developing countries exceeds US$800 billion.[9] The infrastructure financing deficit is projected to be roughly US$57 trillion until 2030, far exceeding the demands predicted to be more than twice that amount.[10] According to the

[1] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 135.
[2] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 135.
[3] African Development Bank at https://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/infrastructure-development (accessed 18 October 2022).
[4] African Development Bank at https://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/infrastructure-development (accessed 18 October 2022).
[5] World Economic Forum -Strategic Infrastructure in Africa: A business approach to project acceleration (2013) 7.
[6] World Economic Forum-Strategic Infrastructure in Africa: A business approach to project acceleration (2013) 7.
[7] World Economic Forum-Strategic Infrastructure in Africa: A business approach to project acceleration (2013) 7.
[8] World Economic Forum -Strategic Infrastructure in Africa: A business approach to project acceleration (2013) 7.
[9] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 114.
[10] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 114.

Programme for Infrastructure Development in Africa (PIDA), Africa will need to invest up to US$ 93 billion annually for both capital investments and maintenance projects.[11] Given the substantial sum at stake, this necessitates the development of alternative finance streams to invest in and develop sustainable infrastructure.[12]

South Africa has a backlog in delivering infrastructure services, which damages the population and the economy.[13] There have historically been significant disparities and inequalities in South Africa's service delivery, notably in terms of access to water.[14] High levels of inequality in water access were a tendency under the apartheid era, which unfairly disadvantaged black rural communities and benefited the minority white inhabitants.[15] Even though South Africa's water law and policy have been revised after apartheid was officially ended in 1994, there are still numerous and intensely debated calls for equal access to water in the country.[16] There are still some structural flaws; a segment of the population either lacks access to water services or is still susceptible to waterborne diseases because of unequal access to working systems.[17] According to the General Household Survey, five provinces saw a water access drop between 2002 and 2019. The provinces which experienced a drop in access to water are Mpumalanga (-5,3 percent), Limpopo (-3,8 percent), and the Free State saw the biggest drops (-3,7 percent).[18] The survey shows that 12.2 percent of people continued to use community taps, 2.5% continued to use neighboring faucets, and 3.1 percent of homes continued to get their water from wells, springs, dams, stagnant water pools, rivers, and streams.[19]

[11] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 112.
[12] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 112.
[13] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 136
[14] Jegede AO & Shikwambane P 'Water 'Apartheid' and the Significance of Human Rights Principles of Affirmative Action in South Africa (2021) 13 *The Politics of the Human Right to Water* 3.
[15] Jegede AO & Shikwambane P 'Water 'Apartheid' and the Significance of Human Rights Principles of Affirmative Action in South Africa (2021) 13 *The Politics of the Human Right to Water* 3.
[16] Jegede AO & Shikwambane P 'Water 'Apartheid' and the Significance of Human Rights Principles of Affirmative Action in South Africa (2021) 13 *The Politics of the Human Right to Water* 4.
[17] Hemson D 'Water, sanitation, and health: South Africa's remaining and existing issues' 2016 *SAHR* 26.
[18] The General Household Survey, 2019, available at https://www.statssa.gov.za/?p=13908 (assessed on 13 October 2022)
[19] The General Household Survey, 2019, available at https://www.statssa.gov.za/?p=13908 (assessed on 13 October 2022)

Around 18.2 million South Africans experienced extreme poverty as of 2022, with the daily poverty line set at USD 1.90.[20] Approximately 18.5 million South Africans are anticipated to be subsisting on a daily income of little more than $1.90 by 2025.[21] The process of social and economic transformation is putting increasing pressure on the South African government to accelerate infrastructure development.[22]

According to the African Union Commission and the Nepad Agency, the economic and infrastructure relationship is crucial for fostering inclusive growth and sustainable development.[23] Africa needs significant financial support and investments to close the infrastructure gap across the continent and catch up to the rest of the developing world.[24] Therefore, the private sector needs to get involved in helping the governments deliver public facilities by raising money, providing skilled management, and fostering innovation.[25] Public Private Partnerships can lessen the difficulty that the South African government faces in improving citizen's lives by developing adequate infrastructure and attracting local and foreign direct investment.[26]

A Public-private partnership (PPP) is defined as an agreement between a public institution and a private party in which the private party carries out a public-sector function and makes use of state assets.[27] Technical, financial, and operational project risks are largely passed to the private party.[28] PPPs are aimed at creating Private Finance Initiatives (PFI) to encourage private participation in infrastructure development and social service delivery and to bring competitiveness to the public sector.[29] PPPs are institutional arrangements for achieving public

[20] Number of people living in extreme poverty in South Africa from 2016 to 2025: https://www.statista.com/statistics/1263290/number-of-people-living-in-extreme-poverty-in-south-africa/ (accessed 13 October 2022).
[21] Number of people living in extreme poverty in South Africa from 2016 to 2025: https://www.statista.com/statistics/1263290/number-of-people-living-in-extreme-poverty-in-south-africa/ (accessed 13 October 2022).
[22] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 136.
[23] African Union Commission and Nepad Agency - Infrastructure Development As Catalyst For Economic Growth In Africa (2011) 33.
[24] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 134.
[25] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 134.
[26] Sanni AO & Hashim M 'Building infrastructure through Public Private Partnerships in sub-Saharan Africa: Lessons from South Africa' (2014) 143 *Procedia - Social and Behavioural Sciences* 135.
[27] Treasury Regulations, 2005 section 16.1
[28] Treasury Regulations, 2005 section 16.1
[29] Linder SH 'Coming to Terms With the Public-Private Partnership: A Grammar of Multiple Meanings' (1999) 43 *American Behavioral Scientist* 38.

value initiatives for which governments lack expertise because the private sector contributes resources and the necessary expertise to carry out a project on behalf of the public sector.[30]

1.2 Problem statement

There is a significant perception that the public sector has become cut off and disconnected from the rest of society.[31] The public sector lacks organizational rigor, is often ineffective, financially complacent, fixated on due process, and unconcerned with the general public's needs.[32] Moreover, a major rationale and catalyst for increased private sector participation in public service provisions have been provided by the poor performance and mismanagement that characterizes most publicly owned and operated utilities.[33]

South Africa is one of the countries with a backlog in infrastructure service delivery, which is detrimental to both the economy and the general public.[34] South Africa must therefore urgently devise new strategies for raising money for infrastructure development initiatives.[35] This can be accomplished by devising appropriate, innovative financing models that will both lessen the effects of these declining financial flows and discover new ways to attract new participants who will raise the level of finance for infrastructure projects.[36]

To eliminate service delivery backlogs, the administration has adopted PPPs as one of the answers to provide the general public with the necessities needed without having to struggle.[37] This research emphasizes how crucial it is for the private sector to actively participate in Public-Private Partnership (PPP) projects that aid the government in advancing infrastructure.

[30] Linder SH 'Coming to Terms With the Public-Private Partnership: A Grammar of Multiple Meanings' (1999) 43 *American Behavioral Scientist* 39.
[31] Peters B & Pierre J 'Governance Without Government? Rethinking Public Administration (1998) 8 *JPART* 228.
[32] Peters B & Pierre J 'Governance Without Government? Rethinking Public Administration (1998) 8 *JPART* 229.
[33] Peters B & Pierre J 'Governance Without Government? Rethinking Public Administration (1998) 8 *JPART* 229.
[34] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 115.
[35] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 115.
[36] Salim B & Rwelamila PD 'The Role Of Public Private Partnerships In The Provision Of Infrastructure Projects' 2016 *Graduate School of Business Leadership, University of South Africa (UNISA)* 116.
[37] Bovis CH 'Risk in Public-Private Partnerships and Critical Infrastructure' (2015) 6 *European Journal of Risk Regulation 202.*

1.3 Research Question

What legislative and policy reforms will positively influence PPP's ability to serve as a viable model for developing infrastructure and attracting investment in South Africa?

The following sub-questions will also be considered:

i. What is the nature of PPPs, and how can they contribute to the development of South Africa's infrastructure and promotion of investment?

ii. What is the existing PPP legal framework, and how may it be improved to promote the successful implementation of PPPs?

iii. What factors are crucial for the successful implementation of PPPs?

iv. What challenges hinder the successful implementation of PPPs and how may the challenges hindering the successful implementation of PPPs be resolved?

1.4 Research Objectives

The main objective of this study is to focus on the current South African legal framework governing PPPs to determine if the rules and regulations enable the effective implementation of PPPs

i. To evaluate the factors that influence the nature of PPPs

ii. To assess the impact of existing PPP's contribution to investment and infrastructure development in South Africa

iii. To address the challenges and recommend suitable recommendations on how South Africa can mitigate the obstacles faced in implementing PPPs successfully.

1.5 Research Methodology

This study will take a descriptive and analytical approach. The analytical approach will be used to assess South Africa's current legislative environment for PPPs execution while the descriptive approach will be used to provide an overview of the PPPs concept.

The research is desk-based and involves a qualitative review of the literature, which includes primary sources like the Constitution of the Republic of South Africa, legislation, case law, and treaties. The study also consists of secondary sources like books, journal articles, conference papers, and internet sources. Additionally, this research will rely on Kenya as a case study. By analysing Kenya as a case study, I will examine the PPP legal framework to draw valuable insights and recommendations that can facilitate the successful implementation of PPPs in South Africa.

1.6 Chapter Outline

Chapter 1: This chapter introduces the topic and covers other preliminary matters which include: the problem statement; research aims and objectives and the methodology to be used for the research and an outline of the thesis.

Chapter 2: The definition of PPPs in the context of infrastructure development and investment in South Africa will be covered in this chapter, along with an analysis of the legal and policy frameworks that apply to PPPs

Chapter 3: The critical success factors of a successful public-private partnership governance framework will be covered in this chapter. Reference will be made to PPP case studies from Kenya. The research will focus on case studies of completed PPP projects and lessons that can be learned from them.

Chapter 4: This Chapter will investigate the opportunities, and challenges South Africa faces with the execution of PPPs and the recommendation from best practices.

Chapter 5: Conclusion and Recommendations -The chapter provides a summary of the findings of the study, draws conclusions, and makes recommendations.

CHAPTER TWO

UNDERSTANDING PUBLIC-PRIVATE PARTNERSHIPS IN SOUTH AFRICA: A HISTORICAL & LEGAL PERSPECTIVE

2.1 Introduction

African nations are considering using public-private partnerships (PPPs) to carry out crucial infrastructure projects due to the pressing need for enhanced infrastructure in the continent.[38] The region's economic activity, effectiveness, and competitiveness are all severely affected by the region's inadequate infrastructure, which also has an impact on vital public utility services like power, water, transportation, and communication.[39] Despite the desire of investors to conduct business with Africa, the inadequate infrastructure of the continent makes it challenging, for investors to enter the markets.[40] According to studies like those carried out by the Infrastructure Consortium of Africa (ICA) inadequate rail, port, and road infrastructure drives up the cost of goods transported between African states by 30–40%.[41] Reports from the African Development Bank (AfDB) further emphasize that Africa's economy remains severely hampered by the lack of adequate infrastructure, with both its quantity and quality ranking among the poorest in the world.[42] As a result, trade and investment flows are constrained and transaction costs are high.[43] To unleash Africa's full economic potential, the AfDB strongly advocates for substantial infrastructure development.[44] Bridging the infrastructure gap on the continent calls for more infrastructure investment from the government and private enterprises.[45] The involvement of private sector participation is required to complement

[38] World Bank *Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners* (2009) 9.
[39] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 89.
[40] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 89.
[41] Pottas A 'Addressing Africa's Infrastructure Challenges' (2018) *Deloitte Corporate Finance Advisory Leader for Sub-Saharan Africa* 3.
[42] AfDB, OECD, and UNDP 'African Economic Outlook 2010: Public Resource Mobilisation and Aid in Africa' 2010 *OECD* 8.
[43] AfDB, OECD, and UNDP 'African Economic Outlook 2010: Public Resource Mobilisation and Aid in Africa' 2010 *OECD* 8.
[44] AfDB, OECD, and UNDP 'African Economic Outlook 2010: Public Resource Mobilisation and Aid in Africa' 2010 *OECD* 9.
[45] AfDB, OECD, and UNDP 'African Economic Outlook 2010: Public Resource Mobilisation and Aid in Africa' 2010 *OECD* 9.

governmental investment because public investment alone cannot address Africa's infrastructure demands.[46]

PPPs can help in reducing risks and expenses associated with infrastructure development by incorporating the expertise, resources, and financing of the private sector.[47] To encourage PPPs, the AfDB advises that governments provide a supportive legal and regulatory environment, guarantee openness and responsibility in the procuring procedure, as well as put in place effective risk-sharing agreements.[48] The AfDB's emphasis on the importance of private sector involvement demonstrates that PPPs help improve the effectiveness and quality of infrastructure services, strengthening economic competitiveness and promoting social inclusion.[49]

Through private investment, PPPs can assist in sustainable infrastructure in urban areas, such as affordable housing, public transportation, and energy-efficient buildings, which can promote urban development that is sustainable.[50] By working in collaboration with governments and civil society, the private sector can help to promote sustainable development goals, reduce poverty, and improve the standard of living of people in Africa.[51]

The chapter examines the concept of PPPs in relation to infrastructure development and investment in South Africa. The background, history and definitions of PPPs will all be covered in great length in this chapter. This chapter will examine the regulatory and legislative frameworks for PPPs in South Africa. To demonstrate how PPPs promote the development of infrastructure, three successful PPP projects in the road and prison sectors will be examined. The study is limited to the three case studies because they were among the first PPPs to be completed successfully between the years 1997 to 2001 when South Africa began to look at PPPs as a means of enhancing infrastructure and guaranteeing that public services are offered based on the demands of the population as a whole. The purpose of examining the definitions

[46] AfDB, OECD, and UNDP 'African Economic Outlook 2010: Public Resource Mobilisation and Aid in Africa' 2010 *OECD* 9.
[47] Infrastructure Consortium for Africa's *Infrastructure Financing Trends in Africa* (2018) African Development Bank 24.
[48] Infrastructure Consortium for Africa's *Infrastructure Financing Trends in Africa* (2018) African Development Bank 24.
[49] Infrastructure Consortium for Africa's *Infrastructure Financing Trends in Africa* (2018) African Development Bank 25.
[50] United Nations: Sustainable Development Goal 11: Sustainable Cities and Communities: https://www.un.org/sustainabledevelopment/cities/ (accessed 15 March 2023).
[51] United Nations: Sustainable Development Goal 11: Sustainable Cities and Communities: https://www.un.org/sustainabledevelopment/cities/ (accessed 15 March 2023).

of PPPs in South Africa with reference to the first three notable successful PPPs is to establish a robust understanding of their practical application. These case studies provide real examples of how PPPs have been effectively put into practice, showcasing the substantial benefits of PPPs, including enhanced infrastructure development, cost-effectiveness, and improvements in service delivery. Examining the legal framework of South African PPPs ensures a comprehensive understanding of the legal aspects of PPP implementation. This involves reviewing the legislation, regulations, and contractual arrangements that govern PPPs' formation, negotiation, and management. Furthermore, evaluating the legal framework also uncovers potential gaps, challenges, and shortcomings. Identifying these issues can contribute to discussions on policy implications and reforms within the context of PPPs in South Africa.

2.2 History of PPPs in South Africa

The historical background of South Africa's investment laws can be traced to the colonial era when the country was under British rule. During this time, investment policies were primarily focused on promoting the interests of the colonial powers and their economic interests.[52] The Native Land Act of 1913, which incorporated territorial segregation, is a key piece of legislation in the history of investment laws in South Africa because it established the expropriation of Black South Africans from their land and established a legal framework to protect the interests of white settlers and British investors.[53] The law prohibited natives from purchasing land from white people and vice versa.[54] Exceptions required the Governor-General's approval. Less than 10% of the Union's total land mass initially belonged to the native areas that remained; this number later increased to 13%.[55] An annexure identified the region that was first allotted to Blacks, with the requirement that a commission further analyses the situation in order to draw more accurate boundaries.[56] White people, who made up less than 20% of the population, received more than 80% of the funds.[57] According to the Act, Black individuals would only reside outside of the reserves if they could provide proof that they had a job at the time.[58] The intention of the Act was to provide a stable and predictable investment

[52] Sornarajah M *The International Law on Foreign Investment*, 3 ed (2010) ch 2.
[53] The Natives Land Act 27 of 1913.
[54] Collins RO and Burns JM *A History of Sub-Saharan Africa* 2 ed (2013) ch 1.
[55] Collins RO and Burns JM *A History of Sub-Saharan Africa* 2 ed (2013) ch 1.
[56] The Native Land Act is passed: available at https://www.sahistory.org.za/dated-event/native-land-act-passed (accessed 20 March 2023).
[57] The Native Land Act is passed: available at https://www.sahistory.org.za/dated-event/native-land-act-passed (accessed 20 March 2023).
[58] The Native Land Act is passed: available at https://www.sahistory.org.za/dated-event/native-land-act-passed (accessed 20 March 2023)

environment for the white settlers and British investors by ensuring that the country's most fertile and productive land was reserved for them and ensuring that they had access to profitable economic opportunities.[59] This land was considered essential for the development of agriculture and mining.

The establishment of the National Party (NP) in 1948 led to the Apartheid system in South Africa, which formalized the creation of two separate economies and societies within the country.[60] This system was designed to segregate and oppress non-white South Africans, including Black, Indian, and Coloured people, from the White minority.[61] The Apartheid system involved creating laws that enforced racial segregation, such as the Group Areas Act of 1950, which divided South Africa into different geographic regions, and the Separate Amenities Act of 1953, which further divided public facilities based on race.[62] The Apartheid system was based on the belief that different races could not coexist, and thus, it aimed to maintain racial separation in all areas of life, including education, housing, employment, and public facilities.[63] As a result, the non-white population was subjected to widespread discrimination, violence, and economic exploitation, while the White minority enjoyed privileges and advantages in all aspects of life.[64]

In the 1950s, the significant upsurge in the black South African population's fight against racial injustices attracted the attention of the rest of the world.[65] Around 1960, there was a movement by international companies to withdraw their investments from South Africa as a form of social protest against the apartheid regime. Trade and investment sanctions were implemented.[66] Foreign state governments started enacting laws that forbade American investors from

[59]The Native Land Act is passed: available at https://www.sahistory.org.za/dated-event/native-land-act-passed (accessed 20 March 2023)
[60] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 341.
[61] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 341.
[62] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 341.
[63] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 341.
[64] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 342.
[65] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 342.
[66] Hunter RC & Bogran A 'Foreign Direct Investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 344.

conducting business and investing in South Africa.[67] In an effort to end the racial discrimination and injustice experienced by black South Africans, African organisations supported the movement against foreign investment and discouraged trade with South Africa.[68] Consequently, an estimated 350 multinational corporations made the decision to cease doing business in South Africa, which caused a massive outflow of cash from the country.[69] Additionally, due to intense international pressure, international companies refrained from collaborating with South African enterprises, which hindered their ability to develop into globally functioning businesses.[70] For this reason, at the end of the 1980s, South Africa experienced both political instability and a decline in its economy.[71] Due to harsh external criticism and increasingly rising internal expenses brought on by the expensive maintenance of the existing security system, the government was eventually forced to reconsider its position on apartheid.[72]

<u>Post-1994 history</u>

Nelson Mandela's election as president of South Africa marked the end of the apartheid era and signified the transition to a democratic government in 1994.[73] The newly elected government began to implement policies promoting investment and developing a more balanced economy, including programs for black economic empowerment and easier access to credit for communities and people who have faced historical disadvantages.[74] South Africa has been depending on public-private partnerships since the late 1990s to generate energy, provide parastatal and government services, and acquire public assets.[75] Infrastructural projects requiring significant capital investment, such as the construction of swift train systems,

[67] Taylor E 'The History of Foreign Investment and Labour Law in South Africa and the Impact of the Labour Relations Act 66 of 1995' (1996) 9 *Global Business and Development Law Journal* 620.
[68] OECD 'Self-Assessment of South Africa's Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment' (2015) – South Africa Investment Policy Dialogue (2015) 15
[69] Trade Law Centre 'Investment Project: South African Case Study International Institute for Sustainable Development Report' (2004) 3.
[70] Langalanga A 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context'2015 *South African Institute for International Affairs* 5.
[71] Library of Congress. Federal Research Division *South Africa: A Country Study* 3 ed (1997) ch 2.
[72] Taylor E 'The History of Foreign Investment and Labour Law in South Africa and the Impact of the Labour Relations Act 66 of 1995' (1996) 9 *Global Business and Development Law Journal* 622.
[73] Post apartheid South Africa available at *https://www.britannica.com/place/South-Africa/Postapartheid-South-Africa* (accessed 18 March 2023).
[74] Post apartheid South Africa available at *https://www.britannica.com/place/South-Africa/Postapartheid-South-Africa* (accessed 18 March 2023).
[75] A general introduction to public-private partnerships in South Africa available at https://www.lexology.com/library/detail.aspx?g=c1886a19-8799-499d-aecb-9e283e06d612 (accessed 18 March 2023).

hospitals, prisons, toll roads, and government offices, were widely undertaken using the PPP model.[76]

An Interdepartmental Task Team (ITT) was established by the country's government in April 1997 with the goal of developing a set of institutional, legal, and policy reforms to promote a PPP-friendly environment.[77] With the help of this initiative, between 1997 and 2000, South Africa launched several innovative PPP projects. These included the establishment of national reserves, the construction of private prisons, and the construction of the N3 and N4 toll roads.[78] These projects were aimed at leveraging private sector expertise and resources to deliver public services and infrastructure more efficiently and effectively. The South African government issued Treasury Regulations for PPPs in compliance with the principles of the Public Financial Management Act (PFMA).[79] The purpose of the PFMA was to regulate the development and execution of PPPs in the country and to ensure that they were consistent with the government's overall financial management objectives.[80] The PPP unit was subsequently established within the National Treasury by mid-2000 with technical assistance from foreign governmental support. The unit consisted of five professionals with expertise drawn from the government and private sectors.[81]

There have been a total of 34 PPP projects implemented successfully, worth R89.3 billion.[82] The initiatives carried out on a national scale are categorized into transport, water and sanitation, healthcare, tourism, and information technology.[83] Public-private partnerships have played a significant role in South Africa's socioeconomic advancement.[84] However, the National Treasury shows an abrupt decline in the number of newly established PPP projects.[85] The overall worth of new PPP agreements in South Africa decreased from R10.7 billion during

[76] A general introduction to public-private partnerships in South Africa available at https://www.lexology.com/library/detail.aspx?g=c1886a19-8799-499d-aecb-9e283e06d612 (accessed 18 March 2023)
[77] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 95.
[78] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 95.
[79] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 96.
[80] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 96.
[81] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 97.
[82] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 167.
[83] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 167.
[84] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 168.
[85] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 168.

2011-12 to R5.6 billion in 2019-20.[86] Factors, including high prices of some PPP projects and increasing scrutiny from regulators and other stakeholders, are considered to influence the decline of PPPs.[87]

Before analysing the legal route of PPPs in South Africa, one needs to understand the definition provided for PPPs and how it has an impact on the legal analysis. The definition of PPPs in South Africa will be covered in the following section.

2.3 Definition of PPPs in South Africa

In South Africa, a public-private partnership (PPP) is defined as *"a contract between a government institution and a private party, where the private party performs an institutional function and or uses state property in terms of output specifications; substantial project risk is transferred to the private party; and the private party benefits through unitary payments from government budgets and or user fees."*[88] PPPs have been defined by Yescombe,[89] as long-term contracts that shift the majority of risk to the private business sector as compared to the public sector organization.[90] According to the agreement the private company is in charge of planning, financing, constructing, operating, and maintaining public infrastructure (the "asset").[91] In accordance with the PPP contract's regulations, the private company's financial obligations are repaid with the income from the asset, which is either paid by the consumers who utilize the resources or by other parties. The asset often remains in public-sector ownership after the PPP contract expires or returns to it.[92] PPPs are not explicitly defined in the Infrastructure Development Act (IDA), however, the Act lays down a framework for the development of infrastructure in South Africa that makes provision for the establishment of PPPs.[93] The duty of identifying infrastructure projects and aiding their implementation will fall under the purview of an infrastructure development committee that will be constituted.

An infrastructure development committee will be established in accordance with the IDA, and its mandate will include identifying infrastructure projects and promoting their implementation.[94] In accordance with this clause, the Committee may also make agreements

[86] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 168.
[87] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 168.
[88] National Treasury PPP Unit: Introducing Public Private Partnerships in South Africa (2007) 5.
[89] Yescombe ER Public-Private Partnerships in Sub-Saharan Africa:Case Studies for Policymakers (2017) ch 1.
[90] Yescombe ER Public-Private Partnerships in Sub-Saharan Africa:Case Studies for Policymakers (2017) ch 1.
[91] Yescombe ER Public-Private Partnerships in Sub-Saharan Africa:Case Studies for Policymakers (2017) ch 1.
[92] Yescombe ER Public-Private Partnerships in Sub-Saharan Africa:Case Studies for Policymakers (2017) ch 1.
[93] The Infrastructure Development Act 23 of 2014
[94] Section 2 of the Infrastructure Development Act 23 of 2014.

with public or private organizations, including PPPs, for the financing, development, operation, and upkeep of infrastructure projects.[95] Furthermore, Section 4 of the IDA establishes the guiding ideals for infrastructure development, such as encouraging private investment, maximizing public resources, and aligning infrastructure.[96] The aim of PPPs in South Africa is to accelerate infrastructure development, improve service delivery, and promote economic growth and job creation while minimizing the burden on public finances.

PPPs are not characterized by a single definition under international investment law adopted by South Africa, as PPPs can take many various forms and structures based on the unique circumstances of the project and the legal context in which projects are established. The World Bank, United Nations, and United Nations Conference on Trade and Development have established the following definitions of PPPs in terms of international investment law which hold significance in South Africa's context as the country is a member of these influential international organizations. In the context of South Africa, where advancing development objectives and addressing social inequalities are paramount concerns, UNCTAD's definition offers a comprehensive perspective that considers the complex interplay between economic and social facets. According to UNCTAD, *PPPs are "innovative methods used by the public sector to contract with the private sector who bring their capital and their ability to deliver projects on time and within budget, while the public sector retains the responsibility to provide these services to the public in a way that benefits the public and delivers economic development and improvement in the quality of life*".[97]

It is clear from the aforementioned definitions that high-quality infrastructure services for the public can be delivered through PPPs. When correctly planned and implemented, PPPs have the potential to increase the efficiency and sustainability of the supply of public services such as energy, transport, telecommunications, water, healthcare, and education.

2.4 An Analysis of Three Successful Public-Private Partnerships in South Africa between 1997 -2001

An analysis will be conducted of three notable PPPs in South Africa that took place between 1997 and 2001. These partnerships have been selected based on their remarkable success and

[95] Section 2 of the Infrastructure Development Act 23 of 2014.
[96] Section 4 of the Infrastructure Development Act 23 of 2014.
[97] United Nations Economic Commission for Europe - Guidelines on Promoting Good Governance in Public-Private Partnerships (2006) 1.

the valuable lessons they offer for future PPP initiatives. By assessing these case studies, I aim to gain a deeper understanding of the factors that contributed to their implementation and the benefits of the PPP projects

2.4.1 South African National Roads Agency SOC Ltd (SANRAL) N4 Toll

The South African National Roads Agency SOC Ltd (SANRAL) N4 Toll was the first Public Private Partnership to be completed successfully in 1998.[98] The project was developed by the governments of Mozambique and South Africa as well as a business company.[99] The private partnership Trans-African Concessions (TRAC), with a capital value of R3 billion worth, executed the build, operate, and transfer model to construct the N4 Toll Road contract.[100] It marked the start of the first significant public-private infrastructure partnership project in South Africa and the first cross-national transport PPP project in Sub-Saharan Africa.[101] The N4 Toll Road is a 630-kilometer brownfield toll road concession that connects a deep-water port on the Indian Ocean with Maputo and with the Pretoria administrative centre of South Africa.[102] The concessionaire arranged 80% of the loan financing and 20% equity for the project.[103] TRAC accepted the risk associated with demand and traffic. The debt financing was mutually agreed upon by both governments, but the toll revenue had to completely cover all operating expenses and debt obligations.[104] The project had a number of goals, including promoting trade between Mozambique and South Africa to increase economic activity, direct access to the Port of Maputo, which will enhance local and global trade, and further develop export-oriented industries.[105]

2.4.2 SANRAL N3 Toll Road

On the 2nd of November 1999, a 30-year toll road concession agreement was signed by the South African National Roads Agency Limited and N3 Toll Concession Proprietary Limited

[98] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 171.
[99] Massingue T Private and Public Partnerships South African Experience 2015 *Sanral* 28.
[100] Leccis F Public-Private Partnerships for Transportation Infrastructure Delivery (2015) 3 *Open Journal of Social Sciences* 23.
[101] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 171.
[102] Leccis F Public-Private Partnerships for Transportation Infrastructure Delivery (2015) 3 *Open Journal of Social Sciences* 23.
[103] Leccis F Public-Private Partnerships for Transportation Infrastructure Delivery (2015) 3 *Open Journal of Social Sciences* 23.
[104] Leccis F Public-Private Partnerships for Transportation Infrastructure Delivery (2015) 3 *Open Journal of Social Sciences* 24.
[105] Leccis F Public-Private Partnerships for Transportation Infrastructure Delivery (2015) 3 *Open Journal of Social Sciences* 25.

for the management of the N3 Toll Route.[106] From Cedara to Heidelberg South, N3 Toll Road spans KwaZulu-Natal and Gauteng. N3TC manages the design, construction, funding, operation, and upkeep of this section of the N3 Route till the concession contract ends in 2029.[107] The N3 Toll Road serves as a vital transportation route between Gauteng, South Africa's economic centre, and the country's main port, the Durban Harbour in KwaZulu-Natal. Many deep rural and agricultural settlements, as well as small towns and villages, are traversed by the Road.[108] Transport corridors, like the N3 Toll Road, boost the economy and alleviate poverty through the construction of infrastructure, the creation of employment opportunities, the improvement of skills, and the expansion and development of business nodes along the route.

2.4.3 Mangaung Correctional Centre

The Mangaung Correctional Centre commonly referred to as the Bloemfontein Prison is the first PPP prison project in South Africa.[109] A PPP agreement between the South African government and the private corporation G4S allowed for the establishment of the prison in 2001.[110] The prison was built primarily to improve the management of the criminal justice system and to address the issue of overcrowding in prisons. The government believed that collaborating with the business sector would assist to improve conditions for prisoners, lower costs, and raise the efficiency of prison operations.[111] G4S is responsible for the maintenance of the facility until the contract expires in 2025, but the facility itself is currently owned by the Department of Public Works.[112] The Mangaung Correctional Centre is designed to house medium- to high-security inmates and has a capacity of approximately 3,000 prisoners. The facility incorporates modern technologies and management practices, including electronic surveillance systems, biometric identification systems, and computerized offender management systems.[113] The PPP arrangement also includes provisions for the training and

[106]About the N3 Toll Route available *at* http://www.n3tc.co.za/about-the-n3/ (accessed 11 April 2023).
[107] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form? (2006) 23 *Land Use Policy* 345.
[108] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form? (2006) 23 *Land Use Policy* 345.
[109] Bloemfontein's first private prison available at https://www.engineeringnews.co.za/print-version/bloem-prison-a-first-for-the-state-2000-12-01 (accessed 20 March 2023).
[110] Bloemfontein first private prison *available* https://www.engineeringnews.co.za/print-version/bloem-prison-a-first-for-the-state-2000-12-01 (accessed 20 March 2023).
[111] Constitutional Court of South Africa- Prison visit report: Mangaung Correctional Centre (2013) 2.
[112] Constitutional Court of South Africa (2013) Prison visit report: Mangaung Correctional Centre Bloemfontein (2013) 2.
[113] Constitutional Court of South Africa (2013) Prison visit report: Mangaung Correctional Centre Bloemfontein (2013) 3.

employment of local people, which is seen as a significant benefit for the surrounding community.

The first PPP projects that were completed served as a starting point for developing an effective structure for the management and regulation of PPP in South Africa. The South African Government approved a PPP strategic framework in 1999. After this, according to the directive of the Public Financial Management Act, the government released Treasury Rules for PPPs. These projects include hospitals, transportation and road developments, tourism initiatives, and projects for company offices.

2.5 National Legal Framework on PPPs in South Africa

The South African administration showed its dedication to a PPP strategy for providing high-quality infrastructure delivery services by directing the Minister of Finance, through the Cabinet, to initiate measures for formulating an all-encompassing PPP structure for the nation.[114] The national and provincial levels of the country also created thorough legislative and regulatory PPP frameworks in response to that order. In South Africa, PPPs are regulated through various legislations.

2.5.1 Constitution of the Republic of South Africa

In the Constitution of the Republic of South Africa, section 217 primarily deals with PPPs directly. The Constitution outlines the principles governing public procurement, including public-private partnerships (PPPs). The section reads as follows:

"When an organ of the state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective".[115] Every procurement must follow a fair, equitable, transparent, competitive, and cost-effective procedure. This is applicable to all state organs, including those involved in PPPs. This criterion is intended to make sure that there is no bias, corruption, or favouritism in the government's procurement procedures.[116] The provision of the Constitution further promotes equality given South Africa's history of apartheid.[117] In the context of PPPs, this means that the government must choose private partners for PPP projects through an open and

[114] National Treasury PPP Unit, op cit (note 6) 15.
[115] Section 217(1) Constitution of the Republic of South Africa 1996.
[116] Section 217(1)(b) of the Constitution of the Republic of South Africa 1996.
[117] Section 217(2) of the Constitution of the Republic of South Africa 1996.

competitive bidding procedure. All prospective bidders must be treated fairly and equally during this process, and the private partner that provides the best value for the money must be chosen. This illustrates an intentional attempt to utilize the law as a device to advance fairness and equal opportunity in society.

Section 217 prohibits wasteful, unlawful, or irregular use of public monies.[118] As a result, the government is required to ensure the appropriate and profitable use of the public monies employed in PPP projects. Additionally, the government must make sure that the PPP project conforms with all applicable legal criteria and is legally authorized.[119] In the context of PPPs, this implies that the government must guarantee that the PPP project is financially sustainable and that the private partner is capable of providing the necessary services in a way that is both efficient and cost-effective.[120] The duty of the government is to ensure that the PPP project complies with all relevant legislative requirements, such as those relating to labour, the environment, and anti-corruption.[121] The Constitution empowers the Parliament to enact legislation pertaining to the subjects enumerated in schedules 4 and 5 of the Constitution.[122] A few of the items on the list are housing, public transportation, and airports.[123] The Constitution, also, gives provinces the power to enact laws regarding a wide range of other topics, such as, for instance, provincial roadways, provincial parks, accommodation facilities, and public transportation.[124]

Property rights, including those of investors and private companies engaged in PPPs, are protected in the Constitution.[125] It ensures that property may only be taken in compliance with a law that has a broad scope and is in the public interest or serves a public purpose and is compensated.[126] This means that any expropriation of property, including that of private entities involved in PPPs, must be done in accordance with due process and in the public interest. This provides a level of certainty and predictability for private entities involved in

[118] Section 217(1) of the Constitution of the Republic of South Africa 1996.
[119] Section 217(3) the Constitution of the Republic of South Africa 1996.
[120] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form? (2006) 23 *Land Use Policy* 346.
[121] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form? (2006) 23 *Land Use Policy* 346.
[122] Section 44 Constitution of the Republic of South Africa 1996.
[123] Section 44 Constitution of the Republic of South Africa 1996.
[124] Section 44 Constitution of the Republic of South Africa 1996.
[125] Section 25(1) of the Constitution of the Republic of South Africa 1996.
[126] Section 25(2) of the Constitution of the Republic of South Africa 1996.

PPPs and can help to promote investment and economic growth. PPPs frequently involve substantial investments in assets, such as infrastructure, that are essential for the delivery of public services and economic expansion.[127] As a result, investors who take part in PPPs have a legitimate expectation that their property rights would be protected.[128] PPPs typically involve the transfer of some or all of the ownership and/or control of public assets to private entities. For the private investors in the PPP, this change in ownership and control produces a new set of property rights.[129]

The fundamental objectives and guiding principles of public administration, which must be guided by democratic values and principles, are outlined in the Constitution.[130] The democratic values enshrined in the Constitution are human dignity, equality, and freedom.[131] The values set guidelines for the conduct of public officials and institutions involved in PPPs in the context of creating and implementing PPPs (i) accountability - public officials[132] involved in PPPs must take responsibility for their actions and conduct, (ii) transparency[133] guarantees that public authorities working in PPPs must be transparent in their decision-making processes and must promptly and easily make information available to the public[134], and (iii) the administration involved in PPPs must act impartially, in a fair and impartial manner to uphold the public interest.[135] Furthermore, citizens must be given the chance to take part in decision-making processes that have an impact on them, including the creation and execution of PPPs.[136]

These guidelines offer a framework for the creation and execution of PPPs that is founded on good governance, openness, and accountability. They mandate that public employees who participate in PPPs operate in the public interest and make sure that the rewards of PPPs are distributed properly and equally and according to the democratic values enshrined in the Bill of Rights.

[127] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form (2006) 23 *Land Use Policy* 349.
[128] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form (2006) 23 *Land Use Policy* 349.
[129] Donaldson R Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form (2006) 23 *Land Use Policy* 349.
[130] Section 195(1) of the Constitution of the Republic of South Africa 1996.
[131] Section 7(1) of the Constitution of the Republic of South Africa 1996.
[132] Section 195 (1)(f) Constitution of the Republic of South Africa 1996.
[133] Section 195(1)(g) Constitution of the Republic of South Africa 1996.
[134] Section 195(1)(g) Constitution of the Republic of South Africa 1996.
[135] Section 195(1) (d) Constitution of the Republic of South Africa 1996.
[136] Section 195(1)(e) Constitution of the Republic of South Africa 1996.

2.5.2 Treasury Regulation 16

The main piece of law regulating PPPs for South Africa's national and provincial tiers of government is the Treasury Regulation (TR16). The TR16 defines PPPs and outlines the requirements for a project to qualify as PPP. According to TR16, "*PPPs involve a commercial transaction in which an institution engages a private party to either carry out an institutional function on behalf of the institution for a specified or indefinite period or to utilize state property for the private party's own commercial purposes for a specified or indefinite period*".[137] In exchange for performing the function or using the property, the private party receives a benefit, which may take the form of compensation from a revenue fund, charges or fees collected from users or customers of a service provided by the private party, or a combination of such compensation and charges/fees.[138] Fundamental characteristics of a PPP are emphasized by this definition, including the sharing of obligations and risks between the public and private sectors as one of the main characteristics of a PPP.[139] The project's private sector partner is expected to be responsible for a substantial share of the financial, technical, and operational risk, which encourages them to complete it on schedule, on budget, and to the requisite quality standards.[140] TR16 offers recommendations for PPPs in South Africa that are intended to make sure they are carried out in an open, accountable, and economical manner. According to these principles, the PPP agreement must be transparent and include a strong business case, a competitive procurement procedure, strict risk assessment and management, routine monitoring, and evaluation.[141]

Since it was first published in May 2000, Treasury Regulation 16 has undergone changes and now offers PPPs explicit and comprehensive guidelines.[142] According to the Regulation, PPPs can be divided into two categories, those in which a private party fulfils an institutional purpose and those in which a private party receives the right to use public property for its own purposes and business needs. A combination of these sorts is also conceivable. [143] It can be deduced that South Africa permits the implementation of both concession-based and private finance initiative (PFI) PPP models, which enable payments to be made through various means. These

[137] Treasury Regulations 2005 section 16.1.
[138] Treasury Regulations 2005 section 16.1.
[139] Treasury Regulations 2005 section 16.1.
[140] Treasury Regulations 2005 section 16.1.
[141] Treasury Regulations 2005 section 16.1.
[142] National Treasury PPP Unit, Public Private Partnership Manual (2001).
[143] National Treasury PPP Unit, Introducing Public-Private Partnerships in South Africa (2007) 8.

payments may involve the institution paying for the usage of the facility, the private party collecting tolls or fees from end-users for the use of the facility, or a hybrid of the two.[144]

According to TR16, a PPP agreement can only be signed by a financial officer acting on behalf of the institution.[145] Additionally, the financial officer is strictly prohibited to proceed with the procurement of a PPP agreement without obtaining prior written consent from either the National Treasury or the relevant provincial treasury.[146] In the case of a provincial institution, the National Treasury must have delegated the necessary authority to the provincial treasury.[147] TR16 mandates that PPP projects go through a thorough approval process that includes a detailed evaluation of the project's viability and economic worth. The PPP must be the best possible choice for the project and offer greater value for money, according to the government.[148] Section 3 of TR 16 deals with treasury approval. This is significant since it stipulates that PPP projects must go through an independent evaluation and approval process by the National Treasury as well as any other pertinent government ministries or bodies.[149] As a result, PPPs are reviewed fairly and this process makes the government confident in the viability and cost-effectiveness of the project. Approval is conditional and requires written permission from either the National Treasury or the relevant provincial treasury, depending on whether it's a national or provincial institution.[150] They will assess whether the PPP brings economic benefits to the country, if PPPs are financially viable, and consider the related consequences.[151]

In South Africa, every PPP project is subjected to a rigorous three-part evaluation. The evaluation scrutinizes (i). whether the private party has assumed a significant transfer of technical, operational, and financial risk, (ii). whether the institution is capable of meeting the proposed fee, and (iii) whether the investment yields a favourable return.[152] A private party submitting a bid for a project must unequivocally be financially viable, both in terms of the predicted costs and the expected revenues or advantages.[153] The private sector partner must

[144] National Treasury PPP Unit, Public Private Partnership Manual (2001).
[145] Treasury Regulation 16.2.1.
[146] Treasury Regulation 16.3.1.
[147] Treasury Regulation 16.3.1.
[148] Treasury Regulation 16.6.5.
[149] Treasury Regulation 16.3.1.
[150] Treasury Regulation 16.3.1.
[151] Treasury Regulation 16.3.1.
[152] African Union Commission Department of Trade and Industry available at https://au.int/en/ti/department available at (accessed 25 March 2023).
[153] African Union Commission Department of Trade and Industry available at https://au.int/en/ti/department available at (accessed 25 March 2023).

demonstrate that they have the necessary financial resources to finish the project, as well as the skill and knowledge to do so more efficiently than other parties.[154] This helps avoid projects being postponed due to a private-sector partnership's inability to complete them. The budget required for the public entity supporting the project to carry out its obligations under the agreement must be available. By satisfying these three criteria, the PPP project is deemed to be in compliance with the objectives of the country's governance.

2.5.3 Public Finance Management Act 1999 (PFMA)

The Public Finance Management Act (PFMA) comprises the department(s) in charge of finances and taxes as well as the Minister, who serves as the Treasury's head.[155] According to the PFMA, a specific PPP Unit has been established. Its fundamental objective is to provide proper transfer of risks, accessibility, and adequate value for funds in public-private partnerships.[156] It is backed by the Government Technical Advisory Centre (GTAC). The role of the GTAC is to provide professional consulting services, project management, and transaction assistance for public financial management.[157] The piece of legislation's main goal is to boost public sector financial management.[158] Between 2000 and 2014, twenty-four national and provincial PPPs projects amounted roughly to $8.35 billion in monetary investment.[159] Their success depended on the PPP unit. PPP Units are used by experts in the accounting, consulting, and financial service areas. This is advantageous for the unit's development because it necessitates in-depth knowledge of complex financial arrangements.[160] The PFMA provides guidelines for the appointment of Accounting officers in the department and constitutional institutions.[161] In order to carry out their governmental duties, they must directly answer to the legislative assembly for the effective management of their budgets.[162] By requiring the Auditor General to carry out an impartial examination of PPP projects and to look into their management and procurement procedures, the PFMA ensures that public funds are used effectively and efficiently. PPP projects are cost-effective and compliant with the

[154] African Union Commission Department of Trade and Industry available at https://au.int/en/ti/department available at (accessed 25 March 2023).
[155] Section 5(1) of the Public Finance Management Act 1999.
[156] PPP Knowledge Lab available at https://pppknowledgelab.org/guide/sections/32-dedicated-ppp-units (accessed 25 March 2023)
[157] Strategic and Technical Advisory available at https://www.gtac.gov.za/ (accessed 25 March 2023)
[158] Strategic and Technical Advisory available at https://www.gtac.gov.za/ (accessed 25 March 2023)
[159]PPP Knowledge Lab available at https://pppknowledgelab.org/guide/sections/5-establishing-the-ppp-framework (accessed 25 March 20230
[160] PPP Knowledge Lab available at https://pppknowledgelab.org/guide/sections/5-establishing-the-ppp-framework (accessed 25 March 2023)
[161] Section 36 of the Public Finance Management Act of 1999.
[162] Section 36 of the Public Finance Management Act of 1999.

PFMA if an independent evaluation is conducted and the documentation process is examined. The PFMA in South Africa does not explicitly specify the criteria for determining whether a PPP qualifies as national or provincial.[163] The PFMA serves as a comprehensive framework governing financial management and accountability within the public sector, encompassing guidelines for PPPs.[164] Section 17 outlines the criteria for the establishment of provincial treasuries in each province.[165] These treasuries consist of two key components: The Member of the Executive Council (MEC) responsible for finance within the respective province, who assumes the role of the head of the provincial treasury.[166] Section 17(2) further specifies that the MEC for finance, who serves as the head of the provincial treasury, is responsible for making policy and other decisions related to the treasury.[167] However, this authority may exclude decisions made as a result of a delegation or instruction in accordance with Section 20 of the PFMA.[168]

Section 10 of the PFMA in South Africa empowers the National Treasury to delegate written responsibilities to department heads within its own organization and instruct them to carry out specific tasks mandated by the PFMA.[169] In the context of provincial departments or provincial public entities, PFMA grants the National Treasury the authority, through written delegation, to transfer its powers as outlined in the PFMA to a provincial treasury.[170] Furthermore, it provides the National Treasury with the option to request the provincial treasury to assume responsibilities that would typically fall under the purview of the National Treasury according to the Act.[171] This delegation or request process involves collaboration between the Minister and the relevant Member of the Executive Council (MEC) responsible for finance within the province.[172] This provision highlights the critical importance of collaboration between national and provincial authorities. Since PPPs often operate across both national and provincial boundaries, effective communication and cooperation between these governmental levels are essential for the successful implementation of these partnerships.

163 Public Finance Management Act of 1999.
164 Public Finance Management Act of 1999.
165 Section 17(1) of the Public Finance Management Act of 1999.
166 Section 17(1) of the Public Finance Management Act of 1999.
167 Section 17(2) of the Public Finance Management Act of 1999.
168 Section 17(2) of the Public Finance Management Act of 1999.
169 Section 10(a) of the Public Finance Management Act of 1999.
170 Section 10(b) of the Public Finance Management Act of 1999.
171 Section 10 of the Public Finance Management Act of 1999.
172 Section 10 of the Public Finance Management Act of 1999.

2.5.4 Municipal Finance Management Act 56 of 2003 (MFMA)

In 2003, the Municipal Finance Management Act (MFMA) was passed as a response to the shortcomings in local government finance procedures at the time.[173] The existing system was characterized by one-year line-item budgeting, which hindered strategic planning and the alignment of budgets with medium-term priorities.[174] As a result, instead of taking into account present demands and community needs, councils allocated resources based on earlier commitments.[175] The municipal finance practices also lacked a culture of performance and frequent reporting. Reports were generally inconsistent, inaccurate, unreliable, and frequently missed important information.[176] Annual reports were regularly withheld from the public, and financial accounts were not instantly and accurately submitted for audit.[177]

The MFMA's establishment in 2003 set the foundation for addressing these challenges.[178] Following that, a number of regulations were put into place to address particular issues such as asset transfers, public-private partnerships, supply chain management, and minimum competency standards for municipal finance officials.[179] Each of these components plays a crucial role in ensuring that expenditure is developmental, effective, and efficient, while also promoting accountability within municipalities.[180]

MFMA promotes effective financial management within municipalities.[181] It mandates that municipalities establish a financial management system that aligns with generally recognized accounting practices.[182] Municipalities can promote effective budgeting in PPP projects by following these practices which provide a standardized framework for financial planning, ensuring that budgets are realistic, accurate, and based on sound financial principles.[183] MFMA's provision for establishing a financial management system aligned with generally recognized accounting practices is essential for promoting effective financial management in

[173] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[174] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[175] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[176] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[177] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[178] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[179] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[180] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[181] Section 15 of the Municipal Finance Management Act 56 of 2003.
[182] Section 16 of the Municipal Finance Management Act 56 of 2003.
[183] Section 16 of the Municipal Finance Management Act 56 of 2003.

municipalities, particularly in the context of PPPs.[184] Municipalities can construct accurate and realistic budgets by following these procedures, which also provide expenditure management and protect taxpayer's funds.[185] By promoting financial accountability and effective resource allocation, the MFMA enhances municipal financial management in general and helps PPP projects be successfully implemented.[186]

Section 17 of the MFMA complements Section 16 by mandating municipalities to prepare annual financial statements.[187] This clause makes the use of public funds in PPP projects transparent. Annual financial statements offer a comprehensive overview of the municipality's financial activities, including transactions related to PPPs.[188] Stakeholders can evaluate the municipality's PPP efforts' financial stability, effectiveness, and compliance thanks to these disclosures laid out in the MFMA.[189] Municipalities also increase openness by making these statements available to the public, enabling stakeholders and citizens to examine how public monies are used holding the municipality responsible for its financial choices.[190]

Section 120 of the MFMA outlines the conditions and procedures for PPPs.[191] The section emphasizes the importance of abiding by the broader regulatory framework governing PPPs in the municipal context by ensuring that municipalities can enter into a PPP agreement if it is affordable, offers value for money, and transfers the appropriate amount of technical, operational, and financial risk to the private party.[192] This ensures that the municipality will evaluate PPP proposals, and determine if they are in the best interests of all parties involved by taking into account how the project will affect its citizens.[193] MFMA emphasizes the need to follow specific provisions and procedures related to partnerships, cooperative governance, and intergovernmental relations outlined in Chapter 8.[194] By complying with the regulatory framework, municipalities ensure that PPPs are implemented in accordance with legislative requirements.[195]

[184] Chapter 4 of the Municipal Finance Management Act 56 of 2003.
[185] Chapter 4 of the Municipal Finance Management Act 56 of 2003.
[186] Chapter 4 of the Municipal Finance Management Act 56 of 2003.
[187] Section 17 of the Municipal Finance Management Act 56 of 2003.
[188] Section 17(1) of the Municipal Finance Management Act 56 of 2003.
[189] Section 17(3) of the Municipal Finance Management Act 56 of 2003.
[190] Municipal Finance Management Act 56 of 2003.
[191] Section 120 of the Municipal Finance Management Act 56 of 2003.
[192] Section 120 (1) of the Municipal Finance Management Act 56 of 2003.
[193] Section 120(1) of the Municipal Finance Management Act 56 of 2003.
[194] Section 120 (3) of the Municipal Finance Management Act 56 of 2003.
[195] Section 120(3) of the Municipal Finance Management Act 56 of 2003.

Additionally, the MFMA puts an important requirement on municipalities that feasibility studies must be conducted before a PPP is concluded.[196] These studies serve as a crucial evaluation tool for identifying the proposed PPP arrangement's strategic and financial benefits.[197] Feasibility studies delve into an in-depth analysis of the partnership, including an examination of the private party's role and its alignment with the municipality's objectives.[198] Municipalities can assess the suitability of the private party's participation in the PPP and assess their capability and competencies to effectively carry out their specified function by conducting this analysis.[199] By ensuring that PPPs are founded on a thorough understanding of their possible advantages and risks, feasibility studies serve as the cornerstone for informed decision-making. This fosters effective governance, promotes collaboration, and provides necessary oversight in the partnership arrangement.

2.5.5 Municipal Systems Act 32 of 2000

The purpose of the Municipal System Act is to establish essential principles, mechanisms, and processes that will facilitate municipalities in their progressive journey toward the social and economic upliftment of local communities.[200] It aims to ensure universal access to affordable essential services for all residents.[201] This emphasizes community participation, providing opportunities for the public to be involved in local decision-making.[202] The legislation also establishes a straightforward and enabling framework for core processes like planning, performance management, resource mobilization, and organizational change, all fundamental aspects of developmental local government.[203]

Section 77 of the MSA is critical in the context of PPPs as the Act outlines the circumstances where a municipality must consider and decide on the appropriate mechanism to provide a municipal service.[204] These are relevant when a municipality is creating or reviewing an integrated development plan,[205] offering new municipal services,[206] significantly enhancing or

[196] Section 120(4) of the Municipal Finance Management Act 56 of 2003.
[197] Section 120(4) of the Municipal Finance Management Act 56 of 2003.
[198] Section 120(4) of the Municipal Finance Management Act 56 of 2003.
[199] Section 120(4) of the Municipal Finance Management Act 56 of 2003.
[200] Municipal Systems Act 32 of 2000.
[201] Municipal Systems Act 32 of 2000.
[202] Chapter 4 of Municipal Systems Act 32 of 2000.
[203] Municipal Systems Act 32 of 2000.
[204] Section 77 of the Municipal Systems Act 32 of 2000.
[205] Section 77 (a) of the Municipal Systems Act 32 of 2000.
[206] Section 77 (b) of the Municipal Systems Act 32 of 2000.

expanding existing municipal services,[207] reviewing a delivery method,[208], undergoing municipal restructuring or reorganization,[209] or responding to a request from the local community.[210] By analyzing Section 77 of the MSA, we can infer that the Act values PPPs as a method of providing effective and efficient municipal services. The Act gives municipalities the authority to consider, decide, and enter into PPPs when appropriate, depending on a variety of contextual considerations such as the service's nature, local requirements, and potential efficiency advantages.[211] This encourages local governments to adopt PPPs as a proactive means of enhancing service delivery and fostering sustainable growth within their boundaries. However, the effectiveness of this provision relies on the municipality's willingness to proactively explore PPP options and engage in a transparent and fair decision-making process.[212]

The criteria and procedures that municipalities must follow when selecting delivery methods for municipal services, including the possibility of PPPs, are outlined in Section 78 of the MSA.[213] Municipalities are obliged to conduct a thorough cost-benefit analysis before deciding on a PPP for service supply.[214] This inquiry seeks to compare a PPP to alternative delivery options and assess all possible benefits and drawbacks. Additionally, municipalities must also assess the qualifications of potential private partners. This evaluation takes into account the abilities, knowledge, and resources that the private partner may offer to guarantee the effective delivery of services under the PPP agreement.[215] Municipalities are required to consider the opinions of organized labour when evaluating various service delivery options.[216] MSA makes sure that municipalities take decisions that are in the best interests of their communities by performing detailed cost-benefit assessments, assessing the capabilities of private sector partners, and taking into account the opinions of organized labour and the local population. This legal framework promotes accountable and inclusive governance, making it possible to implement PPPs successfully to address South Africa's municipal service demands.

207 Section 77 (c) of the Municipal Systems Act 32 of 2000.
208 Section 77 (d) of the Municipal Systems Act 32 of 2000.
209 Section 77 (e) of the Municipal Systems Act 32 of 2000.
210 Section 77 (f) of the Municipal Systems Act 32 of 2000.
211 Dominic M Increasing service delivery through partnerships between private and public sector (2007) 12.
212 Dominic M Increasing service delivery through partnerships between private and public sector (2007) 12.
213 Section 78 of the Municipal System Act 32 of 2000.
214 Section 78(1)(a)(i) of the Municipal System Act 32 of 2000.
215 Section 78(1)(a)(ii) of the Municipal System Act 32 of 2000.
216 Section 78(1)(a)(iii) of the Municipal System Act 32 of 2000.

Before entering into a service delivery agreement for a fundamental service, municipalities must set up a program for community consultation and information sharing, according to the MSA.[217] The implementation of a community consultation program encourages the municipality to be accountable and responsive to its inhabitants.[218] Allowing the community to express their needs, worries, and preferences, gives them more influence and guarantees that their opinions are taken into account before any service delivery agreements are finalized.[219] Furthermore, because MSA mandates the disclosure of information regarding the proposed service agreement,[220] this enables the community to make well-informed decisions by assisting them in understanding the consequences, advantages, and potential challenges involved with the agreement.

Through contracts with external providers, MSA regulates the duties that municipalities must fulfil when offering services.[221] This is vital because it guarantees effective service delivery and protects the interests of the community. Municipalities are required to manage tariff settings made by the service provider, monitor and evaluate the agreement's implementation, and guarantee continuous service delivery in the best interests of the community.[222] The Act permits municipalities to provide the service provider with specified service delivery plans.[223] This enables the service provider more control over the management of operational planning, service delivery, service-related economic and social development, customer management, and financial operations.[224] In accordance with Section 81(3), the municipality regularly monitors and audits the service provider's performance to guarantee efficiency and responsibility.[225] By encouraging accessibility, equality, and community involvement in the selection and performance monitoring of service providers, these provisions play a critical role in ensuring effective service delivery and establishing public trust.

The key competitive bidding procedure for municipalities to follow when choosing a service provider is outlined in Section 83 of the MSA.[226] This procedure must be impartial, open,

[217] Section 80 (2) of the Municipal System Act 32 of 2000.
[218] Section 80 (2) of the Municipal System Act 32 of 2000.
[219] Fombad M ''An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 14.
[220] Section 80 (2) of the Municipal System Act 32 of 2000.
[221] Section 81 of the Municipal System Act 32 of 2000.
[222] Section 81(1) of the Municipal System Act 32 of 2000.
[223] Section 81(2) of the Municipal System Act 32 of 2000.
[224] Section 81 (2) of the Municipal System Act 32 of 2000.
[225] Section 81(3) of the Municipal System Act 32 of 2000.
[226] Section 83 of the Municipal System Act 32 of 2000.

equitable, cost-effective, and designed to prevent fraud and corruption.[227] All prospective service providers must have equal and simultaneous access to relevant bidding information to ensure fairness and competitiveness.[228] The municipality is accountable to the local community, providing updates on the progress of selecting a service provider and explaining the reasons behind their decision.[229] Furthermore, the selection process must adhere to principles of fairness, equity, transparency, cost-effectiveness, and competitiveness.[230] In order to address unfair discrimination, a municipality may establish preferences for particular service providers, advancing the needs of people from disadvantaged backgrounds.[231]

Following selection, the municipality must negotiate the service delivery agreement's final terms and conditions in accordance with the bid documents.[232] If an agreement cannot be reached in a reasonable period of time, the municipality has the option to negotiate with the next-ranked prospective service provider.[233] Copies of the service delivery agreement must be made public after the agreement has been finalized, and the media must be informed of all relevant details, including the name of the selected service provider, and the location where the agreement may be examined.[234] Section 21a of the Act is also significant as it outlines the proper procedures for communication with the local community in the notification of a potential PPP agreement.[235] These clauses are important because they encourage openness and public access to information about the service provider agreement. The municipality maintains transparency and accountability in the bargaining process by making the service delivery agreements accessible to the public and informing the media. As a result, the municipality's actions are supported by trust and confidence, and PPP collaborations benefit from successful public participation.

The Municipal Systems Act is a crucial piece of law that gives municipalities the authority to provide fundamental services, including the public in decision-making, and successfully implement PPPs. Its provisions support inclusive, transparent, and responsible government, which ultimately benefits both the municipalities and the residents they serve.

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[227] Section 83 of the Municipal System Act 32 of 2000.
[228] Section 83 (1) of the Municipal System Act 32 of 2000.
[229] Section 83 (1) of the Municipal System Act 32 of 2000.
[230] Section 83 (3) of the Municipal System Act 32 of 2000.
[231] Section 83 (2) of the Municipal System Act 32 of 2000.
[232] Section 84 (1) of the Municipal System Act 32 of 2000.
[233] Section 84 (2) of the Municipal System Act 32 of 2000.
[234] Section 84 (3) of the Municipal System Act 32 of 2000.
[235] Section 21 of the Municipal System Act 32 of 2000.

2.5.6 The Protection of Investment Act 22 of 2015

The primary goal of the PIA is to ensure the protection of investors and their assets while balancing the rights and responsibilities that apply to all investors.[236] The Act provides a definition of an "investor" as an enterprise that invests in the Republic, regardless of nationality.[237] The PIA has three main objectives, which are to protect investments in compliance with the Constitution, to uphold the Republic's sovereign right to regulate investment in the public interest, and to affirm the Constitution's Bill of Rights and laws that apply to all investors and their investments in the Republic.[238] Any investments made in the Republic under section 2 of the Act are subject to the provisions of the PIA.

In the context of PPPs, the PIA gives protection to international investors who participate in PPP projects in South Africa. The PIA upholds investors' rights to fair and equal treatment as well as protection from unjustified expropriation.[239] These protections are important in PPP projects where foreign investors may be providing financing, technology, or expertise. The Republic is required to provide foreign investors and their interests with the same level of physical security as local investors are typically entitled to under customary international law.[240]

To give investors a reason to take part in PPPs and make the necessary investments for the purpose of providing public services, economic growth, and the accomplishment of contractual agreements between public and private entities, (PIA) grants investors who take part in PPPs a mechanism for resolving disputes. PIA offers a framework, which can help to reduce risks and increase investment in the industry. If an investor disagrees with a government decision that has an impact on their investment, they may request, within six months of finding out about the disagreement, that the Department appoint a mediator to help them resolve their disagreement.[241] A foreign investor is not prevented from bringing their dispute before any South African court, independent panel, or statutory agency.[242] In cases where domestic

[236] The Protection of Investment Act No 22 of 2015
[237] Section 1 of the Protection of Investment Act No 22 of 2015
[238] Section 4 of the Protection of Investment Act No 22 of 2015.
[239] Section 8 of the Protection of Investment Act 22 of 2015.
[240] Section 9 of the Protection of Investment Act 22 of 2015.
[241] Section 13 of the Promotion of Investment Act 22 of 2015.
[242] Section 13 of the Promotion of Investment Act 22 of 2015.

remedies have been exhausted and the dispute persists, the South African government might agree to international arbitration. This would involve South Africa and the foreign investor's home country.[243] This clause is crucial since PPPs entail cooperation between the government and private sector entities, which frequently have divergent interests, priorities, and business practices. A dispute resolution mechanism enables and assists parties to settle their disagreements in a manner that is flexible, inexpensive, and effective, allowing the parties to resolve their differences quickly and effectively. This prevents the progress of the project from slowing down or underperforming.

On December 30, 2016, the South African Department of Trade and Industry (DTI) published the Draft Mediation Rules and Guidelines. Conflicts over investments between investors and the government would be subject to these restrictions.[244] The Regulations require, among other things, that a dissatisfied investor declare a disagreement within six months of learning about it, that the investor and the DTI agree on the mediator's identity, and that the DTI's mediation procedures be followed.[245] It is argued that the Rules as written will only satisfy a foreign investor who has faith in the South African market, particularly when the investor's possible remedies are not mentioned.

2.5.7 Black Economic Empowerment (BEE)

The BEE Code is a South African public policy that has an impact on PPP agreements. Given the nation's history of apartheid, the Code was adopted to encourage equality. This policy, which was released in accordance with the Public Financial Management Act, has been formally recognized by the Black Economic Empowerment in Public-Private Partnerships Code of Good Practice.[246] BEE objectives must be met throughout the entire PPP process, from choosing the contractual advisor to the private party's last acquisition. As a result, for any PPP agreement, a private sector consortium is required to achieve the targets on a balancing

[243] Section 13 of the Promotion of Investment Act 22 of 2015.
[244] South Africa: Draft Regulations on Mediation Rules for investor-state disputes: available at https://www.twobirds.com/en/insights/2017/global/africa-newsletter-feb/south-africa-draft-regulations-on-mediation-rules-for-investor-state-disputes#:~:text=LinkedIn, South%20Africa%3A%20Draft%20Regulations%20on%20Mediation%20Rules%20for%20investor%2Dstate%20disputes (accessed 15 April 2023)
[245] South Africa: Draft Regulations on Mediation Rules for investor-state disputes: available at https://www.twobirds.com/en/insights/2017/global/africa-newsletter-feb/south-africa-draft-regulations-on-mediation-rules-for-investor-state-disputes#:~:text=LinkedIn-,South%20Africa%3A%20Draft%20Regulations%20on%20Mediation%20Rules%20for%20investor%2Dstate%20disputes (accessed 15 April 2023)
[246] National Treasury PPP Unit (2000) 15.

scorecard for BEE.[247] In terms of equity, significant direct ownership must be held by black individuals, businesses, and women. Second, the private partner and its subcontractors' management and employment must include black people.[248] Thirdly, the project must be advantageous to start-ups and medium-sized businesses, the handicapped, young, and non-governmental organizations. The private party must give a significant portion of its subcontracting work to Black individuals living in the project area. To support this, the National Treasury of South Africa (NTSA) and the Development Bank of Southern Africa (DBSA) collaborated on a PPP BEE equity facility that funds BEE equity in PPP deals.[249] The purpose of the Broad-Based Black Economic Empowerment which is a feature of the BEE is to expand the economic empowerment of black people to include a broader range of previously disadvantaged groups.[250] These groups comprise women, workers, youth, disabled people, and rural residents. Businesses are encouraged to promote and adopt BBBEE in their operations, thereby contributing to a more inclusive economy.[251] By complying with BBBEE, businesses can improve their scorecard and become eligible for government tenders, which can help to grow their business. Ultimately, promoting economic growth and inclusivity in South Africa is one of the main objectives of the Act.

2.6 The Gaps in the Implementation of Law: Answering the Why Question

PPPs have become a viable solution to South Africa's urgent infrastructure needs, particularly in municipalities facing major challenges.[252] Although the National Treasury PPP Unit actively promotes PPPs and guidelines for their implementation, a shortage of funds hampers the unit's ability to spread PPP use to municipal governments and promote PPPs in certain sectors.[253] There are significant gaps in South Africa's PPP implementation, including challenging institutional, legal, and financial barriers.[254]

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[247] National Treasury PPP Unit (2000) 15.
[248] Arimoro A, 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 89.
[249] Arimoro A 'An Appraisal of the Framework for Public-Private Partnership in South Africa'(2018) 13 *European Procurement & Public Private Partnership Law Review* 89.
[250] Section 2 of the Broad-Based Black Economic Empowerment Act 53 of 2003.
[251] Section 2 of the Broad-Based Black Economic Empowerment Act 53 of 2003.
[252] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at *https://pmg.org.za/committee-meeting/36183/* (accessed 20 March 2023).
[253] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at *https://pmg.org.za/committee-meeting/36183/* (accessed 20 March 2023).
[254] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at *https://pmg.org.za/committee-meeting/36183/* (accessed 20 March 2023).

A fundamental gap is the absence of a comprehensive policy framework that seamlessly integrates PPPs into the overall planning process for public investments.[255] This lack of integration intensifies the rigidity and complexity of existing PPP processes.[256] There is no centralized strategy or specific "gateway" entity to screen infrastructure projects for PPP acceptability under the current institutional frameworks and accountability standards.[257] The insufficient capacity at various government levels, coupled with a shortage of dedicated staff in the National Treasury and a lack of PPP expertise in procuring institutions, further contribute to the gap in implementing PPP projects.[258] Furthermore, South Africa lacks a unified approach to identifying and screening potential PPP projects, leading to inefficiencies during project selection.[259] The absence of a well-equipped PPP regulator with clear guidelines further complicates matters, hindering effective oversight and guidance for PPP initiatives at provincial and national levels, including the PPP Unit.[260] These constraints in expertise and resources result in challenges in procuring PPP projects, leading to reduced private-sector participation and inadequate public engagement.[261] There is a necessity for an overarching infrastructure policy framework that mainstreams PPPs into the overall planning process for public investments in a fiscally prudent manner.

According to South African PPP regulations, a project must be registered with the appropriate treasury at the project's genesis stage by the institution sponsoring it in order for an officer in charge of projects and a financial advisor to be hired before it can be structured as a PPP.[262] However, it is not explicitly stated in the rules that public consultation is essential. While some documents may rightly be withheld, they should not hinder the public's right to information and proper disclosure.[263] The government should be upfront and honest regarding project

[255] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[256] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[257] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[258] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[259] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[260] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[261] Review of the Public-Private Partnership Regulations to deliver on strategic infrastructure projects; with Deputy Minister available at https://pmg.org.za/committee-meeting/36183/ (accessed 20 March 2023).
[262] Section 2 of the Broad-Based Black Economic Empowerment Act 53 of 2003.
[263] Fombad M ''An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 13.

performance and value for money as taxpayers pay for these projects.[264] Therefore, it is challenging to identify long-term hidden costs that the private sector has transferred to the government due to a lack of rigorous scrutiny by the public.[265] For instance, the Gautrain rapid rail link project has been criticized for not having undergone enough public input and parliamentary discussion prior to being approved and put out to bid.[266] Notwithstanding the fact that the Gautrain Fast Connection Project was a success, it is imperative to communicate with all relevant parties before beginning PPP initiatives. By pointing out the incomplete and inconsistent online publication of PPP information in the PPP Quarterly report,[267] Fombad has suggested that a lack of openness could have a negative impact on PPPs in South Africa.[268] The issue raised here is that the issue of transparency emerges because there isn't much information available to the general population. Regardless of how successfully a project performs, it frequently remains hampered if there are concerns about the morality and legality of the contracting and project execution processes.[269]

In accordance with the provisions of section 217 of the Constitution, Treasury Regulation 16.5.3 (a) emphasizes the value of fair, equitable, transparent, competitive, and cost-effective procurement.[270] However, it is notable that there are no explicit implementation procedures in place to guarantee transparency at all phases of the procurement process.[271] The standards and requirements for ensuring transparency and fairness remain unclear.[272] A comprehensive anti-corruption policy is also lacking in the procurement procedure, with the exception of the PPP Manual, which requires an anti-corruption policy and forensic audits in cases of suspected fraud or corruption.[273] While the PPP Unit's role in certifying specific Treasury approvals may indicate quality control, the limited implementation of PPPs, with only an average of two

[264] Fombad M ''An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 13.
[265] Fombad M ''An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 13.
[266] J Stephen 'Fears Gautrain Will Be a Large, Expensive White Elephant' 2005 *STAR* 9.
[267] Fombad MC 'Accountability Challenges in Public-Private Partnerships from a South African Perspective' (2014) 7 *Journal of Business Ethics* 15.
[268] Fombad MC 'Accountability Challenges in Public-Private Partnerships from a South African Perspective' (2014) 7 *Journal of Business Ethics* 15.
[269] Nyagwachi, JN 'South African Public-Private Partnership Projects Creator'(Ph.D. thesis, Nelson Mandela Metropolitan University, 2008) 60.
[270] Treasury Regulation 16:3:5 (a).
[271] Fombad M ''An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 12.
[272] Fombad M ''An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 12.
[273] Fombad M 'An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa' (2013) 37 *Ufahamu: A Journal of African Studies* 13.

projects per year at the national and provincial levels since 2004, and the lengthy process spanning twenty-four to thirty-six months, suggest a lack of clarity in procurement procedures.[274]

Although the MFMA outlines the conditions and procedures for PPP projects[275] and the resolution of financial problems,[276] the Act offers only limited guidance of information on the specific procedures and requirements for implementing PPPs into reality.[277] It lacks detailed provisions or guidelines that municipalities can rely on to navigate the complexities of PPP project selection, procurement, and contract management.[278] As a result, municipalities may have difficulties in adequately establishing and administering PPPs, which could lead to inconsistencies, delays, and increased transaction costs.[279] The MFMA does not specifically address how to handle potential conflicts of interest or ensure a fair distribution of risks and rewards between the public and private sectors. The negotiation and execution of mutually beneficial PPPs will be hindered by this lack of guidance and clarity.[280]

The main focus of the MFMA is on the financial management aspects of PPPs, such as budgeting, spending control, and financial reporting. However, successful PPPs require considerations beyond financial aspects, including social, environmental, and developmental impacts.[281] The Act's little attention to these non-financial factors may prevent municipalities from thoroughly assessing the broader advantages and possible risks connected with PPP projects.[282]

The MFMA significantly increases the financial management and reporting obligations placed on municipalities. However, due to their constrained capability and resources, many municipalities in South Africa struggle to meet the Act's criteria.[283] This could result in a lack of financial expertise, which could result in errors, poor management, or a failure to comply with the requirements for financial reporting in PPP projects.[284] Although it is a requirement that municipalities prepare annual accounting records, these reports might not include adequate

[274] Burger P 'The dedicated PPP unit of the South African National Treasury. South Africa' 2004 *University of the Free State* 6.
[275] Section 120 of the Municipal Finance Management Act 56 of 2003.
[276] Chapter 13 of the Municipal Finance Management Act 56 of 2003.
[277] National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
[278] National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
[279] National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
[280] National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
[281] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[282] National Treasury *Financial Management and MFMA Implementation* (2011) ch 5.
[283] National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
[284] National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.

data about the effectiveness and results of particular PPPs.[285] Transparency and accountability may be hampered by the Act's unclear provisions for ongoing monitoring, evaluation, and reporting on the status, performance, and cost-effectiveness of PPP projects.[286]

Black Economic Empowerment Code requirements for PPPs, as they are now enforced in South Africa, place a heavy burden on investors and PPP project promoters.[287] Concerns have been raised regarding the potential detrimental effect on foreign investment and the risk of promoting corruption in relation to the notion of holding the private sector responsible for addressing inequality issues.[288] In some cases, businesses with the necessary expertise and resources to develop and execute perfect projects may struggle to meet the BEE targets, and as a result, they may be disqualified in favour of less competent sponsors who only pretend to comply with BEE regulations on the surface.[289] The government must address the problem of inequality without obstructing the honourable endeavors of the private sector. PPPs are complicated contracts, thus any effort to make them simpler should be encouraged.

2.7 Conclusion

For South Africa to develop modern infrastructure, all facets of the economy must be heavily involved in ensuring that the South African government creates appropriate investment models.[290] To adequately protect the public interest in infrastructure development, it is essential to award work to private contractors through a transparent and enforceable public bidding process. [291] This process must include clear performance agreements to ensure that contractors meet their obligations and deliver quality work on time. By doing so, the public can have confidence that their tax is being used effectively and that infrastructure projects are being completed to the highest standards. Additionally, a public bidding process promotes competition among contractors, which can lead to cost savings and improved quality of work. Therefore, it is crucial to prioritize the public interest when awarding contracts to private contractors and ensure that infrastructure development benefits the community as a whole. This

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285 National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
286 National Treasury *Financial Management and MFMA Implementation* (2011) ch 6.
287 Nyagwachi, JN 'South Good, African Public-Private Partnership Projects Creator'(Ph.D. thesis, Nelson Mandela Metropolitan University, 2008) 61.
288 Fombad MC 'Accountability Challenges in Public-Private Partnerships from a South African Perspective' (2014) 7 *Journal of Business Ethics* 16.
289 Fombad MC 'Accountability Challenges in Public-Private Partnerships from a South African Perspective' (2014) 7 *Journal of Business Ethics* 17.
290 Nyagwachi, JN 'South African Public-Private Partnership Projects Creator'(Ph.D. thesis, Nelson Mandela Metropolitan University, 2008) 61.
291 National Treasury PPP Practice Note Number 01 of 2004.

chapter has provided an insightful examination of South Africa's legal framework pertaining to PPPs. It has shed light on the historical development and enactment of PPP policies while highlighting the existing gaps, challenges, and shortcomings in their implementation. One significant finding is the absence of a comprehensive policy framework that incorporates PPPs into the broader landscape of public investment planning. This lack of integration adds rigidity and complexity to the current PPP processes. These issues highlight the importance of South Africa making essential improvements to the legal framework governing PPPs. The improvements are vital to ensure that the country's legal structure better serves the interests and overall welfare of its people.

The next chapter will extensively discuss the critical success factors of PPPs and examine notable case studies from Kenya, a prominent East African nation recognised for its proficient execution of PPPs. The case studies will offer valuable insights into how these partnerships are put into practice and provide valuable lessons for their effective implementation.

CHAPTER THREE

THE ROLE OF CRITICAL SUCCESS FACTORS IN THE IMPLEMENTATION OF PUBLIC-PRIVATE PARTNERSHIPS (PPPS): A CASE STUDY OF KENYA

3.1 Introduction

The concept of critical success factors (CSFs) holds significant importance within PPPs as it determines successful project execution.[292] CSF refers to successfully establishing and maintaining exceptional performance cultures inside an organization.[293] The significance of this is brought by the crucial roles that planning, identification, and assessment phases play in assuring the success of a PPP implementation.[294] To effectively formalize contractual agreements, it is vital to have a comprehensive understanding of the critical issues that require utmost attention.[295] The importance of understanding CSFs is evident due to the numerous variations in the nature and scope of PPPs, which are contingent upon specific project requirements.[296] An in-depth analysis of CSFs is therefore crucial for properly conducting a PPP project given its numerous characteristics.[297] These performance parameters include factors like a favourable legal framework, good governance, enabling environment, appropriate risk allocation, political stability, project technical feasibility, and a stable macroeconomic environment.[298]

To understand CSF involvement in the success of a PPP model in the domestic plane, we need to get inspiration from our neighbouring countries where there are instances of success regarding the experimentation of PPPs. Over the years, Kenya has successfully created a transparent legal framework for PPPs in its domestic space. These experiences of Kenya will not only help us in understanding the trajectory of the development of PPPs but will also

[292] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 55.
[293] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 55.
[294] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 55.
[295] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 56.
[296] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 56.
[297] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 55
[298] Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 3.

provide us insights into the history of implementation and its success stories as there here were persistent efforts put in by Kenya to accelerate the growth of private investment in infrastructure finance. This was not only limited to the strengthening of the regulatory environment but also extended to the establishment of sixty-nine PPPs.[299] The Kenyan government has selected projects that may be funded using a user-payer system, where earnings are utilized to pay off the debt that the private sector obtained to fund the project.[300] I will start by assessing the CSF for effective PPP implementation, and proceed to examine the history of Kenya, the legislative framework for PPP implementation, and the link between the African Free Continental Trade Area (AfCFTA) and Kenya's PPP implementation. Following this, I will look at three case studies that are solely focused on Kenyan road and railway infrastructure projects that have aided the country's efforts to effectively trade with African East African nations and attract foreign investment, and then conclude with lessons South Africa can learn from Kenya’s PPPs experiences.

3.2 Assessing Critical Success Factors

The demand for public services has increased throughout time as a result of population growth, changing demographics, and increasing societal needs.[301] It is difficult for public institutions to meet the growing demands and needs of citizens because of the budgetary restrictions placed on them by governmental organizations.[302] A government entity's capacity to expand services and advance infrastructure is constrained by a lack of financing.[303] The resources and skills of public entities are frequently constrained, while the risk management expertise and experience of private sector entities are specialized as the private sector have access to modern technology, highly qualified personnel, and industry-specific knowledge that can result in more effective risk management.[304] While PPPs have gained popularity worldwide, it is essential for each country to carefully assess CSF to ensure the successful implementation of projects. I will go

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299 Kenya: Enabling Private-Sector Participation in Infrastructure and Social Services available at *https://www.worldbank.org/en/about/partners/brief/kenya-enabling-private-sector-participation-in-infrastructure-and-social-services* (accessed 21 May 2023).
300 Kenya: Enabling Private-Sector Participation in Infrastructure and Social Services available at *https://www.worldbank.org/en/about/partners/brief/kenya-enabling-private-sector-participation-in-infrastructure-and-social-services* (accessed 21 May 2023).
301 Curristine T, Lonti Z, and Joumard I ‘Improving Public Sector Efficiency: Challenges and Opportunities’ (2007) 7 *OECD Journal on Budgeting* 4.
302 Curristine T, Lonti Z, and Joumard I ‘Improving Public Sector Efficiency: Challenges and Opportunities’ (2007) 7 *OECD Journal on Budgeting* 4.
303 Curristine T, Lonti Z, and Joumard I ‘Improving Public Sector Efficiency: Challenges and Opportunities’ (2007) 7 *OECD Journal on Budgeting* 5.
304 Curristine T, Lonti Z, and Joumard I ‘Improving Public Sector Efficiency: Challenges and Opportunities’ (2007) 7 *OECD Journal on Budgeting* 5.

into more detail about the key CSF which influences PPP project performance in the subsections that follow:

3.2.1 Favourable Legal Framework

A favourable legal framework establishes a clear set of laws and regulations that govern PPP projects.[305] For companies who are involved in the private sector, this consistency helps to lessen uncertainty and investment risks.[306] Investors are more likely to invest their financial resources in PPP projects if they can count on reliable legal frameworks.[307] The project's financial viability is subsequently improved, drawing in a larger pool of potential investors.[308] By ensuring that the legal rights and obligations of the public and private parties are clearly stated, it enables them to make informed decisions and enter into enforceable contracts.[309] This legal security fosters long-term investment by private sector organizations and the creation of comprehensive project plans.

Transparency and accountability in PPPs are encouraged by a supportive legal environment.[310] It creates frameworks for transparent bidding, fair procurement procedures, and effective contract enforcement.[311] All interested parties have equal opportunity to engage in PPP projects as a result of transparent processes.[312] Clear accountability frameworks reduce the likelihood of corruption and favouritism by holding all stakeholders, including public authorities and

[305] Hovy P 'Risk Allocation in Public-Private Partnerships: Maximizing Value for money' 2015 *International Institute for Sustainable Development* 5.
[306] World Bank: Strong PPP legal frameworks are fundamental & new guidance helps countries build them available at *https://blogs.worldbank.org/ppps/strong-ppp-legal-frameworks-are-fundamental-new-guidance-helps-countries-build-them* (accessed 14 June 2023).
[307] World Bank: Strong PPP legal frameworks are fundamental & new guidance helps countries build them available at *https://blogs.worldbank.org/ppps/strong-ppp-legal-frameworks-are-fundamental-new-guidance-helps-countries-build-them* (accessed 14 June 2023).
[308] World Bank: Strong PPP legal frameworks are fundamental & new guidance helps countries build them available at *https://blogs.worldbank.org/ppps/strong-ppp-legal-frameworks-are-fundamental-new-guidance-helps-countries-build-them* (accessed 14 June 2023).
[309] World Bank: Strong PPP legal frameworks are fundamental & new guidance helps countries build them available at *https://blogs.worldbank.org/ppps/strong-ppp-legal-frameworks-are-fundamental-new-guidance-helps-countries-build-them* (accessed 14 June 2023).
[310] Allen & Overy: Supports the World Bank in developing its new Guidance on PPP Legal Frameworks available at *https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-supports-the-world-bank-in-developing-its-new-guidance-on-ppp-legal-frameworks-2022* (accessed 14 June 2023).
[311] Allen & Overy: Supports the World Bank in developing its new Guidance on PPP Legal Frameworks available *https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-supports-the-world-bank-in-developing-its-new-guidance-on-ppp-legal-frameworks-2022* (accessed 14 June 2023).
[312] Allen & Overy: Supports the World Bank in developing its new Guidance on PPP Legal Frameworks available at *https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-supports-the-world-bank-in-developing-its-new-guidance-on-ppp-legal-frameworks-2022* (accessed 14 June 2023).

corporate partners, accountable for their activities.[313] To resolve disputes that might arise during a PPP project, an efficient legal framework integrates robust dispute resolution processes, including arbitration or mediation.[314] Disputes are likely to occur in a PPP contract regarding financing, operation, and other responsibilities.[315] These mechanisms provide easily accessible and effective means of resolving conflicts, guaranteeing prompt resolution and minimizing delays in project execution.[316] Investor confidence is boosted by the existence of trustworthy and impartial dispute resolution procedures, which also contribute to the PPP project's overall effectiveness and success.[317]

3.2.2 Good Governance

PPPs can maximize their chance of success and contribute to enhanced infrastructure and growth in the economy through the application of good governance principles.[318] Good governance in PPPs comprises a set of principles that guarantee fair project development, equitable benefit distribution, inclusive decision-making, efficient resource utilization, prioritization of safety, and responsible enhancement of public services.[319] These fundamental principles not only enhance the effectiveness of PPPs but also serve as protectors of the public interest.[320] Good governance should be utilized as a guideline for encouraging and facilitating fair competition to speed up and lessen the cost of the entire procurement process.[321] Finding the most competitive proposal that would offer value for money is the major goal of the PPP

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[313] Allen & Overy: Supports the World Bank in developing its new Guidance on PPP Legal Frameworks available at https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-supports-the-world-bank-in-developing-its-new-guidance-on-ppp-legal-frameworks-2022 (accessed 14 June 2023).
[314] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 147.
[315] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 148.
[316] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 148.
[317] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 149.
[318] Ghulam N and Noel P 'Critical Success Factors for Public Private Partnership in the Afghanistan Construction Industry' 2018 *Lecture Notes in Mechanical Engineering* 4.
[319] United Nations: Economic & Social Commission for Asia and the Pacific available at https://www.unescap.org/ttdw/ppp/ppp_primer/314_good_governance.html (accessed 07 September 2023).
[320] United Nations: Economic & Social Commission for Asia and the Pacific available at https://www.unescap.org/ttdw/ppp/ppp_primer/314_good_governance.html (accessed 07 September 2023).
[321] Ghulam N and Noel P 'Critical Success Factors for Public Private Partnership in the Afghanistan Construction Industry' 2018 *Lecture Notes in Mechanical Engineering* 5.

project.[322] A competitive selection process encourages private sector companies to submit proposals that maximize resource use and provide affordable solutions.[323] The procedure promotes creative thinking, cost-cutting techniques, and effective project execution by drawing in a large pool of potential private partners and fostering competition.[324] This approach obtains the best value for the resources invested and results in increased project efficiency, lower costs, and better project performance.[325]

PPP projects need to use good governance to guarantee value for money.[326] The pursuit of value for money is a guiding principle in PPP projects.[327] Value for money represents the ideal balance between the quality and cost of the infrastructure or services provided.[328] Selecting the most competitive proposal ensures that the chosen private partner offers the best value in terms of quality, efficiency, and affordability.[329] Assessment of value for money entails determining the entire expenses of a project throughout the course of its lifecycle, taking into account both up-front investment costs and ongoing operating and maintenance costs.[330] By prioritizing value for money, the public sector seeks to maximize the positive outcomes gained from the PPP project while working within the constraints of available funds.[331]

Stakeholder involvement is made possible by good governance, which enables different opinions to be taken into account during decision-making. Stakeholders are essential to a PPP's sustainability. They contribute significantly to the design and execution of the plan of action.[332] Allowing stakeholders to provide feedback on PPP arrangements fosters commitment and leads to creative solutions.[333] This inclusiveness improves the potential of productive techniques that benefit all stakeholders, develop a sense of ownership, and minimize disagreements.[334]

[322] Ghulam N and Noel P 'Critical Success Factors for Public Private Partnership in the Afghanistan Construction Industry' 2018 *Lecture Notes in Mechanical Engineering* 5.
[323] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[324] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[325] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[326] Ghulam N and Noel P 'Critical Success Factors for Public Private Partnership in the Afghanistan Construction Industry' 2018 *Lecture Notes in Mechanical Engineering* 9.
[327] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[328] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[329] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[330] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[331] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[332] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[333] Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
[334] Ghulam N and Noel P 'Critical Success Factors for Public Private Partnership in the Afghanistan Construction Industry' 2018 *Lecture Notes in Mechanical Engineering* 9.

Insufficient stakeholder consultation or communication increases the risk of opposition, which could arise late in the process and cause delays or even cancellation.[335]

To avoid hindering the implementation of PPP projects, it is crucial to explicitly define the roles and duties of stakeholders.[336] Authorities can lessen their workload while still retaining the right degree of control by using delegation strategies.[337] This guarantees the authorities focus on a specific task entrusted to them with proper diligence and that their task is carried out with the utmost care to ensure the success of the PPP projects.[338] This makes it even more certain that timely consideration is given to pertinent criticisms and comments from the public before the project's acceptance.[339]

3.2.3 Enabling Environment

According to the Public-Private Infrastructure Advisory Facility (PPIAF), global experience has demonstrated that for PPP projects to be executed effectively and essentially improve the public sector, an enabling environment must be developed.[340] The public sector acts as the catalyst for ensuring that the service being provided by the private sector is feasible and that the conditions of the contract are adhered to.[341] An enabling environment that is supportive of PPP projects increases efficiency by simplifying procedures, minimizing bureaucratic hurdles, and encouraging effective resource allocation.[342] An enabling environment fosters the use of performance metrics and monitoring systems, which promotes operational effectiveness and high-quality service delivery.[343] Contractual provisions that encourage private partners to deliver projects on time, within budget, and at established service levels, for instance, can include those that provide specific performance metrics and consequences for

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335 Felsinger K *Public-Private Partnership Handbook* (2008) ch 3.
336 Arthur D. Little -Successful Public-Private Partnerships: How countries should set up an effective ecosystem for Public-Private Partnerships (2020) 2.
337 Arthur D. Little -Successful Public-Private Partnerships: How countries should set up an effective ecosystem for Public-Private Partnerships (2020) 2.
338 Arthur D. Little -Successful Public-Private Partnerships: How countries should set up an effective ecosystem for Public-Private Partnerships (2020) 3.
339 Successful Public-Private Partnerships: How countries should set up an effective ecosystem for Public-Private Partnerships available at *https://www.adlittle.com/en/insights/viewpoints/successful-public-private-partnerships#:~:text=Creating%20high%2Dperforming%20and%20effective,strategy%2C%20transaction%20process%20and%20implementation%2F* (accessed 18 June 2023).
340 Public-Private Infrastructure Advisory Facility - Toolkit For Public-Private Partnerships In Roads And Highways (2009) 1.
341 Public-Private Infrastructure Advisory Facility - Toolkit For Public-Private Partnerships In Roads And Highways (2009) 4
342 Public-Private Infrastructure Advisory Facility - Toolkit For Public-Private Partnerships In Roads And Highways (2009) 4
343 Governance in Public-Private Partnerships in South Africa; Lessons from the Gautrain available at *https://www.tandfonline.com/doi/abs/10.1080/03057070.2015.1117240* (accessed 18 June 2023).

noncompliance.[344] The investors demand a contract that is fair to both parties and that the concessionaire's revenue guarantees the repayment of capital loans.[345] Following this, it is important to provide an opportunity for contract revision to allow for the contract to adapt effectively to inevitable changes over time. However, caution must be exercised when engaging in renegotiation processes.[346]

3.2.4 Appropriate Risk Allocation

Risk allocation is a key factor in ensuring the success and sustainability of PPP initiatives.[347] Effective risk allocation is the process of sharing the PPP project's risks with the party that is best suited to handle and bear them.[348] An appropriate risk allocation protects the public interest by avoiding the unauthorized transfer of risks and obligations to the public sector.[349] As a result, public money is used effectively and economically while minimizing the financial strain on governments.[350] PPPs can take advantage of this knowledge to manage and mitigate risks more skilfully by transferring them to the private sector, which reduces costs and improves project outcomes.[351] Accountability and performance-driven culture are fostered by appropriate risk allocation.[352] When risks are adequately allocated, it is the responsibility of each partner to effectively manage the risks that have been assigned to them to avoid adverse consequences.[353] Private partners are compelled to reduce risks and guarantee project success by financial and reputational concerns. The possibility of successful project delivery is increased by this accountability, which encourages a proactive approach to risk management. [354]This guarantees the application of the required safeguards, restrictions, and mitigation techniques. The

[344] Governance in Public-Private Partnerships in South Africa; Lessons from the Gautrain available at https://www.tandfonline.com/doi/abs/10.1080/03057070.2015.1117240 (accessed 18 June 2023).
[345] Public-Private Infrastructure Advisory Facility - Toolkit For Public-Private Partnerships In Roads And Highways (2009) 4.
[346] Public-Private Infrastructure Advisory Facility - Toolkit For Public-Private Partnerships In Roads And Highways (2009) 4.
[347] Mulyani S 'Critical Success Factors in Public-Private Partnership' (2021) 4 Journal of Accounting Auditing and Business 84.
[348] Hovy P 'Risk Allocation in Public-Private Partnerships: Maximizing Value for money' 2015 *International Institute for Sustainable Development* 1.
[349] Karim NUA 'Risk Allocation In Public-Private Partnership (PPP) Project: A Review On Risk Factors' (2011) 2 *International Journal of Sustainable Construction Engineering & Technology* 13.
[350] Karim NUA 'Risk Allocation In Public-Private Partnership (PPP) Project: A Review On Risk Factors' (2011) 2 *International Journal of Sustainable Construction Engineering & Technology* 13.
[351] Karim NUA 'Risk Allocation In Public-Private Partnership (PPP) Project: A Review On Risk Factors' (2011) 2 *International Journal of Sustainable Construction Engineering & Technology* 13.
[352] Karim NUA 'Risk Allocation In Public-Private Partnership (PPP) Project: A Review On Risk Factors' (2011) 2 *International Journal of Sustainable Construction Engineering & Technology* 13.
[353] Hovy P 'Risk Allocation in Public-Private Partnerships: Maximizing Value for money' 2015 *International Institute for Sustainable Development* 4.
[354] Hovy P 'Risk Allocation in Public-Private Partnerships: Maximizing Value for money' 2015 *International Institute for Sustainable Development* 4.

likelihood of delays, cost overruns, and poor quality is decreased as a result, increasing the project's overall efficiency.[355]

3.2.5 Political Stability

Political stability has a significant impact on PPP success. A stable political climate guarantees consistency and government backing for PPP efforts.[356] The implementation and feasibility of a project may be threatened by governmental changes, policy changes, or political instability.[357] Political stability is a crucial component that has a significant impact on PPP's success because it guarantees long-term commitment, investor confidence, public trust, and policy continuity—all of which improve project outcomes and entice private-sector involvement.[358] Political stability improves project financial viability and promotes long-term investments by supplying a consistent policy framework and reducing risks.[359] In countries where political stability is weak, the perception of political risk is high. This high amount of risk deters prospective competitors from taking part in the tendering process, which leads to a small number of participants.[360] A country must therefore be politically stable to draw in private sector participation and foreign direct investment.[361] Investors and private partners want certainty that, regardless of political changes, their rights and duties would be honoured throughout the project's existence.[362]

[355] Hovy P 'Risk Allocation in Public-Private Partnerships: Maximizing Value for money' 2015 *International Institute for Sustainable Development* 4.
[356] Mulyani S 'Critical Success Factors in Public-Private Partnership' (2021) 4 *Journal of Accounting Auditing and Business* 83.
[357] Mulyani S 'Critical Success Factors in Public-Private Partnership' (2021) 4 *Journal of Accounting Auditing and Business* 83.
[358] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 146.
[359] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 146.
[360] Helmy R, Khourshed N, Wahba M, and Bary A 'Exploring Critical Success Factors for Public-Private Partnership Case Study: The Educational Sector in Egypt' (2020) 6 *Journal of Open Innovation: Technology, Market, and Complexity* 147.
[361] Mulyani S 'Critical Success Factors in Public-Private Partnership' (2021) 4 *Journal of Accounting Auditing and Business* 83.
[362] Mulyani S 'Critical Success Factors in Public-Private Partnership' (2021) 4 *Journal of Accounting Auditing and Business* 83.

3.2.6 Project technical feasibility

Before establishing a PPP agreement, a comprehensive project technical feasibility assessment is necessary.[363] Considerations should be made for elements such as engineering design, environmental impact, technology requirements, resource availability, and operational effectiveness. Determining the project's cost-effectiveness and long-term viability assists with technical feasibility evaluation.[364] In this evaluation, the project's operational effectiveness, environmental effects, and life-cycle costs are all examined.[365] Project stakeholders can find chances for cost reduction, resource efficiency, and eco-friendly practices by taking technical feasibility into account.[366] A project that is technically feasible and strikes a balance between sustainability and economic feasibility is more likely to draw funding from the private sector and support from the general public.[367] Delivering infrastructure or services that fulfil goals, quality standards, and stakeholder expectations is ensured by a technically viable project.[368]

3.2.7 Stable Macroeconomic Environment

In PPP projects, a stable macroeconomic environment is crucial. The financial viability and attractiveness of PPP investments are directly impacted by the stability of the economy, which includes interest rates, inflation rates, and various economic growth indicators.[369] Determining the project's cost-effectiveness and long-term viability assists with technical feasibility evaluation.[370] In this evaluation, the project's operational effectiveness, environmental effects, and life-cycle costs are all examined.[371] Project stakeholders can find chances for cost reduction, resource efficiency, and environmentally sustainable practices by taking technical

363 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 5.
364 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.
365 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.
366 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.
367 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.
368 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 7.
369 Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 56.
370 Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 56.
371 Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.

feasibility into account.[372] A project that is technically feasible and strikes a balance between sustainability and economic feasibility is more likely to draw funding from the private sector and support from the general public. [373] This increases investor confidence, provides certainty, lower financial risks, makes the funding of projects easier, and ensures that long-term contractual obligations are met.[374] To create an environment that is favourable for the implementation of PPPs, governments, and stakeholders must give priority to the critical success factors.

3.3 Historical Background of PPPs in Kenya

As one of the most prominent and developed economies in East Africa, Kenya has an extensive track record of economic leadership.[375] Foreign direct investment (FDI) increased steadily in the 1970s in Kenya as the country became a top preference for global investors seeking to establish new markets in Eastern and Southern Africa.[376] The comparatively high degree of development, solid infrastructure, sizable market, growth potential, and openness to FDI that Kenya possessed drew multinational corporations to choose it as their regional hub.[377] This was a time when other nations in the region had more restrictive policies toward foreign investment.[378] The FDI inflow to Kenya hit its peak in 1979-1980, at $80 million, after starting at a low of $10 million annually in the early 1970s.[379] In the early 1980s, poor economic policies and inconsistent attempts at ensuring economic reforms, escalating issues with governance as well as corruption, and the degradation of public services discouraged FDI.[380] Poor governance led to a prolonged period of decline in development indicators and significantly weakened the country's position as a trailblazer at a time when other nations in the region were starting to make significant progress.[381]

[372] Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.
[373] Zhang, X. 'Critical Success Factors of Public Private Partnership in infrastructure development' (2005) 131 *Journals of Construction Engineering and Management* 6.
[374] Dahiru A and Muhammad RS 'Critical Success Factors of Public-Private-Partnership Projects in Nigeria' (2015) 8 *ATBU Journal of Environmental Technology* 56.
[375] United Nations Conference on Trade and Development- Investment Policy Review Kenya (2005) 3.
[376] United Nations Conference on Trade and Development- Investment Policy Review Kenya (2005) 3.
[377] United Nations Conference on Trade and Development- Investment Policy Review Kenya (2005) 3.
[378] Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 812.
[379] Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 812.
[380] Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 813.
[381] Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 813.

The 1980s and 1990s were marked by several ineffective and temporary initiatives to strengthen the economy.[382] Although partially successful, the government's efforts to reduce the fiscal deficit did not address the problem of poor governance and policies.[383] Unfortunately, these measures only offered short-term relief and were largely ineffective in guiding the country towards sustained high economic growth.[384] In addition , the deterioration of public infrastructure became worse, and governance and security issues had gotten more detrimental, which further discouraged private investment.[385]

In 2002, a new democratic government was elected in Kenya, acknowledging the need for extensive economic and social reforms to put the nation on a sustained path of high growth.[386] Under its Economic Recovery Strategy for Wealth and Employment Creation, the government started to encourage wealth creation and the eradication of poverty, the new administration was committed to strengthening policies and fostering an atmosphere that is conducive to private investment.[387] The primary objective was to focus on the following areas, the macroeconomic framework, governance, security, public sector reforms, infrastructure, sectoral policies, and social policies.[388] However, the country's PPP program did not take off until the early 2000s, when the government began to put in place a legal and regulatory framework to support PPPs.[389] Kenya's government launched Vision 2030 in 2008 as a strategy for growth to make the country a middle-income country with recent industrialization and effective infrastructure.[390] Infrastructure investment was identified in the plan as a major factor in economic development and growth.[391] The government acknowledged that it lacked the funds

382 Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 813.
383 Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 813.
384 Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 814.
385 Ocharo KN, Wawire NW, Ng'ang'a TK, Kosimbei G 'Private capital inflows and economic growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 814.
386 United Nations Conference on Trade and Development- Investment Policy Review Kenya (2005) 13.
387 United Nations Conference on Trade and Development- Investment Policy Review Kenya (2005) 14.
388 United Nations Conference on Trade and Development- Investment Policy Review Kenya (2005) 14.
389 Tshombe LM , Molokwane T,Nduhura A & Nuwagaba I 'An Analysis of Public Private Partnerships i n East Africa' (2020) 11 *Research in World Economy* 158.
390 Obosi, J Nature and Scope of Public-Private Partnerships in the Water Sector in Kenya (2018) 8 *Open Journal of Political Sciences* 13.
391 Obosi, J Nature and Scope of Public-Private Partnerships in the Water Sector in Kenya (2018) 8 *Open Journal of Political Sciences* 13.

to finance the essential infrastructure projects on its own, therefore it resorted to PPPs to tap the potential of the private sector.[392]

3.4 Kenya's Investment Climate as a Catalyst for Promoting Successful Public-Private Partnerships (PPPs)

The PPP Disclosure Diagnostic template, which is advised by the World Bank framework for disclosure of information in PPPs, was utilized by a World Bank PPP team in Kenya between September 2016 and March 2017.[393] The PPP Disclosure Diagnostic Report for Kenya, which examines the institutional, political, and legal framework for disclosure in PPPs, was created from the study's findings.[394] According to the findings of the Diagnostic Report, Kenya's government has recently implemented several efforts that have increased flexibility and accountability across the board.[395] The Public-Private Infrastructure database in Kenya covers 25 PPP projects with a total investment commitment of US$9.3 billion that were completed financially between 1990 and 2014.[396] The National Priority List of PPP Projects currently comprises seventy-one projects that the PPP Committee has approved.[397] The National Priority List is an evolving list as projects are added to or withdrawn from it in compliance with established standards.[398] The most significant of these initiatives are in the areas of transportation, energy, education, housing, and health.[399]

Kenya has emerged as one of the fastest-growing economies within Sub-Saharan Africa, experiencing an average economic growth rate of 5.7 percent.[400] The country's economic growth averaged 5.7 percent due to such factors as a strong macroeconomic environment,

[392] Obosi, J Nature and Scope of Public-Private Partnerships in the Water Sector in Kenya (2018) 8 *Open Journal of Political Sciences* 13.
[393] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 8.
[394] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 8.
[395] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 8.
[396] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 8.
[397] Infrastructure Finance, PPPs & Guarantees: Kenya available at *https://ppi.worldbank.org/snapshots/country/kenya* (accessed 03 May 2023).
[398] Infrastructure Finance, PPPs & Guarantees: Kenya available at *https://ppi.worldbank.org/snapshots/country/kenya* accessed 03 May 2023
[399] Infrastructure Finance, PPPs & Guarantees: Kenya https://ppi.worldbank.org/snapshots/country/kenya (accessed 03 May 2023).
[400] World Bank: Kenya Among the Fastest Growing Economies in Africa available at *https://www.worldbank.org/en/news/press-release/2015/03/05/kenya-among-the-fastest-growing-economies-in-africa* (accessed 18 June 2023).

investor confidence, and a stable service sector.[401] Kenya's remarkable progress in the World Bank Group's Doing Business Report, 2020, where it moved up a rank to 56th out of 190 economies, demonstrates the country's commitment to improving its business environment.[402] Kenya's economy exhibited remarkable resilience during the COVID-19 pandemic, with output surpassing pre-pandemic levels in the first half of the year.[403] Economic performance is anticipated to be good in 2022-2031, expanding at a rate of 4.9% yearly, which is expected to be faster than the pre-pandemic pace (5% average annual growth from 2010 to 2019).[404] Notably, Kenya's ecosystem for tech startups has been recognized as a model for other countries to follow. Kenya's start-ups consistently rank at the top of the continent's nations in luring foreign investment.[405] The best internet speed on the continent is available to Kenyans, who have exceptional access to the internet. Kenya, which has served as a centre for several organizations and corporations aiming to develop throughout Africa, is home to the United Nation's Africa headquarters.[406]

The Kenyan National Assembly passed the Investment Promotion Act (IPA), a significant piece of legislation, to promote and facilitate foreign investment in the country. The IPA eliminates bureaucratic delays by streamlining the investor licensing procedures.[407] It introduces techniques to expedite the procedure while ensuring efficiency and removing needless bureaucratic processes, as well as excessively complex, costly, and time-consuming procedures.[408] The IPA seeks to foster a favourable environment for investment through simplified licensing procedures, expedited immigration procedures, and the provision of tax incentives. To carry out the legislation's objectives, the IPA created a corporate entity known as the Kenya Investments Authority (KenInvest).[409] KenInvest serves as the central agency responsible for facilitating investment, providing guidance to investors, and coordinating with other relevant government agencies.[410] When deciding whether to grant an investment certificate, KenInvest takes into account how much the investment will benefit the Kenyan

[401] World Bank: Kenya Among the Fastest Growing Economies in Africa available at https://www.worldbank.org/en/news/press-release/2015/03/05/kenya-among-the-fastest-growing-economies-in-africa (accessed 18 June 2023).
[402] World Bank Group's Doing Business Report: Ease Of Doing Business In Kenya (2020) available at https://archive.doingbusiness.org/en/data/exploreeconomies/kenya (accessed 18 June 2023).
[403] Africa Legal Network *Investment Guide Kenya* (2021) 10.
[404] Africa Legal Network *Investment Guide Kenya* (2021) 10.
[405] Africa Legal Network *Investment Guide Kenya* (2021) 11.
[406] Africa Legal Network *Investment Guide Kenya* (2021) 11.
[407] Part II of The Investment Promotion Act, 2004.
[408] Part II of The Investment Promotion Act, 2004.
[409] Section 14 of the Investment Promotion Act 2004.
[410] Section 14 of the Investment Promotion Act 2004.

economy in terms of the following areas: increasing the quantity and quality of jobs in Kenya, educating Kenyans in new skills or technology, promoting economic development, allowing the transfer of technology, increasing tax revenue, affecting foreign exchange, utilising domestic raw materials and adopting value addition in the production process.[411] KenInvest improves the efficiency and effectiveness of law enforcement substantially. Kenya aims to attract both domestic and foreign investment, promoting economic growth and development, through maintaining a favourable legal environment.

3.5 Assessing Kenya's Public-Private Partnership (PPP) Legislation

Through several legislative and institutional measures, Kenya has made impressive progress toward enhancing transparency and accountability. The Constitution of Kenya mandates access to information held by the government and by private organizations that have an impact on citizens' fundamental rights.[412] Any significant information that has an impact on the country must be published and made widely known to all.[413] Further reinforcing this is the clause which states that "*the principles of accountability and transparency in the form of provision to the public of timely, accurate information shall guide public service*."[414] By strengthening and ensuring accountability and transparency, the Access to Information (ATI) Act 2016, which authorizes access to information maintained by both public and private entities, has improved these constitutional guarantees.[415] The constitutional provisions ensure that PPPs in Kenya are governed by a substantial standard of openness, accountability, and public participation. Public disclosure of information on the nature and parameters of the partnership, the financial arrangements, the rights and obligations of the parties, and the anticipated outcomes is required of both public and private enterprises engaging in PPPs.

Article 1(1) of Kenya's Constitution grants the people sovereign power.[416] This fundamental principle emphasizes the importance of upholding and promoting public participation in all parts of governance.[417] Additionally, it encompasses Kenya's core values and governance principles, placing an obligatory responsibility on the state to encourage public participation in environmental management, protection, and conservation.[418] The government of

[411] Section 15 of the Investment Promotion Act 2004.
[412] Article 35(1) of the Constitution of Kenya.
[413] Article 35(3) of the Constitution of Kenya.
[414] Article 232 of the Constitution of Kenya.
[415] The Access to Information Act 31 of 2016.
[416] Article 1(1) of the Constitution of Kenya.
[417] Article 1(1) of the Constitution of Kenya.
[418] Article 69(d) of the Constitution of Kenya.

Kenya launched 545 projects with the primary objective of boosting the economy and creating jobs.[419] However, concerns about wasteful spending raised doubts whether the government could accomplish this development.[420] In 2018, Henry Rotich, the Treasury Cabinet Secretary, informed the National Assembly that the President had put approximately KES 366 billion worth of national government projects on hold nationwide.[421] This was as a result of large amounts of money allocated to projects that faced delays in implementation or were left unfinished.[422] Despite the strong emphasis on public participation in Kenya's Constitution, it is clear that the government made significant decisions regarding projects without adequate public involvement.[423] Due to the lack of public participation and lack of knowledge regarding the viability of the projects and the funding allocation, resources were squandered and misused.[424] The existing Kenyan legislative framework governing PPPs does not sufficiently acknowledge stakeholders' and beneficiaries constitutionally required right to participate in public decision-making.[425] The PPP laws must include measures for government accountability and response to citizen concerns to increase public trust. Before commencing any project, it is essential to address public concerns.

The Public Procurement and Disposal regulations were released by the Kenyan government in 2009.[426] These regulations offer guidelines and procedures for the creation of a PPP unit, whose main responsibilities are to guarantee transparency and accountability in all PPP projects, promote competition, and ensure that competitors are treated fairly and with integrity to

[419] David Mwere 'State doing badly as projects worth over Sh366bn stall" available at https://nation.africa/kenya/news/Govt-put-on-the-spot-over-stalled-projects/1056-4980834-%20mnc%203/index.html (accessed 08 September 2023).
[420] David Mwere 'State doing badly as projects worth over Sh366bn stall" available at https://nation.africa/kenya/news/Govt-put-on-the-spot-over-stalled-projects/1056-4980834 %20mnc%203/index.html (accessed 08 September 2023).
[421] David Mwere 'State doing badly as projects worth over Sh366bn stall" available at *https://nation.africa/kenya/news/Govt-put-on-the-spot-over-stalled-projects/1056-4980834-%20mnc%203/index.html* (accessed 08 September 2023).
[422] David Mwere 'State doing badly as projects worth over Sh366bn stall" available at *https://nation.africa/kenya/news/Govt-put-on-the-spot-over-stalled-projects/1056-4980834-%20mnc%203/index.html* (accessed 08 September 2023)

[423] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 52.
[424] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 52.

[425] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 52.

[426] The World Bank Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya (2018) 13.

increase private sector funding and advance Kenya's economy and infrastructure development.[427]

PPPs are implemented by collaborating with numerous government departments and organizations operating at different government levels.[428] These organizations work together to manage and shape the PPP process, ensuring successful execution.[429] The importance of obtaining authorizations, licenses, and approvals in accordance with the PPP Act must be expressed clearly in the project agreement. In Kenya, this entails getting approval from several organizations, particularly for projects involving the commercialization of natural resources, such as the PPP Committee and Cabinet[430], the Debt Management Office[431], and Parliament.[432] Participating in PPP projects with numerous government agencies offers complex issues, such as bureaucratic delays brought by delayed decision-making, lengthy approval processes, and hierarchical systems.[433] These delays may increase project costs and decrease private sector interest. The division of duties among departments also creates accountability problems, making resolving issues harder.[434] When various departments and agencies are responsible for different aspects of a PPP project, it can become challenging to pinpoint accountability. This lack of clarity can lead to a diffusion of responsibility, making it easier for issues to go unresolved.[435] Additionally, a lack of communication and isolation among departments can result in misinterpretations, disputes, double work, and higher expenditures, all of which can endanger the success of a project.[436] It has been observed that Jurisdictions that offer one-stop authorization successfully attract private investment by eliminating approval delays and unnecessary regulations.[437] The most significant risks for developers are delays in rules and the

[427] The World Bank Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya (2018) 13.
[428] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 68.
[429] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 68.
[430] Section 24 of the Public Private Partnership Act 15 of 2013.
[431] Section 35 (2) of the Public Private Partnership Act 15 of 2013.
[432] Section 55 of the Public Private Partnership Act 15 of 2013.
[433] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 69.
[434] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 69.
[435] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 69.
[436] Muthonga M *The Legal and Institutional Environment on Implementation of Public private Partnerships in Kenya* (unpublished LLM thesis, University of Nairobi, 2019) 69.
[437] Corrigan M B, Hambene J, Hudnut III W, Levitt R L, Stainback, J, Ward R & Witenstein N ‘Ten Principles for Successful Public/Private Partnerships’ 2005 *Urban Land Institute* 5.

potential loss of development rights.[438] The likelihood of a successful public-private partnership is significantly increased by mitigating these risks.

The Public-Private Partnership Act of 2013 provides a legal framework for the implementation of PPP projects in Kenya. PPPs are defined as "*a contractual arrangement between the government and the private sector for the provision of public infrastructure and related services"*.[439] The PPP Act of 2013 requires the disclosure of information about PPP projects at different stages. This entails disseminating the National Priority List of authorized projects,[440] procurement announcements,[441] specific bid documents like the Request for Qualifications (RFQ),[442] information about the winning bidders, and details about the nature and scope of the contract, as well as details about its value, cost, and duration.[443] The Kenyan government established the Public-Private Partnership Unit (PPPU) within the National Treasury to efficiently oversee and guarantee the smooth implementation of Public-Private Partnership (PPP) projects.[444] The PPPU is responsible for providing guidance, assistance, and oversight during the execution of PPP projects in Kenya.[445] This includes creating policies and regulations, examining and approving project proposals for PPPs, and providing technical support to parties interested in PPP initiatives.[446] The PPPU is crucial in ensuring that PPP projects follow best practices and the guiding ideals of accountability, openness, and value for money.

The government has launched numerous PPP projects since the PPP Act's enactment in a variety of industries, including energy, transportation, and water. and sanitation, and healthcare.[447] Some of the notable PPP projects in Kenya include the Nairobi-Thika highway, the Mombasa-Nairobi Standard Gauge Railway, the Olkaria Geothermal Power Plant, and the Nairobi West Hospital.[448] These projects have demonstrated the potential of PPPs to deliver

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[438] Corrigan M B, Hambene J, Hudnut III W, Levitt R L, Stainback, J, Ward R & Witenstein N 'Ten Principles for Successful Public/Private Partnerships' 2005 *Urban Land Institute* 5.
[439] Section 2 of the Public Private Partnership Act No.15 of 2013.
[440] Section 25 of the Public Private Partnership Act No. 15 of 2013.
[441] Section 37 of the Public Private Partnership Act No. 15 of 2013.
[442] Section 43 of the Public Private Partnership Act No. 15 of 2013.
[443] Section 60 of the Public Private Partnership Act No. 15 of 2013.
[444] Section 11 of the Public Private Partnership Act No.15 of 2013.
[445] Section 14 of the Public Private Partnership Act No.15 of 2013.
[446] Section 14 of the Public Private Partnership Act No.15 of 2013.
[447] Tshombe LM , Molokwane T,Nduhura A & Nuwagaba I 'An Analysis of Public-Private Partnerships in East Africa' (2020) 11 *Research in World Economy* 159.
[448] Tshombe LM , Molokwane T,Nduhura A & Nuwagaba I 'An Analysis of Public-Private Partnerships in East Africa' (2020) 11 *Research in World Economy* 159.

high-quality public infrastructure and services, while also creating business opportunities for the private sector.

Part V of the PPP Act provides a thorough overview of the PPP cycle, which includes phases like entering into project agreements[449], conducting sector diagnostic studies and assessments[450], determining the duration of PPP projects[451], carrying out project management[452] , and obtaining committee approval.[453] However, it lacks specific timeframes for any of these crucial phases. The lack of prescribed time frames causes negotiations to go on indefinitely, resulting in excessively lengthy delays.[454] This results in PPP projects taking longer to complete because stakeholders usually engage in talks with no clear resolution.[455] These delays hold down projects and discourage potential private sector partners who view the delays as unnecessary.[456] An illustration is the Kenyatta University Student Hostel PPP project. The Kenyatta University Student Hostel contract was signed in 2015 after the project's procurement process was completed in 2014.[457] However, in June 2018, six years after its launch to the market, the project was still pending financial closure.[458] This lengthy timeline highlights the urgent necessity to establish specific timelines for each stage of the PPP procurement cycle.[459] The absence of clear time frames leads prospective investors to lose

[449] Section 18 of the Public Private Partnership Act 15 of 2013.
[450] Section 20 of the Public Private Partnership Act 15 of 2013.
[451] Section 21 of the Public Private Partnership Act 15 of 2013.
[452] Section 22 of the Public Private Partnership Act 15 of 2013.
[453] Section 24 of the Public Private Partnership Act 15 of 2013.
[454] Odhiambo C Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program available at https://www.linkedin.com/pulse/too-long-wait-assessment-kenyas-public-private-ppp-program-odhiambo (accessed 08 September 2023).

[455] Odhiambo C Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program available at https://www.linkedin.com/pulse/too-long-wait-assessment-kenyas-public-private-ppp-program-odhiambo (accessed 08 September 2023).

[456] Odhiambo C Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program available at https://www.linkedin.com/pulse/too-long-wait-assessment-kenyas-public-private-ppp-program-odhiambo (accessed 08 September 2023).

[457] Odhiambo C Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program available at https://www.linkedin.com/pulse/too-long-wait-assessment-kenyas-public-private-ppp-program-odhiambo (accessed 08 September 2023).

[458] Odhiambo C Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program available at https://www.linkedin.com/pulse/too-long-wait-assessment-kenyas-public-private-ppp-program-odhiambo (accessed 08 September 2023).

[459] Odhiambo C Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program available at https://www.linkedin.com/pulse/too-long-wait-assessment-kenyas-public-private-ppp-program-odhiambo (accessed 08 September 2023).

interest and begin exploring opportunities in different sectors or regions. It is crucial to amend the PPP Act and establish clear time frames for each phase of the PPP cycle. Clear time frames will lead to a more efficient and organized process, benefiting all stakeholders. As a result, Kenyan PPPs would become more effective and promote more private sector participation in public services and infrastructure provision.

At an international level, Kenya ratified the United Nations Convention Against Corruption (UNCAC) in 2003 on a global scale. According to the UNCAC, "specific requirements are to be established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement, and transparency and accountability in matters of public finance must also be promoted."[460] The ratification of UNCAC by Kenya in 2003 was a significant step in the direction of fostering accountability and transparency in PPPs. They demonstrated a dedication to combating corruption and advancing good government.[461] It can aid in fostering an atmosphere that encourages private-sector competitors to collaborate with the public sector to provide high-quality services. By following the UNCAC's guidelines, Kenya can strengthen its governance and promote trust between the public and private sectors.

In 2012, Kenya formally joined the Open Government Partnership (OGP), pledging to increase transparency and accountability in areas such as public service delivery, e-government, elections and political funding, fiscal health, and anti-corruption.[462] Kenya pledged to increase electoral process transparency, encourage public involvement, increase judicial transparency, and adopt open budgets in its first OGP Action Plan for 2012–2013. Two of these commitments delineating election boundaries and establishing a system for public judicial screening and case distribution have been mostly fulfilled.[463]

Kenya created a second Action Plan (July 2016-June 2018) that includes commitments related to publishing oil and gas contracts, including revenue information to ensure transparency and

[460] United Nations available at https://www.unodc.org/unodc/corruption/convention-highlights.html (accessed 5 May 2023).
[461] Kenya Law available at http://kenyalaw.org/treaties/treaties/129/United-Nations-Convention-against-Corruption (accessed 5 May 2023)
[462] Kenya's OGP Commitments and Progress available at https://www.opengovpartnership.org/members/kenya/ (accessed 5 May 2023).
[463] Kenya's OGP Commitments and Progress available at https://www.opengovpartnership.org/members/kenya/ (accessed 5 May 2023).

accountability of the extractives sector; ensuring greater transparency around bids and contracts by individuals and companies in Kenya; creating transparent public procurement processes; and public oversight of expenditures.[464] Kenya is also continuing its efforts on the first OGP Action Plan. A few of these pledges are being carried out on a nationwide scale.[465]

The Public Finance Management Act (PFMA) authorized the creation of the PDMO as a National Treasury department. It offers suggestions to the PPP Committee on Fiscal Commitments and Contingent Liabilities at different points throughout the PPP process. [466]All entities entering into contracts must prepare and submit quarterly financial commitment reports to the Public Debt Management Office (PDMO), along with an annual summary of the reports, according to the rules governing the assessment and management of Fiscal Commitments and Contingent Liabilities in public-private partnerships (PPP) in Kenya.[467] This information must be disclosed by PDMO in its Annual Debt Report and Debt Management Strategy, which is submitted to the Parliament.[468] The Guidelines mandate that the PPP Unit publish this data on its website.[469] The Guidelines specify that the following specific information must be disclosed (i) quantity and length of financial commitments; (ii) contingent liabilities categorized by category or industry, (iii) the justification for accepting the contingent liabilities (iv) full exposure (v) the total face value of all issued guarantees (vi)estimated fiscal cost at the net present value of all estimated payments and/or annual cash flows.[470]

Kenya's commitment to PPPs as a means of delivering public services and infrastructure is evident in establishing the PPPU and enacting the PPP Act. The successful implementation of several PPP projects in various sectors has demonstrated their potential to drive economic growth and development. The PPP policy statement provides a step in the right direction toward addressing these challenges and improving the implementation of PPP projects in

[464] Kenya's OGP Commitments and Progress available at https://www.opengovpartnership.org/members/kenya/ (accessed 5 May 2023).
[465] Kenya's OGP Commitments and Progress available at https://www.opengovpartnership.org/members/kenya/ (accessed 5 May 2023).
[466] Section 62 of the Public Finance Management Act of 2012.
[467] The National Treasury and Planning: *PPP Fiscal Commitments And Contingent Liabilities Management Framework* (2018) 4.
[468] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 26.
[469] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 26.
[470] The World Bank *Improving Transparency and Accountability in Public Private Partnerships, Disclosure Diagnostic Report: Kenya* (2018) 27.

Kenya. The Public Private Partnership Committee[471] is a crucial statutory body in Kenya's PPP regulation, responsible for developing and implementing PPP policy initiatives.[472] Its roles include creating PPP policy guidelines, aligning projects with national priorities, and evaluating project proposals.[473] However, it lacks representation from county governments, which is crucial given their interests.[474] The proposal for one representative from the Council of Governors falls short, as the national government appoints nine members, raising fairness and constitutional concerns.[475] The PPP Act establishes the Petitions Committee, a tribunal to handle private party complaints related to PPP agreements.[476] It comprises a chairperson, a person qualified to be appointed as a judge of the High Court of Kenya, the Unit Director, and four other persons with such knowledge and experience as the Cabinet Secretary, in consultation with the PPP Unit, considers appropriate.[477] Its composition includes executive-leaning appointments and the Unit Director, posing issues of independence and separation of powers.[478] However, including the Unit Director on the Petitions Committee and executive-leaning selections raises questions about independence and the separation of powers.[479] The Unit's recommendations have a binding impact on all the procedures used by the contracting authority during a PPP project, which adds to the situation's complexity. This arrangement might allow a member of the Petitions Committee to judge the decisions they were involved in while serving in the Unit, which could jeopardize the administration of justice.[480] It is crucial to emphasize that the Petitions Committee's decisions are final and binding on all parties.[481] The lack of an appeals procedure could result in severe and long-lasting effects on public procurement if the Petitions Committee makes an unfair decision.[482]

[471] Section 4 of the Public Private Partnership Act 15 of 2013.
[472] Section 7 of the Public Private Partnerships Act 15 of 2013.
[473] Section 7 of the Public Private Partnerships Act 15 of 2013.
[474] Kipchirchir R N *Sub-national Public Private Partnerships in Kenya: An Appraisal of the Legal and Institutional Framework against the Constitutional Principles on Devolution and Public Procurement* (unpublished LLM thesis, Strathmore University, 2021) 46.
[475] Kipchirchir R *N Sub-national Public Private Partnerships in Kenya: An Appraisal of the Legal and Institutional Framework against the Constitutional Principles on Devolution and Public Procurement* (unpublished LLM thesis, Strathmore University, 2021) 46.
[476] Section 67(1) of the Public Private Partnerships Act 15 of 2013.
[477] Section 67(2) of the Public Private Partnerships Act 15 of 2013.
[478] Section 67(1) Public Private Partnerships Act 15 of 2013.
[479] Kipchirchir R N Sub-national Public Private Partnerships in Kenya: An Appraisal of the Legal and Institutional Framework against the Constitutional Principles on Devolution and Public Procurement (unpublished LLM thesis, Strathmore University, 2021) 46.
[480] Section 31(4) of the Public Private Partnerships Act 15 of 2013.
[481] Section 67(5) of the Public Private Partnership Act 15 of 2013.
[482] Republic v Public Private Partnerships Petition Committee (The Petition Committee) &3 others Ex Parte A P M Terminals [2015] eKLR.

3.6 Kenya's Exemplary Case Studies

Sub- Saharan Africa uses road transportation as the most frequently used means of transporting goods and people. Imports and exports of different goods happen primarily by land because of the region's geographic nature where many of the countries are landlocked hence the goods are transported by land in this case road transport.[483] The movement of products and people is facilitated by effective and modern road and railway networks, which boost trade and economic growth by promoting increasing trade activities.[484] Businesses may deliver their goods more swiftly, reliably, and affordably thanks to efficient transportation infrastructure, which boosts their competitiveness and broadens their market reach.[485] Regional and community connections are facilitated by well-connected road or rail networks. They make it simpler to access stores, colleges, hospitals, and other crucial services.[486] This interconnectedness encourages social cohesion, improves social and economic possibilities, lessens regional inequities, and draws foreign investment to a country.

3.6.1 Rift Valley Railways Concession, Kenya

In 2006, Rift Valley Railways (RVR) was granted a concession to manage the Kenya-Uganda railway system under a build-operate-transfer (BOT) financing model.[487] This was a calculated effort to improve the railway's performance and its contribution to economic growth. The recognition of the historical connections between Kenya Railways and Uganda Railways, their mutual dependence, and the potential advantages that both nations could gain from the endeavour served as the basis for this decision.[488] A PPP project was executed by the concession deal that the governments of Kenya and Uganda signed with the RVR consortium.[489] The consortium was made up of the Australian company Babcock & Brown,

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483 Moeti K *The importance of road transport infrastructure development and maintenance in trade facilitation: A South African case* (unpublished LLM Thesis, University of Cape Town 2015) 7.
484 Moeti K *The importance of road transport infrastructure development and maintenance in trade facilitation: A South African case* (LLM Thesis, University of Cape Town 2015) 7.
485 Moeti K *The importance of road transport infrastructure development and maintenance in trade facilitation: A South African case* (LLM Thesis, University of Cape Town 2015) 9.
486 Moeti K *The importance of road transport infrastructure development and maintenance in trade facilitation: A South African case* (LLM Thesis, University of Cape Town 2015) 9.
487 Rambo CM & Okelo S 'Correlates Of Severity Of Financing Challenges Experienced By The Concessionaire: The Case Of A Railways Concession Project In Kenya' (2016) 4 *European Journal Of Business, Economics, and Accountancy* 59.
488 Rambo CM & Okelo S 'Correlates Of Severity Of Financing Challenges Experienced By The Concessionaire: The Case Of A Railways Concession Project In Kenya' (2016) 4 *European Journal Of Business, Economics and Accountancy* 60.
489 Ndonye HN, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2016) 6 *European Journal of Business and Management* 148.

the South African company Sheltam Rail Corporation, the Kenyan companies TransCentury Investments, Prime Fuels Limited, Mirambo Holdings, and Centum Investments, as well as the South African company Sheltam Rail Corporation.[490]

Through this partnership, the railway system was able to benefit from the experience, capital, and efficient operation of the private industry. RVR was assigned the responsibility of delivering shipping services for 25 years and passenger services in Kenya for 5 years under the concession agreement.[491] In addition, the consortium was in charge of updating and modernizing the train fleet, restoring the railroad supply, purchasing new trains and wagons, remodeling buildings and workshops, and putting new information technology systems into place.[492] It's significant to note that the governments of Kenya and Uganda still have control over the regulation and ownership of the infrastructure and assets used for railroads.[493] The PPP model used in the concession of the Kenya-Uganda railway line gave rise to fresh hope that rail transport would once more significantly contribute to the expansion of the country's economy. Including the private sector.[494] Through engaging the assistance of the private industry, the project improved performance, dependability, and overall service quality were the goals of the consortium's investment and redevelopment activities.

Rift Valley Railways' (RVR) challenges became visible quite quickly. The governments retained ownership of the existing assets as part of this concession agreement, but they gave RVR control over the operation and maintenance of the rolling stock.[495] By the end of 2005, Kenya Railways (KR) had only handled 1.9 million tons of freight, a considerable decline from the enormous 4.3 million tons it had moved in 1983.[496] KR experienced freight volume,

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[490] Ndonye HN, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2016) 6 *European Journal of Business and Management* 148.
[491] Rambo CM & Okelo S 'Correlates Of Severity Of Financing Challenges Experienced By The Concessionaire: The Case Of A Railways Concession Project In Kenya' (2016) 4 *European Journal Of Business, Economics, and Accountancy* 61.
[492] Rambo CM & Okelo S 'Correlates Of Severity Of Financing Challenges Experienced By The Concessionaire: The Case Of A Railways Concession Project In Kenya' (2016) 4 *European Journal Of Business, Economics, and Accountancy* 62.
[493] Amonya, F 'Public-Private Partnerships on Moulding State Structures: The Non-Ergodic Africa' (2016) 4 *Risk Governance and Control: Financial Markets & Institutions* 13.
[494] Amonya, F 'Public-Private Partnerships on Moulding State Structures: The Non-Ergodic Africa' (2016) 4 *Risk Governance and Control: Financial Markets & Institutions* 13.
[495] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 147.
[496] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 147.

neglect, and investment declines, similar to many other railways in sub-Saharan Africa.[497] In 2008, RVR suffered a substantial loss of Ksh. 1.8 billion because of difficulties managing the railway operation, making investments, and paying government fees.[498] Lenders refused to provide the necessary loans because of this financial setback. Government representatives in both nations considered terminating the concession deal with RVR in early 2009 because of persistent problems.[499] RVR responded to the predicament by altering their consortium.[500] Sheltam, the largest shareholder, left the consortium, and in 2010, Amending Deeds were signed to reset the concession's performance improvement deadline to 25 August 2010, prolonging it for 25 years.[501] Over time, the consortium's composition kept changing. For instance, The Daily Nation reported on April 1st, 2014, that investment firm Trans Century had sold its 34% interest in a deal valued at about Sh5 billion to Citadel.[502] Citadel now owns 85% of the railway concession, leaving just Uganda's Bomi Holdings as a shareholder.[503] Although there was a need for the RVR network to be enhanced, rolling stock to be refurbished, and service quality to be increased, ongoing financial difficulties were a significant obstacle. The railroad company experienced a continuous decline in its market share within the transportation sector.

3.6.2 Lot 33: Kajiado – Imaroro And Ngong – Kiserian – Isinya Roads

The government, through the State Department for Infrastructure, established a plan to enhance the 10,000 km of roads through a PPP under the Road Annuity Programme and the Low

[497] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 147.
[498] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 148.
[499] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 148.
[500] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 148.
[501] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 148.
[502] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 148.
[503] Ndonye H, Anyika E & Gongera G 'Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya' (2014) 6 *European Journal of Business and Management* 148.

Volume Sealed Roads (LVSR) program.[504] The government's cabinet gave its approval to Phase 1 Annuity Projects in March 2016.[505] The 91-kilometer Ngong-Kiserian-Isinya-Kajiado/iMARORO road project, Kenya's first annuity-financed road project, was granted in May 2018 by the State Department of Infrastructure through its implementing agency, Kenya Rural Roads Authority (KeRRA).[506]

Lot 33 is made up of approximately 91 KM of roads: Kajiado-Imaroro; Ngong-Kiserian-Isinya on the Design-Build-Finance-Operate-Maintain (DBFOM) PPP Model. A 10-year payment timeline was chosen for the implementation of the PPP since it demonstrated it would reduce the government's costs compared to utilizing conventional methods of procurement.[507] Construction on the project was finished in October 2020. In addition to ensuring value for money, involving private parties enhanced the quality of services and project efficacy given that they contributed their knowledge, expertise, and experience while also advancing the road infrastructure.[508]

By integrating and connecting Kenyan areas, Lot 33 improve trade opportunities, provide small business owners access to a larger range of markets, and simplify transportation for both completed goods and raw materials, all of which will boost the country's gross domestic product and social progress.[509] The goal is to enhance Kenyans' transport options and support sustainable urbanization. Providing an interconnected infrastructure for the continued growth of the Global Partnership, aids in industrial growth within the country as a whole.[510]

[504] Roads Annuity Programme Lot 33: Kajiado – Imaroro And Ngong – Kiserian – Isinya Roads available at http://portal.pppunit.go.ke/project/32/roads-annuity-programme-lot-33kajiado-imaroro-and-ngong-kiserian-isinya-roads (accessed 23 May 2023).
[505] Roads Annuity Programme Lot 33: Kajiado – Imaroro And Ngong – Kiserian – Isinya Roads available at http://portal.pppunit.go.ke/project/32/roads-annuity-programme-lot-33kajiado-imaroro-and-ngong-kiserian-isinya-roads (accessed 23 May 2023).
[506] Roads Annuity Programme Lot 33: Kajiado – Imaroro And Ngong – Kiserian – Isinya Roads available at http://portal.pppunit.go.ke/project/32/roads-annuity-programme-lot-33kajiado-imaroro-and-ngong-kiserian-isinya-roads (accessed 23 May 2023).
[507] Roads Annuity Programme Lot 33: Kajiado – Imaroro And Ngong – Kiserian – Isinya Roads available at http://portal.pppunit.go.ke/project/32/roads-annuity-programme-lot-33kajiado-imaroro-and-ngong-kiserian-isinya-roads (accessed 23 May 2023).
[508] Jevans O *Assessment of the factors influencing the implementation of Public-Private-Partnerships in the Road Annuity Program in Kenya* (unpublished LLM thesis, Strathmore University,2021) 4.
[509] Jevans O *Assessment of the factors influencing the implementation of Public-Private-Partnerships in the Road Annuity Program in Kenya* (unpublished LLM thesis, Strathmore University,2021) 16.
[510] Jevans O *Assessment of the factors influencing the implementation of Public-Private -Partnerships in the Road Annuity Program in Kenya* (unpublished LLM thesis, Strathmore University,2021) 16.

In Kenya, the implementation of road projects through PPPs is plagued by numerous challenges.[511] These challenges manifest in the form of cost overruns, disruptions in schedules, and overall project quality.[512] The term "project delays" refers to situations in which the execution of a project takes longer than originally anticipated or exceeds the deadline set by all parties participating in the construction project.[513] Projects that are delayed may go over the agreed-upon deadline for completion or the contractual delivery date.[514] Project delays have serious repercussions, including financial losses and a detrimental effect on one or more of the project's participants.[515]

In addition, project delay frequently results in constrained budgets and unpredictability in cash flow due to irregular money payments.[516] These challenges collectively contribute to the complexity and difficulties faced in successfully executing infrastructure projects in the country.[517] To ensure the effective and swift completion of vital road projects that are fundamental to the nation's development and connectivity, it is imperative to address these issues.

3.6.3 **Nairobi Expressway Project**

Kenya's capital and largest city, Nairobi, is connected to Mombasa, a significant port city, via the 482 km long Nairobi-Mombasa Road (A8).[518] The A8 Road, originally known as the A104, also connects Kenya's western and northern regions to Uganda in the northwest.[519] It is an essential part of the Trans-African Highway 8 (Lagos-Mombasa Highway), which connects West Africa with East Africa, along with Burundi, the eastern part of the Democratic Republic of the Congo, Rwanda, Uganda, South Sudan, and other landlocked countries. Mombasa, a port

[511] Lumumba C B *'Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 4.
[512] Lumumba C B '*Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 4.
[513] Lumumba C B '*Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 4.
[514] Lumumba C B '*Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 5.
[515] Lumumba C B '*Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 5.
[516] Lumumba C B *'Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 8.
[517] Lumumba C B *'Challenges Facing Implementation Of Donor Support Projects In The Kenya National Highway Authority'* (Unpublished Master of Science in Commerce Thesis, KCA University, 2021) 8.
[518] Centric Africa Limited *Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 2.
[519] Centric Africa Limited *Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 5.

city on the Indian Ocean, serves as a key gateway between these nations.[520] Along A8 Road, Nairobi's core district usually has high traffic congestion, especially during morning and afternoon rush hours. Traffic is extremely congested between Mlolongo and James Gichuru Road, which causes severe delays.[521] Due to an increase in traffic, the A8 National Road's traffic capacity cannot keep up with the expanding needs of the economy and society.[522] The plan for a motorway along the median strip of A8 National Road, beginning at Mlolongo and finishing at James Gichuru Road, was made to address these issues and redirect traffic from the city area.[523]

The Nairobi Motorway, a large-scale infrastructure project intended to solve the growing traffic congestion in Kenya's capital, was unveiled on October 15, 2019, by President Uhuru Kenyatta.[524] With ten interchanges and tolls, the 27-kilometer, four-lane dual highway runs alongside the median strips of Mombasa Road, Uhuru Highway, and Waiyaki Way. The project is being carried out through a Public-Private Partnership.[525] As Kenya's first PPP road project, the Nairobi Motorway establishes a significant precedent and demonstrates the commitment of the administration to creative finance and collaboration approaches.[526] By implementing the PPP model, the government will maximize the best use of its meager public resources while utilizing the knowledge and resources of the private sector.[527] This strategy guarantees the prompt and effective completion of crucial infrastructure projects while allowing the government to focus its resources on other urgent needs, such as healthcare and education. The expressway's construction is made easier by the PPP model, which also finances long-term upkeep and operation.[528] Efficiency, accountability, and sustainability in the administration of public assets are promoted by this transition towards private capital investment and

[520] Centric Africa Limited *Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 5.
[521] Dr. Lango B 'Nairobi Express Way Project Joins Africa's Mega Development Projects with a Focus on Financing Model' 2020 *AEDI* 2.
[522] Dr. Lango B 'Nairobi Express Way Project Joins Africa's Mega Development Projects with a Focus on Financing Model' 2020 *AEDI* 2.
[523] Centric Africa *Limited -Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 8.
[524] Dr. Lango B 'Nairobi Express Way Project Joins Africa's Mega Development Projects with a Focus on Financing Model' 2020 *AEDI* 3.
[525] Dr. Lango B 'Nairobi Express Way Project Joins Africa's Mega Development Projects with a Focus on Financing Model' 2020 *AEDI* 3.
[526] Nairobi Expressway Project available at *https://naturaljustice.org/eia-process/nairobi-expressway/* (accessed 22 May 2023).
[527] Nairobi Expressway Project available at *https://naturaljustice.org/eia-process/nairobi-expressway/* (accessed 22 May 2023).
[528] Centric Africa Limited *Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 8.

involvement in infrastructure development.[529] The motorway will be maintained and operated by the China Road and Bridge Corporation, which is in charge of the project's design, finance, and construction. During the concession term, tolls will cover the cost of the investment.[530]

The estimated KSh 62 billion price tag for the Nairobi Motorway is a major investment in Kenya's infrastructure. In addition to its direct effects on transportation, the project has the potential to boost economic growth.[531] The project will generate employment opportunities during the construction phase, enhancing local economies and generating money for a large number of people and families.[532] Once the motorway is put into use, the improved connectivity and shortened travel times will draw in investments and motivate companies to relocate or develop along the motorway path.[533] In turn, this can promote entrepreneurship, economic growth, and new employment prospects in the region. Thus, the Nairobi Motorway positions itself as a driver of economic growth that helps both urban and rural areas.[534]

The Nairobi motorway has enormous potential for Kenya's development due to its emphasis on increased transportation effectiveness, economic development, and the ground-breaking PPP model. The motorway will improve mobility and support regional economic development by reducing traffic congestion. The Nairobi Motorway serves as a model for future infrastructure developments in Kenya and is evidence of the nation's dedication to progress and sustainable growth. The Nairobi Express project is expected to be completed within 5 years, according to the Kenya National Highway Authority.[535] This timeline is reliant on thorough research, designs, negotiations, and securing funds.[536] By 2024, a high-speed expressway is anticipated to be built on the Nairobi-Mombasa route, according to a report by Road Traffic

[529] Centric Africa Limited *Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 9.
[530] Centric Africa Limited *Environmental And Social Impact Assessment For The Proposed Nairobi Expressway Project* (2020) 9.
[531] Dr. Lango B 'Nairobi Express Way Project Joins Africa's Mega Development Projects with a Focus on Financing Model' 2020 AEDI 4.
[532] Nairobi Expressway Project available at *https://naturaljustice.org/eia-process/nairobi-expressway/* (accessed 22 May 2023).
[533] Nairobi Expressway Project available at *https://naturaljustice.org/eia-process/nairobi-expressway/* (accessed 22 May 2023).
[534] Nairobi Expressway Project available at *https://naturaljustice.org/eia-process/nairobi-expressway/* (accessed 22 May 2023).
[535] Kinyanjui M 'Nairobi-Mombasa Expressway project to take five years' The Star 18 September 2022 available at https://www.the-star.co.ke/news/2022-09-18-nairobi-mombasa-expressway-project-to-take-five-years/ (accessed 09 Spetember 2023).
[536] Kinyanjui M 'Nairobi-Mombasa Expressway project to take five years' The Star 18 September 2022 available at https://www.the-star.co.ke/news/2022-09-18-nairobi-mombasa-expressway-project-to-take-five-years/ (accessed 09 Spetember 2023).

Technology.[537] This development highlights the strong anticipation that the project is making substantial progress and will stand as a significant milestone in Kenya's ongoing endeavors to improve its infrastructure and strengthen transportation links.

3.7 The Interface between African Free Continental Trade Area (AfCFTA) And Kenya's PPP Implementation.

Kenya and South Africa are members of the African Continental Free Trade Area (AfCFTA) As a member state, South Africa will benefit from the PPP experiences in Kenya, which will help with infrastructure development and attracting investment. South Africa can benefit from Kenya's experience with PPPs to improve its own infrastructure and draw in investment across a range of industries. Learning from Kenya's PPP experiences will enable South Africa handle infrastructure projects with greater proficiency and improve the investment climate therein.

The AfCFTA was signed on March 21 and came into effect on May 30. It consists of the fifty-five countries that make up the entire African Union and eight Regional Economic Communities (RECs).[538] AfCFTA embodies the pan-African principles and the spirit of prosperity and is in line with AU Agenda 2063, "the Africa we want."[539] The African Continental Free Trade Area (AfCFTA) agreement aims to establish a single market for goods and services to strengthen Africa's economic integration by providing the region's countries with a chance to competitively integrate into the world economy.[540] The AfCFTA requires countries to progressively liberalize service trade, abolish tariffs on 90% of imports, and resolve non-tariff obstacles. Economic integration's market access and liberalization will provide companies across the whole continent the chance to tap into enormous markets, improving Africa's competitiveness in the global market.[541] Under the African Continental Free Trade Area (AfCFTA) agreement, the AfCFTA is expected to boost Africa's economic transformation by enhancing intra-African trade and strengthening regional trade markets and

[537] Road Traffic Technology 'Nairobi-Mombasa Expressway project to take five years' available https://www.roadtraffic-technology.com/projects/nairobi-mombasa-highway-expansion-project/at (accessed 09 September 2023).

[538] Sebahizi 'The AfCFTA: A Dream has become a Reality' *AfCFTA*, 08 Jul 2019 available at *https://www.africancfta.org/news/the-AfCFTA-a-dream-has-become-a-reality* (accessed 21 May 2023).

[539] Leshoele M 'AfCFTA and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?' 2019 *Journal of Contemporary African Studies* 8.

[540] Nwankwo CM 'Liberalizing Regional Trade Regimes Through AfCFTA: Challenges and Opportunities' 2020 *Journal of African Law* 2.

[541] UN Conference on Trade and Development: African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions (2018) 7.

industrial networks.[542] By putting the AfCFTA into effect, it could potentially be possible to create more jobs, enhance supply chains, and promote the transfer of knowledge and technology.[543] As international investors seek to access the African market, diversifying investments beyond the traditional extractives sector, the implementation of the AfCFTA could potentially have a good impact on foreign direct investment, notably in the manufacturing (and services sectors).[544] The AfCFTA will be crucial in boosting intra-regional commerce in agri-food goods, notably from surplus to deficit areas, stabilizing food prices, and enhancing food security.[545]

As trade within Africa expands, investment in the fields of transport and logistics will be essential. By 2030, it is anticipated that the AfCFTA will raise demand for intra-African commerce by 28%, resulting in demand for over 2 million vehicles, 100,000 rail wagons, 250 planes, and more than 100 vessels.[546] A greater number of small and medium-sized enterprises need logistics providers to access larger markets, the need for logistics will grow significantly as regional trade expands.[547] Consumption and demand will rise as trade restrictions and tariffs on imports are removed, which will benefit African manufacturers and the logistics and transportation industry.[548] Likewise, this will allow digital logistics firms to enter the market, cut costs, raise service standards, and support sustainability.[549] In Kenya, the AfCFTA and PPPs are closely interconnected since PPPs contribute to ensuring that AfCFTA objectives are implemented.[550] The PPP initiatives for Kenya's roads and railways have been crucial in

542 Luke D 'Making the case for the African Continental Free Trade Area' 2019 *Afronomicslaw* 3
543 Luke D 'Making the case for the African Continental Free Trade Area' 2019 *Afronomicslaw* 3
544 Leshoele M 'AfCFTA and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?' 2019 *Journal of Contemporary African Studies* 8.
545 Leshoele M 'AfCFTA and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?' 2019 *Journal of Contemporary African Studies* 8.
546 United Nations Economic Commission for Africa - Private sector as the backbone of the AfCFTA Implementation (2021) 1.
547 The African Continent Free Trade Agreement: How it will be a game changer for the transportation and logistics industry available *at* https://www.thecooperativelogisticsnetwork.com/blog/2021/05/25/the-african-continent-free-trade-agreement-how-it-will-be-a-game-changer-for-the-transportation-and-logistics-industry/ (accessed 23 May 2023).
548 The African Continent Free Trade Agreement: How it will be a game changer for the transportation and logistics industry available at https://www.thecooperativelogisticsnetwork.com/blog/2021/05/25/the-african-continent-free-trade-agreement-how-it-will-be-a-game-changer-for-the-transportation-and-logistics-industry/ (accessed 23 May 2023).
549 Navigating Africa's New Logistics Landscape available https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/cm-stories/africa-logistics-landscape (accessed 23 May 2023).
550 Ministry of Industrialisation, Trade, And Enterprise Development State Department For Trade And Enterprise Development *Kenya's National AfCFTA Implementation Strategy* (2022) 2.

boosting connectivity, lowering trade barriers, and enhancing infrastructure.[551] These improvements support trade and investment within the AfCFTA framework and contribute to the general economic growth and development of the country as a whole.

3.8 Lessons South Africa Can Learn from Kenya's Experiences with Public-Private Partnerships

Kenya's successful implementation of PPPs offers several lessons that South Africa should take from. A coherent policy framework and legal framework for PPPs exist in Kenya, which provides a solid foundation for the execution of effective partnerships.[552] The creation of a thorough policy framework outlining the goals, functions, and accountability of the public and private sectors in PPP projects would be advantageous for South Africa.[553] To provide a stable and favourable climate for PPP investments, South Africa has to strengthen its legal and regulatory framework. Kenya places a strong emphasis on stakeholder involvement throughout the PPP process. Building consensus, addressing concerns, and ensuring openness are all aided by including pertinent stakeholders, such as neighborhood communities, businesses, and civil society organizations.[554] To develop partnerships that are successful and foster confidence, South Africa should make stakeholder involvement a priority.

Kenya has made investments to increase the capacity of public servants and important PPP project players. Programs for training, workshops, and knowledge-sharing platforms fall under this category.[555] Similar capacity-building programs can be established in South Africa to improve the qualifications and understanding of public servants, regulators, and participants in the business sector.[556]

Kenya has emphasized the significance of guaranteeing the financial sustainability of PPP projects and effectively distributing risks across the public and private sectors.[557] To entice

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551 Ministry of Industrialisation, Trade, And Enterprise Development State Department For Trade And Enterprise Development *Kenya's National AfCFTA Implementation Strategy* (2022) 2.

552 Sarmento EM 'Lessons Learned: Public-Private Partnerships' 2015 *Independent Development Evaluation, African Development Bank* 2.

553 Sarmento EM 'Lessons Learned: Public-Private Partnerships' 2015 *Independent Development Evaluation, African Development Bank* 3.

554 Bertha V, Nicholas O, Maurice B & Banji O 'Lessons From Research-Based Public-Private Partnerships For African Science Granting Councils' (2020) 6.

555 Sarmento EM 'Lessons Learned: Public-Private Partnerships' 2015 Independent Development Evaluation, African Development Bank 3.

556 Sarmento EM 'Lessons Learned: Public-Private Partnerships' 2015 *Independent Development Evaluation, African Development Bank* 5.

557 Bertha V, Nicholas O, Maurice B & Banji O 'Lessons From Research-Based Public-Private Partnerships For African Science Granting Councils' (2020) 7.

private sector participation and reduce project risks, South Africa should carry out in-depth financial analyses and set up distinct risk-sharing structures.[558]

To keep track of the effectiveness and results of PPP projects, Kenya has put in place reliable monitoring and evaluation systems. Monitoring regularly aids in problem-solving, the implementation of remedies, and accountability promotion.[559] To evaluate the efficacy and efficiency of PPP initiatives, South Africa should create an extensive monitoring and evaluation structure.[560]

By considering these lessons from Kenya's successful PPP implementation, South Africa may improve its own PPP framework and establish a supportive climate for long-lasting and fruitful PPPs.

3.9 Conclusion

The implementation of PPPs has been demonstrated to be a complex process that requires careful consideration of critical factors to assure the accomplishment of PPPs implementation and the realization of long-term benefits. To achieve sustainable infrastructure development and service delivery, PPPs must be implemented effectively. This analysis highlights the importance of critical success factors by examining risk allocation, favourable legislative frameworks, political stability, project technical viability, and a stable macroeconomic environment. Kenya serves as an example of a country that successfully implements PPPs while incorporating critical success factors. Its robust economy, which is highlighted by consistent advancement and a favourable investment climate, provides a conducive environment for both private investment and collaboration. The evaluation of Kenya's PPP experience holds significance beyond Kenya, as it contributes to the broader discourse on PPP implementation globally. Future PPP initiatives can be influenced by the lessons learned from the assessment of Kenya's case study, allowing policymakers to create more effective legislative frameworks in Africa that will encourage the development of sustainable infrastructure and generate investment.

558 Bertha V, Nicholas O, Maurice B & Banji O 'Lessons From Research-Based Public-Private Partnerships For African Science Granting Councils' (2020) 7.
559 Sarmento EM 'Lessons Learned: Public-Private Partnerships' 2015 *Independent Development Evaluation, African Development Bank* 3.
560 Sarmento EM 'Lessons Learned: Public-Private Partnerships' 2015 *Independent Development Evaluation, African Development Bank* 3.

The next chapter will evaluate both the opportunities and challenges faced in the implementation of PPPs. The primary objective is to draw lessons from best practices in order to improve and ensure the efficient and effective execution of PPP projects.

CHAPTER FOUR

NAVIGATING THE PPP LANDSCAPE: EXPLORING OPPORTUNITIES, CHALLENGES AND DRAWING LESSONS FROM BEST PRACTICES

4.1 Introduction

Economic growth is significantly hampered by inadequate infrastructure, particularly in developing countries.[561] The availability of infrastructure services is frequently insufficient to meet the demand of the citizens, which causes delays and poor performance or reliability.[562] This prevalent challenge serves to draw attention to the universal challenges encountered by developing nations.[563] To close the infrastructural gap while creating development opportunities, it is critical to investigate cutting-edge technologies and alliances.[564] Given the wide range of targets seeking public funding, governments must now find alternative ways to pay for and handle their infrastructure needs.[565]

PPPs are one strategy for overcoming obstacles in the supply of infrastructure.[566] One of the key objectives of the PPPs is to support public services without placing an excessive burden on scarce public resources or requiring additional taxation.[567] PPPs have a significant impact on how effectively infrastructure services are delivered in different countries.[568] By reducing the administrative and financial costs for the government, PPPs aid the construction sector in transferring private sector experience to the public sector and increasing efficiency.[569] However, there are challenges with these collaborations that prevent the delivery and implementation of infrastructure.[570]

561 Mashwama NX, Thwala DW & Aigbavboa CO *Theoretical Assessment of the Challenges of Public-Private Partnership in Improving Infrastructure Service Delivery in Swaziland* (2017) 232.
562 Mashwama NX, Thwala DW & Aigbavboa CO *Theoretical Assessment of the Challenges of Public-Private Partnership in Improving Infrastructure Service Delivery in Swaziland* (2017) 232.
563 Mashwama NX, Thwala DW & Aigbavboa CO *Theoretical Assessment of the Challenges of Public-Private Partnership in Improving Infrastructure Service Delivery in Swaziland* (2017) 232.
564 Mashwama NX, Thwala DW & Aigbavboa CO *Theoretical Assessment of the Challenges of Public-Private Partnership in Improving Infrastructure Service Delivery in Swaziland* (2017) 233.
565 Mashwama NX, Thwala DW & Aigbavboa CO *Theoretical Assessment of the Challenges of Public-Private Partnership in Improving Infrastructure Service Delivery in Swaziland* (2017) 233.
566 Young K, Ying-Yi C, and Ibbs C 'Towards a comprehensive understanding of Public-Private partnerships for infrastructure development' (2009) 51 *California Management Review* 52.
567 Young K, Ying-Yi C, and Ibbs C 'Towards a comprehensive understanding of Public-Private partnerships for infrastructure development' (2009) 51 *California Management Review* 52.
568 Young K, Ying-Yi C, and Ibbs C 'Towards a comprehensive understanding of Public-Private partnerships for infrastructure development' (2009) 51 *California Management Review* 52.
569 Young K, Ying-Yi C, and Ibbs C 'Towards a comprehensive understanding of Public-Private partnerships for infrastructure development' (2009) 51 *California Management Review* 52.
570 Young K, Ying-Yi C, and Ibbs C 'Towards a comprehensive understanding of Public-Private partnerships for infrastructure development' (2009) 51 *California Management Review* 52.

This chapter examines the opportunities and challenges associated with implementing PPPs, which is a collaborative approach to developing infrastructure. By analyzing PPP experiences and drawing lessons from best practices, I will gain valuable insights into how PPPs can help governments overcome the limitations posed by inadequate infrastructure. This analysis aims to provide a clear understanding of the way forward, highlighting strategies and approaches that can be employed to effectively address infrastructure challenges and drive sustainable development.

4.2 Exploring the Opportunities offered by PPPs

PPPs have made it feasible for countries to benefit from a range of opportunities that will help them with developing their infrastructure, promoting economic expansion, stimulating innovation and the transfer of technology, incorporating private sector participation, and maximising their financial resources. By taking advantage of these opportunities, governments can advance their broad development and growth objectives, improve their infrastructure capabilities, and attract the investment that is required.

4.2.1 Infrastructure Development

Infrastructure plays a critical role in promoting economic growth and improving the quality of life for citizens.[571] The development of robust and high-quality infrastructure requires sustained investment, technological innovation, a skilled workforce, and effective project management.[572] It encompasses transportation, power, communication, and essential social services like water supply, sanitation, education, and healthcare.[573]

Unlocking Africa's economic and developmental potential relies on strategic planning and investment in infrastructure.[574] However, sub-Saharan Africa continues to grapple with significant developmental challenges such as a severe lack of physical infrastructure, inadequate transportation, communication, water, and power infrastructure that impede economic activity, efficiency, and competitiveness.[575] Due to the global economic recovery, greater trade, better commodity prices, and capital inflows, Sub-Saharan Africa is predicted to

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[571] Alameddine H 'The effect of infrastructure development on African economics' 2022 *Beirut Arab University* 3.
[572] Alameddine H 'The effect of infrastructure development on African economics' 2022 *Beirut Arab University* 3.
[573] Alameddine H 'The effect of infrastructure development on African economics' 2022 *Beirut Arab University* 4.
[574] Pottas A 'Addressing Africa's Infrastructure Challenges' 2020 *Deloite* 3.
[575] Pottas A 'Addressing Africa's Infrastructure Challenges' 2020 *Deloite* 3.

rise by 3.4%.[576] However, it is projected that the region's economic recovery will be slower than that of the rest of the world. The expected cumulative per capita GDP growth for the years 2020 to 2025 is only 3.6%, much less than the 14% global average.[577] In 2020, more than 32 million additional people were living in extreme poverty, while employment rates dropped by almost 8.5%.[578] These difficulties emphasize the urgent need for reliable support systems to avert disastrous long-term repercussions.[579] Building efficient social security networks is crucial in preventing irreversible harm to the region's socioeconomic development.[580]

Traditionally, governments have carried the responsibility of infrastructure provision due to factors like high costs, project scale, national security considerations, and natural monopolies.[581] However, relying solely on the public sector has proven insufficient to meet the growing demand. Budget constraints, lack of stable long-term finance, political instability, and governance issues hinder flexible infrastructure development.[582] Following the 2008 global economic crisis, developing countries experienced a decline in foreign investments, leading to reduced levels of investment and official development assistance.[583] This financial shortfall has long-term implications for infrastructure development. Faced with limited budgets, governments must prioritize infrastructure projects that are effective and serve as stepping stones for the future.[584]

As a result, feasible infrastructure projects are being assessed, along with the effects they could potentially have in the future. To close the financial gap and cut costs, governments are

576 International Monetary Fund: Challenges Faced by Sub-Saharan Africa available at https://www.imf.org/en/News/Articles/2021/04/12/na041521-six-charts-show-the-challenges-faced-by-sub-saharan-africa (accessed 9 July 2023).
577 International Monetary Fund: Challenges Faced by Sub-Saharan Africa available at https://www.imf.org/en/News/Articles/2021/04/12/na041521-six-charts-show-the-challenges-faced-by-sub-saharan-africa (accessed 9 July 2023).
578 International Monetary Fund: Challenges Faced by Sub-Saharan Africa available at https://www.imf.org/en/News/Articles/2021/04/12/na041521-six-charts-show-the-challenges-faced-by-sub-saharan-africa (accessed 9 July 2023).
579 International Monetary Fund: Challenges Faced by Sub-Saharan Africa available at https://www.imf.org/en/News/Articles/2021/04/12/na041521-six-charts-show-the-challenges-faced-by-sub-saharan-africa (accessed 9 July 2023).
580 International Monetary Fund: Challenges Faced by Sub-Saharan Africa available at https://www.imf.org/en/News/Articles/2021/04/12/na041521-six-charts-show-the-challenges-faced-by-sub-saharan-africa (accessed 9 July 2023).
581 Pottas A 'Addressing Africa's Infrastructure Challenges' 2020 *Deloite* 3.
582 Pottas A 'Addressing Africa's Infrastructure Challenges' 2020 *Deloite* 4.
583 Dong-Il Suh *Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School Of Public Policy And Management, 2017) 12.
584 Dong-Il Suh *Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School Of Public Policy And Management, 2017) 12.

depending more and more on private investment in the development of infrastructure.[585] PPPs have developed a cooperative strategy to carry out infrastructure projects and encourage creative social development initiatives in recognition of this.[586] PPPs offer governments access to the resources as well as expertise of the private sector, enabling them to address and solve infrastructure gaps efficiently.[587] The technological expertise, innovation, and efficient project management techniques offered by commercial partners enable infrastructure projects of higher quality.[588] Private partners offer skills in project development, technological possibilities, construction, operation, and service supply, which leads to improved project outcomes.[589] This realisation makes it possible to construct infrastructure, allocate resources, and use cutting-edge technologies.

Adequate infrastructure in the form of an appropriate transportation system is crucial for regional integration and economic facilitation in Africa.[590] PPPs play a significant role in the development of cross-border infrastructure, such as highways and logistics networks, which link markets and encourage intra-regional trade.[591] These infrastructure projects reduce trade barriers and promote market access, which strengthens economic cooperation among African countries.[592] In Africa, improving living conditions and human development are intimately intertwined. Through the facilitation of access to clean water, sanitary infrastructure, and a consistent energy supply, PPPs improve public health, sanitation, and hygiene standards.[593]

In addition to fostering the growth of well-equipped educational facilities and information and communication technology infrastructure, these partnerships also encourage high-quality learning and knowledge-sharing.[594] Access to critical healthcare services is guaranteed by

[585] Dong-Il Suh *Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School of Public Policy And Management, 2017) 13.
[586] Dong-Il Suh *Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School of Public Policy And Management, 2017) 13.
[587] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1.
[588] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1.
[589] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1.
[590] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1.
[591] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1.
[592] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1.
[593] UNESCAP *A Guidebook on Public-Private Partnership in Infrastructure* (2011) ch 1
[594] Dong-Il *Suh Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School of Public Policy And Management, 2017) 14.

adequate healthcare infrastructure, which is made possible by PPPs.[595] This decreases inequities and empowers individuals and demonstrates how crucial PPPs are to advancing infrastructure growth in Africa.[596] PPPs present a workable strategy to meet Africa's infrastructure demands by enlisting the private sector's expertise, strengthening project outcomes, promoting regional integration, and enhancing human development and quality of life.

4.2.2 Economic Development, Innovation, and Technology Transfer

PPPs are an effective instrument for fostering economic growth because of their ability to bring all stakeholders together to work towards a common objective of improving the standard of living for all and strengthening the economy of the country.[597] PPPs have the potential to advance improvements in service quality, accessibility, and responsiveness by leveraging the assets and expertise of the private sector.[598] Reducing transaction costs, streamlining supply chains, and strengthening market connections, enhance an enterprise's ability to compete in both domestic and international markets.[599]

When a business can function with greater efficiency, utilise resources effectively, and produce goods or services on time, it will be able to operate more successfully and achieve higher levels of productivity.[600] Raising living standards, creating jobs, and fostering economic growth, this, in turn, encourages community progress. PPPs facilitate collaboration that successfully addresses development goals through the allocation of resources, risk management, and economic development.[601] This partnership enables the sharing of knowledge and experience, strengthening the capacity of public institutions and fostering the development of regional

[595] Dong-Il *Suh Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School of Public Policy And Management, 2017) 14.
[596] Dong-Il *Suh Comparative Study of The Effect Of Infrastructure Development on Economic Growth In Developing Countries* (unpublished Master of Public Policy, KDI School of Public Policy And Management, 2017) 14.
[597] Nugent D *Public-Private Partnerships as a Delivery Option for Public Schools in the Western Cape* (unpublished thesis for the degree of Masters in Public Administration, Stellenbosch University 2020) 26.
[598] Nugent D *Public-Private Partnerships as a Delivery Option for Public Schools in the Western Cape* (unpublished thesis for the degree of Masters in Public Administration, Stellenbosch University 2020) 26.
[599] Nugent D *Public-Private Partnerships as a Delivery Option for Public Schools in the Western Cape* (unpublished thesis for the degree of Masters in Public Administration, Stellenbosch University 2020) 26.
[600] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (unpublished thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 4
[601] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (unpublished thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 4.

expertise and knowledge.[602] PPPs support the economy's long-term viability and growth by disseminating this important knowledge.

PPPs encourage the development and modernization of various sectors, which increases production, fosters innovation, and improves the economy.[603] Improved service delivery stimulates economic growth and can considerably raise living standards, and reduce poverty.[604] It can also significantly reduce crime rates, conflicts, and violence while addressing issues of income inequality and security. This diversification promotes general economic growth and resilience.[605]

By including broader environmental and social objectives, PPPs extend beyond the development of physical goods and services.[606] PPPs have the potential to have positive effects on environmental sustainability, such as lowering carbon emissions, promoting energy efficiency, generating green jobs, and implementing innovative infrastructure ideas like adaptable or ecological infrastructure.[607] These investments serve as an excellent example of the enormous potential for PPPs to provide beneficial spillover effects within the communities they serve.[608]

Through the promotion of knowledge exchange between the public and private sectors, PPPs promote the efficiency of resource allocation and raise the quality of public services.[609] They are viewed as effective strategies for advancing long-lasting, sustainable improvements in public services through wise investment decisions and an appropriate allocation of risks and profits.[610] The purpose is to establish effective PPPs that focus on social objectives in addition

[602] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 41.
[603] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 42.
[604] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 42.
[605] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 42.
[606] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 43.
[607] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 43.
[608] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 43.
[609] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 43.
[610] Ojebode AJ *Public-Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria* (thesis for the degree of Doctor of Philosophy, University of Brighton, 2016) 43.

to economic ones, such as eradicating poverty, advancing governments, and defending marginalized and vulnerable populations.

4.2.3 Value for Money

Value for Money (VfM), often known as the cost-benefit ratio, is an important component in PPP contracts.[611] Opting for private sector involvement in delivering public services proves to be a superior alternative to relying solely on the public sector, with its line departments and bureaucratic administrations, to provide the same services.[612] Through PPPs, governments can leverage private-sector capital and tap into private-sector management and technical expertise.[613] A PPP arrangement can benefit taxpayers by lowering long-term project costs, improving service quality, or even shifting risks to the private sector, which can manage them more effectively and with greater competence.[614] The risk of cost overruns is transferred to private investors to protect taxpayers from unforeseen financial restrictions. By making sure that project costs are precisely predicted and managed, the private sector contributes to the public benefit through its commercial realism and accountability.[615]

PPPs enable governments to transfer particular types of infrastructure project risks to the private sector. Governments can cut costs and optimize resource allocation by utilizing private-sector investments.[616] The inflow of private funding eases the financial strain on the public sector and makes it possible for important infrastructure projects to be implemented on time.[617] In the long run, VfM is improved because private sector organizations are frequently skilled at managing risks more effectively.[618] Certain project risks can be effectively mitigated and managed at a lower cost when they are transferred to the private sector, which lowers overall

[611] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 115.
[612] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 115.
[613] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 115.
[614] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 115.
[615] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 115.
[616] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 116.
[617] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 116.
[618] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 116.

project costs.[619] By bringing in competition and performance-based contracts, the private sector encourages improvements in quality and efficiency. This atmosphere of increased competition motivates commercial partners to provide services at the highest levels, resulting in better VfM for taxpayers.[620]

4.2.4 Increased Private Sector Participation

The success of the economies of developing countries depends on capital security.[621] Investors require governments to be competent and efficient as partners while promoting a secure business environment that attracts investment.[622] The effective implementation of PPPs and the rapid growth of the PPP market depend on the active engagement of the private sector.[623] The ability of the private sector to invest adequately determines whether PPP projects can generate enough funding to cover the project's costs and attract investors.[624] Collaboration between the public and private sectors allows governments to get access to private capital markets, reducing the burden on public finances and promoting investment in sectors that are unlikely to draw private capital. [625] Through funding PPPs, the private sector gives the governments the ability to pay project expenses over an extended period by the benefits anticipated.[626] This technique allows public funds to be made accessible for investments in places where private investment is either impractical or unattainable.[627]

[619] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 116.
[620] Bwanali S and Rwelamila P 'The Role of Public-Private Partnerships in the Provision of Infrastructure Projects' (2016) 7 *International Journal of Construction Supply Chain Management* 116.
[621] Kargbo SM *Foreign Direct Investment and Economic Growth in Africa* (unpublished thesis for the Degree of Doctor Of Philosophy, University of Cape Town, 2017) 21.
[622] OECD: Public-Private Partnerships available at https://www.oecd.org/gov/infrastructure-governance/public-private-partnerships/ (accessed 8 July 2023).
[623] Osei-Kyei R and Chan A 'Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A Survey of International Experts' (2017) 22 *Journal of Financial Management of Property and Construction* 95.
[624] Osei-Kyei R and Chan A 'Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A Survey of International Experts' (2017) 22 *Journal of Financial Management of Property and Construction* 95.
[625] Osei-Kyei R and Chan A 'Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A Survey of International Experts' (2017) 22 *Journal of Financial Management of Property and Construction* 95.
[626] Osei-Kyei R and Chan A 'Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A Survey of International Experts' (2017) 22 *Journal of Financial Management of Property and Construction* 96.
[627] Osei-Kyei R and Chan A 'Factors Attracting Private Sector Investments in Public-Private Partnerships in Developing Countries: A Survey of International Experts' (2017) 22 *Journal of Financial Management of Property and Construction* 96.

PPPs make it possible for private investors to contribute foreign funds to infrastructure development projects, specialised knowledge, and innovative ideas.[628] By engaging private investors, governments can ensure the success of PPP initiatives because these investors place a higher priority on profitability and returns, which encourages PPPs' performance-driven management and accountability.[629] With this collaboration, the public and private sectors benefit from thorough project evaluations, efficient risk management, and resource allocation.[630] Private investment can enhance public investment. Countries can efficiently meet their investment demands and promote economic growth by integrating private investment with public efforts.[631] Considering the substantial benefits of affordability and revenue generation, both of which have a significant impact on how businesses operate governments place a high emphasis on private investment in the implementation of PPPs.[632] The prospect of earning returns on their investments or equity motivates the private sector to take part in PPPs rather than solely relying on government subsidies for capital or income support.[633] This highlights how crucial it is to draw in private investors who are driven by financial considerations and the potential of profit given that this aligns their interests with the long-term viability and success of PPP operations.[634] Private sector involvement in PPPs ultimately improves the outcomes of projects and promotes effective resource utilization for the benefit of both the government and its citizens.[635]

The above analysis demonstrates that the success and development of PPPs depend on the participation of the private sector. It provides projects with crucial financial resources, knowledge, accountability, and innovation, ensuring their financial feasibility and overall efficacy. Governments may increase their PPP markets, effectively allocate public funds,

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[628] Kargbo SM *Foreign Direct Investment and Economic Growth in Africa* (unpublished thesis for the Degree of Doctor of Philosophy, University of Cape Town, 2017) 21.
[629] Kargbo SM *Foreign Direct Investment and Economic Growth in Africa* (unpublished thesis for the Degree of Doctor of Philosophy, University of Cape Town, 2017) 21.
[630] Kargbo SM *Foreign Direct Investment and Economic Growth in Africa* (unpublished thesis for the Degree of Doctor of Philosophy, University of Cape Town, 2017) 21.
[631] OECD: Public-Private Partnerships available at https://www.oecd.org/gov/infrastructure-governance/public-private-partnerships/ (accessed 8 July 2023).
[632] Ruiters C and Matji1 MP 'Public-private partnership conceptual framework and models for the funding and financing of water services infrastructure in municipalities from selected provinces in South Africa'(2016) 42 *African Journals Online* 295.
[633] Ruiters C and Matji1 MP 'Public-private partnership conceptual framework and models for the funding and financing of water services infrastructure in municipalities from selected provinces in South Africa'(2016) 42 *African Journals Online* 295.
[634] Ruiters C and Matji1 MP 'Public-private partnership conceptual framework and models for the funding and financing of water services infrastructure in municipalities from selected provinces in South Africa'(2016) 42 *African Journals Online* 295.
[635] OECD: Public-Private Partnerships available at https://www.oecd.org/gov/infrastructure-governance/public-private-partnerships/ (accessed 8 July 2023).

promote sustainable development, and improve the delivery of services and infrastructure for the advancement of society, as well as by leveraging private sector investments.

4.3 Challenges Encountered in Implementing PPPs

Although PPPs are regarded as one of the key effective tools in the development of many countries, some challenges and gaps are a threat to the successful implementation of PPPs. PPPs are faced with several challenges when it comes to their execution to deliver services in South Africa and around the world, including legal and regulatory issues, a lack of public input, a lack of transparency, political interference, a financial crisis, and ineffective risk allocation.

4.3.1 Legal and Regulatory Challenges

PPPs are contractual agreements in which the public sector and private sector partners work together to provide infrastructure and public services.[636] For these agreements to be legally enforceable, they must be in accordance and comply with the Constitutional values and the country's PPP laws.[637] While PPPs have been implemented in South Africa with varying levels of success, the legal system that regulates these partnerships faces crucial legal challenges.[638] According to South African PPP rules, the institution financing the project must register the project with the appropriate treasury during the project's conceptualization stage to select a project officer and a transaction advisor.[639] However, the rules do not address the importance of public collaboration.[640] It is possible to disregard the concerns and opinions of the impacted communities and the general public if public engagement is not expressly specified in the PPP rules.[641] Due to the general public's exclusion from voicing their thoughts about these initiatives, whose primary goal is to improve their quality of living, this omission raises doubt on the project's accuracy and results in questioning how the laws governing PPPs were

[636] Delmon J *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (2011) ch 1.
[637] Delmon J *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (2011) ch 1.
[638] Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 *University of Maiduguri Journal of Public Law* 24.
[639] National Treasury Public Private Partnership Practice Note Number 02 (2004) available at *https://www.gtac.gov.za/wp-content/uploads/2022/03/GTACs-Public-Private-Partnership-Manual* (accessed 24 June 2023).
[640] National Treasury Public Private Partnership Practice Note Number 02 (2004) available at *https://www.gtac.gov.za/wp-content/uploads/2022/03/GTACs-Public-Private-Partnership-Manual* (accessed 24 June 2023).
[641] Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 *University of Maiduguri Journal of Public Law* 107.

drafted.[642] Regardless of how successful a project may be, the ethics and constitutionality of the contracting and project execution methods can be criticized.

The Black Economic Empowerment Code's PPP provisions place a heavy burden on investors and PPP project promoters.[643] Making potential investors and corporations accountable for addressing inequality issues might deter foreign investment and promote corruption.[644] Companies that have the expertise and resources to develop and complete perfect projects may struggle to meet the BEE requirements, which could result in them losing out to less qualified sponsors who may only appear to be compliant with BEE.[645] The government must address inequality issues without obstructing legitimate private-sector activities. It is necessary to ensure an effective and productive operation for enterprises in the private sector.[646] To address inequality, the government must implement measures that promote diversity and equal opportunity without compromising the ability of businesses to operate.[647] Striking a balance between addressing socioeconomic inequalities and supporting an environment that promotes entrepreneurship, investment, and innovation within the private sector is essential.[648] PPPs entail complex agreements, thus all efforts to make the process simpler should be commended and encouraged.

4.3.2 Lack of public consultation

The call for fairness in service delivery and procurement is impacted by the reality that accountability in South Africa remains a major obstacle to PPP implementation. PPPs constitute significant long-term societal investment projects with the primary objective of

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642 Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 the *University of Maiduguri Journal of Public Law* 107.

643 National Treasury Public Private Partnership Practice Note Number 03 (2004) 5 available at https://www.gtac.gov.za/wp-content/uploads/2022/03/GTACs-Public-Private-Partnership-Manual-Module-2-Code-of-Good-Practice-for-BEE-In-PPPs (accessed 24 June 2023).

644 National Treasury Public Private Partnership Practice Note Number 03 (2004) 5 available at https://www.gtac.gov.za/wp-content/uploads/2022/03/GTACs-Public-Private-Partnership-Manual-Module-2-Code-of-Good-Practice-for-BEE-In-PPPs (accessed 24 June 2023).

645 Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 *University of Maiduguri Journal of Public Law* 108.

646 Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 *University of Maiduguri Journal of Public Law* 108.

647 Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 the *University of Maiduguri Journal of Public Law* 108.

648 Arimoro AE 'Legal Framework For Public-Private Partnership: South Africa And Nigeria In Focus' (2018) 5 *University of Maiduguri Journal of Public Law* 109.

ensuring improved service quality for the general public.[649] They combine the knowledge, innovation, and resources of the private sector with the regulatory oversight and social objectives of the public sector to deliver higher-quality services across sectors, including healthcare, education, transportation, water supply, and sanitation.[650] This results in the delivery of services that meet higher standards, more effectively meet citizen needs, and offer a better overall experience for users.[651] Despite this socioeconomic impact, PPP's inclusion of the general public is excluded from the decision-making process.[652] Concerns over financial confidentiality, intellectual property rights, and database protection frequently serve as justifications for partnership confidentiality, resulting in private agreements between public and private sectors with little involvement from the general public.[653] To start a project in South Africa, the institution must register the project with the appropriate Treasury, appoint a project officer and a transaction advisor, solicit bids from potential transaction advisors, evaluate the results of those bids, and then finalize and sign the contract with the transaction advisor.[654] The South African PPP Manual makes a distinction between two different types of PPPs, (i) those in which a private party provides a service typically handled by the government, like providing water or maintaining a road (ii) those in which a private party obtains the right to use public property for its commercial purposes; and those that combine both of them.[655] The negotiations are between the private sector and the government.[656] Payment options include the private party receiving fees or charges from users of the service, the institution paying the private party for providing the service, or a combination of the two.[657] The lack of public participation during the initial phases of PPP projects, which are vital and have a significant impact on improving the standard of living for South African citizens, is evident in all of these processes.[658]

[649] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) 7 *African Journal of Business Ethics* 13.
[650] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) 7 *African Journal of Business Ethics* 13.
[651] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) 7 *African Journal of Business Ethics* 13.
[652] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) 7 *African Journal of Business Ethics* 15.
[653] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) 7 *African Journal of Business Ethics* 15.
[654] South African National Treasury-Public-Private Partnership Manual Module 1 (2004).
[655] South African National Treasury-Public-Private Partnership Manual Module 1 (2004) 4-5.
[656] South African National Treasury-Public-Private Partnership Manual Module 1 (2004) 4-5.
[657] South African National Treasury-Public-Private Partnership Manual Module 1 (2004) 4-5.
[658] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) 7 *African Journal of Business Ethics* 15.

Publication of information can increase awareness of PPPs in the community, but the interactive active participation of the general public is crucial and very essential for guaranteeing that projects reflect the interests of the citizens, a component that is crucial to the PPPs' achievement of long-term success.[659] When there is insufficient public participation in the decision-making process, there is inadequate communication with the broader public, which causes citizens to oppose PPPs.[660] As a result, the general public may consequently lose faith in the government and its collaborations with the private sector.[661] The likelihood that some groups, such as marginalized groups, won't have a say during the conception and implementation of PPPs, which contribute to social inequities and exclusion, will raise concerns about the fairness and integrity of PPP efforts.[662] Existing gaps in access to services and infrastructure may be made worse.[663] This violates the fundamental right to equality[664] enshrined in the Constitution, which prohibits discrimination based on race, gender, and religion.[665] Since PPP projects will directly affect the citizens' standard of living, public participation is essential for ensuring that the citizen's concerns are adequately taken into consideration in decision-making processes.[666] It also ensures equal opportunities for all individuals and groups and gives them the chance to clearly express their opinions.

4.3.3 A lack of transparency

The concept of transparency in PPPs refers to the principle and practice of making information and procedures open, understandable, and accountable to the pertinent parties involved.[667] This includes information relating to the objectives of the project, the funding budgets, the terms of the contract, performance measures, and risk factors.[668] To ensure that everyone is informed of the PPP project to be implemented, access to the stakeholders, including the public and private

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[659] Boyer E 'How does public participation affect perceptions of Public–Private Partnerships? A citizens' view on push, pull, and network approaches in PPPs' (2018) 21 *Public Management Review* 1.
[660] Song D, Sun Y, and Fan Y 'An Evolutionary Game Model on Public Participation in Public-Private Partnerships' 2020 *Hindawi* 2.
[661] Song D, Sun Y, and Fan Y 'An Evolutionary Game Model on Public Participation in Public-Private Partnerships' 2020 *Hindawi* 2.
[662] Song D, Sun Y, and Fan Y 'An Evolutionary Game Model on Public Participation in Public-Private Partnerships' 2020 *Hindawi* 3.
[663] Song D, Sun Y, and Fan Y 'An Evolutionary Game Model on Public Participation in Public-Private Partnerships' 2020 *Hindawi* 3.
[664] Section 9 of the Constitution of the Republic of South Africa 1996.
[665] Section 9 of the Constitution of the Republic of South Africa 1996.
[666] Song D, Sun Y, and Fan Y 'An Evolutionary Game Model on Public Participation in Public-Private Partnerships' 2020 *Hindawi* 2.
[667] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) *41 Journal of Southern African Studies* 1205.
[668] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) *41 Journal of Southern African Studies* 1205.

sector and the general public, should be easily accessible.[669] The transparent governance of PPPs fosters greater public confidence in both the public and private sectors. When stakeholders are informed on the intricacies of a project, the financing information, the contractual terms, and the performance measures, they are more likely to have confidence that the project is being carried out fairly and appropriately.[670] The confidence gained from this is crucial for the ongoing support and acceptance of PPP projects by the general public.[671]

In South Africa, the right to information[672] serves as the fundamental principle of democracy. The right to information serves as a pillar for accountability and transparency.[673] Knowledge improves people's capacity to assert and defend their rights, which builds communities. Since it is one of the pillars of democracy, access to information is crucial.[674] To assure the accomplishment of the constitutional right to information access and to foster a culture of transparency and accountability among both public and private organizations, the Promotion of Access to Information Act (PAIA) was enacted.[675] PAIA is essential to hold the government responsible for all the actions it takes on behalf of the general public. Providing easy access to accurate information promotes transparency.[676]

The South African PPP unit's online PPP information disclosure through the PPP Quarterly is insufficient and inconsistent.[677] There is a noticeable lack of current information since the latest report was released in December 2010.[678] The content of the report is constrained and falls short of offering thorough information. The data that is disclosed is limited to the project's name, the government organization in charge of carrying it out, the PPP type, contract duration, date of financial closure, private partner(s), financing arrangements, transaction government advisors, project value, the capital value of signed contracts, procurement process, and

[669] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) *41 Journal of Southern African Studies* 1205.
[670] The Public Service Commission Report *Assessment on Implementation of the Promotion of Access to Information Act in Public Service* (2007) 2.
[671] The Public Service Commission Report *Assessment on Implementation of the Promotion of Access to Information Act in Public Service* (2007) 2.
[672] Section 32(1) of the Constitution of the Republic of South Africa, 1996.
[673] The Public Service Commission Report *Assessment on Implementation of the Promotion of Access to Information Act in Public Service* (2007) 3.
[674] The Public Service Commission Report *Assessment on Implementation of the Promotion of Access to Information Act in Public Service* (2007) 3.
[675] The Promotion of Access to Information Act 2 of 2000.
[676] Section 9 of the Promotion of Access to Information Act 2 of 2000.
[677] National Treasury *Public-private Partnership Unit* 2009.
[678] National Treasury *Public-private Partnership Unit* 2009.

government benefits.[679] This restricted disclosure raises questions regarding the accountability and transparency of PPP projects in South Africa.[680]

There were several challenges with Gautrain's transparency, including its failure to disclose the project's information, inadequate budgetary data, allegations of corruption, and a lack of clear bidding criteria.[681] As a result of "commercial confidence," discussions between the public and private parties took place behind closed doors.[682] Government and commercial agency contracts also had clauses ensuring the secrecy of partnerships. That confidentiality makes it difficult to convey information suitably.[683] Budgetary data for the Gautrain PPP project has been criticized for being insufficient, unreliable, and misleading because reliable data was not provided.[684] The government's disclosure of the cost projections for the Gautrain Rapid Rail Link serves as a crystal-clear demonstration of this.[685] From the initial US$300 billion projection, the cost estimate increased to US$2 billion in 2011.[686] The project's budgeting data's accuracy and dependability were called into question by this huge cost increase. According to the leader of South Africa's opposition Democratic Alliance (DA), the Gautrain contract should be made public to disclose the specific annual subsidy costs for the province. The goal was to evaluate South Africa's transport options.[687]

The DA leader stated that the government had suffered significant financial losses as a result of insufficient secrecy and poor preparation.[688] It was more challenging to make informed choices and determine the project's profitability due to the lack of transparency on the project's accurate expenses.[689] Concerns regarding the fairness and integrity of the procurement process

[679] National Treasury *Public-private Partnership Unit* 2009.
[680] Fombad MC 'Accountability challenges in Public–Private Partnerships from a South African perspective'(2013) *7 African Journal of Business Ethics* 15.
[681] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1204.
[682] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1204.
[683] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1204.
[684] Flanagan L 'Democratic Alliance Fight for Transparency in Gautrain's Costs' *The Star* 22 June 2011.
[685] N Campbell, 'Gautrain Contract Must Be Made Public- DA' available at https://www.politicsweb.co.za/politics/gautrain-contract-must-be-made-public--da (accessed 22 June 2023).
[686] N Campbell, 'Gautrain Contract Must Be Made Public- DA' available at https://www.politicsweb.co.za/politics/gautrain-contract-must-be-made-public--da (accessed 22 June 2023).
[687] N Campbell, 'Gautrain Contract Must Be Made Public- DA' available at https://www.politicsweb.co.za/politics/gautrain-contract-must-be-made-public--da (accessed 22 June 2023).
[688] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1206.
[689] Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1206.

are further heightened by the PPP document's lack of specific guidelines for the evaluation of proposals, the choice of contracts, and bid ranking.[690] In the absence of clearly defined restrictions, the Bombeia and Gauliwe consortia based their ideas exclusively on information about the rail network and train stock, as well as how they would manage the mitigation strategies suggested in the Environmental Impact Assessment (EIA) report.[691]

Every citizen of a country should have access to information because it gives them the ability to safeguard and defend their human rights and keeps them secure from corruption, mismanagement, and abuse of power.[692] To evaluate the viability and impact of PPP projects, stakeholders including investors, civil society organizations, and the general public require more thorough and consistent data.[693] The lack of frequent updates in the quarterly report is a major challenge because it makes it challenging for stakeholders to obtain up-to-date information and monitor continuing project development and performance.[694] Investors and financiers considering investing in PPP projects find it challenging to conduct thorough due diligence because of inadequate information.

4.3.4 Political Interference

In PPP projects, political interference greatly reduces the influence of the private sector. The private sector's ability to successfully contribute is hampered by this interference, which also limits its decision-making capacity and ability to influence project outcomes.[695] The collaborative nature of PPPs is threatened as a result of the imbalance, which also affects the balance of power between the public and private sectors.[696] This imbalance weakens the partnership and makes it challenging for the private sector to utilize its assets and expertise to the fullest.[697] The likelihood that a PPP project will produce effective outcomes is greatly reduced in the absence of adequate private-sector participation and an impartial decision-

690 Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1206.
691 Fombad CM 'Governance in Public-Private Partnerships in South Africa: Some Lessons from the Gautrain' (2015) 41 *Journal of Southern African Studies* 1207.
692 The Promotion of Access to Information Act 2 of 2000.
693 Bovens M 'Analyzing and assessing accountability: A conceptual framework' (2007) 13 *European Journal of Law* 450.
694 Bovens M 'Analyzing and assessing accountability: A conceptual framework' (2007) 13 *European Journal of Law* 450.
695 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 22.
696 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 22.
697 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 22.

making process.[698] The shortcomings that come from this will hinder the progress of the project, increase costs, and risk the success of the project as a whole.[699]

Political interference results in the hiring of workers who may lack the expertise and qualifications that are required for the project's effective completion.[700] This happens when merit-based hiring decisions take precedence over political considerations.[701] The selection of a candidate can be influenced by politics, which will result in an unequal placement of opportunities that can lead to discrimination and socioeconomic disparity.[702] Political intervention causes PPP projects to face major challenges, diminishing their potential to improve citizens' quality of life and enhance the economy of the country.[703] As a result, they are incapable of carrying out their duties and are poorly managed. Influence or persuasion may be used to weaken the impartiality of public officials and interfere with decision-making.[704] This ineffective leadership impedes the transparency and accountability required for a successful PPP implementation, losing public confidence and leading to investment losses.[705] Interference in politics frequently serves to increase nepotism, corruption, and favoritism.[706] As a result, it becomes increasingly challenging to select the most qualified private partners and compromises the integrity of the procurement process.[707] In light of this, projects may be assigned to individuals or groups with political power even if they may not be capable of finishing them. This degrade service standards and negatively impact the broader public.[708]

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698 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 22.
699 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 23.
700 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 23.
701 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 23.
702 Seeletse SM 'Performance of South African private-public partnership' (2016) 14 *Problems and Perspectives in Management* 23.
703 The Impact of Political Interference in Public Administration in Kihaba Town Council available at *https://eajournals.org/gjpsa/vol-6-issue-4-september-2018/the-impact-of-political-interference-in-public-administration-in-kibaha-town-council/* (accessed 23 June 2023).
704 The Impact of Political Interference in Public Administration in Kihaba Town Council available at *https://eajournals.org/gjpsa/vol-6-issue-4-september-2018/the-impact-of-political-interference-in-public-administration-in-kibaha-town-council/* (accessed 23 June 2023).
705 The Impact of Political Interference in Public Administration in Kihaba Town Council available at *https://eajournals.org/gjpsa/vol-6-issue-4-september-2018/the-impact-of-political-interference-in-public-administration-in-kibaha-town-council/* (accessed 23 June 2023).
706 Mngomezulu S 'Political Interference in the Administration of Service Delivery in Umlalazi Local Municipality of KwaZulu-Natal, South Africa' (2020) 12 *Journal of Economics and Behavioral Studies* 38.
707 Mngomezulu S 'Political Interference in the Administration of Service Delivery in Umlalazi Local Municipality of KwaZulu-Natal, South Africa' (2020) 12 *Journal of Economics and Behavioral Studies* 39.
708 Mngomezulu S 'Political Interference in the Administration of Service Delivery in Umlalazi Local Municipality of KwaZulu-Natal, South Africa' (2020) 12 *Journal of Economics and Behavioral Studies* 39.

4.3.5 Financial Crisis

A financial crisis is a significant disruption or instability in the financial system that negatively affects the operation and viability of PPPs, such as high transaction costs and fluctuating interest rates that cause a major economic downturn, market volatility, and restricted credit availability.[709] In South Africa, there has been a decrease in new PPPs, with estimated values declining from roughly R10.7 billion in 2011–12 to R5.6 billion in 2019–20.[710] This decline can be attributed, at least in part, to the perception that PPP projects entail transaction high costs.[711]

Transaction costs include planning, negotiation, and implementation fees for PPP contracts as well as administrative and due diligence costs.[712] The provision of public infrastructure and services will neither be practical nor feasible due to PPP projects' high transaction costs. When transaction costs are high, PPPs' potential for cost-effectiveness would be hindered, which lowers the anticipated financial benefits and the projects' ability to be sustainably profitable.[713] Due to the high transaction costs, private partners find it challenging to make informed decisions. The complex bureaucratic system makes it challenging for the private sector to participate part in PPPs.[714] The uncertainty surrounding contract completion and the risk of higher expenses deter long-term investment commitments.[715] The transaction process' complexity and cost also operate as a barrier regarding the bidding process, particularly for small and medium enterprises (SMEs) and other smaller private firms.[716] The limitation on competition has the effect of narrowing the pool of potential private partners, which could limit economic benefits, negatively impact innovation, and even increase costs for the public sector.[717]

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709 International Monetary Fund *The Effects of the Financial Crisis on Public-Private Partnerships* (2009) 9.
710 National Treasury's Public-Private Partnership Manual- Annexure E (2021) 167.
711 National Treasury's Public-Private Partnership Manual- Annexure E (2021) 167.
712 Ping Ho S and Chun-Wei Tsui 'The Transaction Costs of Public-Private Partnerships: Implications of PPP Governance Design' 2009 *National Taiwan University* 2.
713 Ping Ho S and Chun-Wei Tsui 'The Transaction Costs of Public-Private Partnerships: Implications of PPP Governance Design' 2009 *National Taiwan University* 2.
714 Ping Ho S and Chun-Wei Tsui 'The Transaction Costs of Public-Private Partnerships: Implications of PPP Governance Design' 2009 *National Taiwan University* 2.
715 Ping Ho S and Chun-Wei Tsui 'The Transaction Costs of Public-Private Partnerships: Implications of PPP Governance Design' 2009 *National Taiwan University* 3.
716 Ping Ho S and Chun-Wei Tsui 'The Transaction Costs of Public-Private Partnerships: Implications of PPP Governance Design' 2009 *National Taiwan University* 3.
717 Ping Ho S and Chun-Wei Tsui 'The Transaction Costs of Public-Private Partnerships: Implications of PPP Governance Design' 2009 *National Taiwan University* 3.

According to an analysis of PPPs by Dudkin & Valila[718] the costs associated with the procurement phase of PPPs alone tends to amount to considerably over 10% of the capital value of the project, which has the potential to reduce the cost savings achieved by PPPs.[719] However, additional major transaction costs that are challenging to identify and determine, like those brought on by delays and renegotiations, could significantly reduce the anticipated benefits of PPPs.[720] Consequently, reducing these hidden costs to a sustainable level is a major challenge in PPP governance design.

The execution of PPP projects can be greatly impacted due to rising tax rates.[721] Fluctuating interest rates may lead to increased debt service commitments, which will increase project costs and raise the likelihood of liquidity issues.[722] Furthermore, lower-than-expected profits on some projects could pose doubts about their feasibility, resulting in severe delays or even project cancellations. [723]Investment timing may also be impacted by a trade-off between pursuing PPPs and choosing more conventional concessions.[724] The analysis demonstrates that fluctuating interest rates can seriously impede the implementation of PPPs. This will lead to higher transaction costs and delays in payments. The overall feasibility and financing of projects will be affected.

4.3.6 Ineffective risk allocation

One of the primary motivations behind the adoption of PPPs is the ability to share risk.[725] Some of the organizational and technical problems that PPP project partners encounter include unclear risk and responsibility-sharing agreements, inadequate dispute resolution processes, disagreements over appropriate risk allocation, and a lack of agreement on how to handle significant failure and revenue risks.[726] Failure to implement accurate risk assessment

[718] Dudkin G and Valila T 'Transaction Costs in Public-Private Partnerships' (2006) 7 *Competition and Regulation in Network Industries* 306.
[719] Dudkin G and Valila T 'Transaction Costs in Public-Private Partnerships' (2006) 7 *Competition and Regulation in Network Industries* 306.
[720] Dudkin G and Valila T 'Transaction Costs in Public-Private Partnerships' (2006) 7 *Competition and Regulation in Network Industries* 306.
[721] International Monetary Fund *The Effects of the Financial Crisis on Public-Private Partnerships* (2009) 10.
[722] International Monetary Fund *The Effects of the Financial Crisis on Public-Private Partnerships* (2009) 10.
[723] International Monetary Fund *The Effects of the Financial Crisis on Public-Private Partnerships* (2009) 10.
[724] International Monetary Fund *The Effects of the Financial Crisis on Public-Private Partnerships* (2009) 10.
[725] Batjargal T and Zhang M 'Review of key challenges in public-private partnership implementation' (2021) 5 *Journal of Infrastructure, Policy and Development* 1381.
[726] Batjargal T and Zhang M 'Review of key challenges in public-private partnership implementation' (2021) 5 *Journal of Infrastructure, Policy and Development* 1381.

procedures results in inaccurate assessments and unequal partnership distribution.[727] The possibility of a financial and economic disaster is one such instance.[728]

Risks that can be controlled are referred to as internal risks.[729] In the context of finance and economics, internal risks are often associated with factors such as market behaviour, investor actions, or the interaction of various financial players within the system.[730] However not all risks can be controlled, and there can be circumstances in which one or more contracting parties are unable to control a risk.[731] The risk of uninsurable force majeure, which affects all parties, is unpredictable to those parties, whereas the risks of politics and taxes are intrinsic to the government and predictable to the private party.[732]

In South Africa, a large number of PPP projects rely on user fees and unitary payments for services rendered by the private sector.[733] The government's restrictions put in place to control the unforeseen COVID-19 outbreak were extremely detrimental to PPPs.[734] The COVID-19 pandemic had a significant impact on the global transportation industry.[735] The South African government restricted movement as one of its measures to curb the coronavirus's spread. This took the form of travel restrictions, such as the closing of borders, airline suspensions, and quarantine procedures for people entering the country, to restrict the spread of new cases from high-risk countries and prevent the cross-border transmission of the virus.[736] These restrictions caused a lockdown and work-from-home employment. The fear that the virus will spread in crowded settings caused people to travel less and when necessary.[737]

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[727] Batjargal T and Zhang M 'Review of key challenges in public-private partnership implementation' (2021) 5 *Journal of Infrastructure, Policy and Development* 1382.
[728] Batjargal T and Zhang M 'Review of key challenges in public-private partnership implementation' (2021) 5 *Journal of Infrastructure, Policy and Development* 1382.
[729] The Organisation for Economic Co-operation and Development *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships* (2012) 20.
[730] The Organisation for Economic Co-operation and Development *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships* (2012) 20.
[731] The Organisation for Economic Co-operation and Development *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships* (2012) 20.
[732] The Organisation for Economic Co-operation and Development *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships* (2012) 20.
[733] Nugent D *Public-Private Partnerships As A Delivery Option For Public Schools In The Western Cape* (unpublished Master of Public Administration thesis, Stellenbosch University, 2020) 89.
[734] Nugent D *Public-Private Partnerships As A Delivery Option For Public Schools In The Western Cape* (unpublished Master of Public Administration thesis, Stellenbosch University, 2020) 89.
[735] South Africa To Impose 21-Day Lockdown As Coronavirus Cases Jump available at https://www.reuters.com/article/us-health-coronavirus-safrica-idUSKBN21A1SZ Accessed 25 June 2023.
[736] South Africa To Impose 21-Day Lockdown As Coronavirus Cases Jump https://www.reuters.com/article/us-health-coronavirus-safrica-idUSKBN21A1SZ (accessed 25 June 2023).
[737] South Africa To Impose 21-Day Lockdown As Coronavirus Cases Jump available at https://www.reuters.com/article/us-health-coronavirus-safrica-idUSKBN21A1SZ (accessed 25 June 2023).

The expected rise in passengers and profitability, particularly in the transportation and tourism industries, sharply decreased.[738] The decrease in passenger numbers resulted in reduced service, frequency, and financial strain on the transportation industry.[739] For example, the construction and operation of Chapman's Peak Drive which is a significant PPP project in South Africa is prominent since it was one of the first PPPs that a provincial government negotiated under the Public Finance Management Act of 1999.[740] The Western Cape Department of Roads and Transport, which was responsible for guaranteeing the private sector's debt repayment, had to pay the private sector around R13.6 million more than was planned for 2021 and R14 million more than was planned for 2020[741], as decreased traffic values had an impact on revenue collection. The department also predicts that because of decreased traffic, it would have to pay an additional R14 million.[742] Traffic levels and revenue were impacted by a decline in international tourism and an increase in remote work. The provincial government initially anticipated receiving income from this route once debts are paid o

ff in full by 2023.[743] Payment deadlines will be extended, nonetheless, as a result of decreased traffic and the recovery process following the Covid-19 Pandemic.[744] This has brought to light the need for the National Treasury to properly comprehend and manage fiscal risks in publicly financed projects with external funding.

4.4 **Exploring Best Practices and the way forward**

The adoption and application of best practices are essential in the dynamic and always-evolving world of PPPs because these recommendations focus on institutional and procedural characteristics that enable the pursuit of value for money, efficiency, effectiveness, and transparency.[745] They address specific aspects of the governance framework. With the increasing popularity of PPPs, adopting these best practices is becoming more and more crucial

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[738] Nugent D *Public-Private Partnerships As A Delivery Option For Public Schools In The Western Cape* (unpublished Masters of Public Administration thesis, Stellenbosch University, 2020) 89.
[739] Nugent D *Public-Private Partnerships As A Delivery Option For Public Schools In The Western Cape* (unpublished Masters of Public Administration thesis, Stellenbosch University, 2020) 89.
[740] Nugent D *Public-Private Partnerships As A Delivery Option For Public Schools In The Western Cape* (unpublished Masters of Public Administration thesis, Stellenbosch University, 2020) 89.
[741] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 159.
[742] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 159.
[743] National Treasury's Public-Private Partnership Manual- Annexure E (2021) 159.
[744] National Treasury's Public-Private Partnership Manual- Annexure E (2021)
[745] World Bank 'Lessons Learned and Best Practices in Public-Private Partnership Projects' available at https://ppp.worldbank.org/public-private-partnership/library/lessons-learned-and-best-practices-public-private-partnership-projects (accessed 11 July 2023).

for organizations in the public and private sectors.[746] The proposed guidelines and recommendations aim to provide policymakers with a strong framework for implementing PPPs. By following these recommendations, policymakers may create a robust framework for their PPP initiatives, ensuring the best outcomes and fostering a culture of accountability and public confidence.[747] These guidelines are a valuable aid in promoting the appropriate and successful implementation of PPPs, which will ultimately lead to greater service provision and resource utilization.

The Organisation for Economic Co-operation and Development (OECD) has a distinct advantage in that it can assist its member countries in overcoming the challenges associated with effectively and efficiently delivering public services through PPPs.[748] By drawing on the combined knowledge and experience of its member countries, the OECD develops comprehensive regulations for the institutional and procedural aspects of PPPs.[749] These guidelines are a valuable source for maximizing PPP benefits while retaining financial sustainability for both OECD members and non-member countries.[750] Through this collaborative effort, the OECD establishes an environment that is valuable for the adoption of PPPs and paves the way for better public service delivery.

4.4.1 Establish a transparent, consistent, and effectively regulated legal framework to govern PPPs.

It is essential to establish a transparent, accessible, and predictable legal framework for PPP projects to promote investment and foster a competitive market.[751] This entails making sure that information is accessible to everyone and that equity is upheld in the decision-making process.[752] Transparent legal frameworks also serve as a layer of protection, minimizing risks

[746] World Bank 'Lessons Learned and Best Practices in Public-Private Partnership Projects' available at https://ppp.worldbank.org/public-private-partnership/library/lessons-learned-and-best-practices-public-private-partnership-projects (accessed 11 July 2023).
[747] World Bank 'Lessons Learned and Best Practices in Public-Private Partnership Projects' available at https://ppp.worldbank.org/public-private-partnership/library/lessons-learned-and-best-practices-public-private-partnership-projects (accessed 11 July 2023).
[748] Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 2.
[749] Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 2.
[750] Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 2.
[751] Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 9.
[752] Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 9.

of conflicts of interest, regulatory capture, corruption, and unethical behaviour.[753] By prioritizing these elements an atmosphere that encourages investment, promotes fair competition, and supports ethical standards in the PPP industry is created.[754]

The government should actively encourage and expedite investment by eliminating unnecessary administrative obstacles and minimizing delays in approval processes.[755] To accomplish this, coordinated efforts in particular circumstances are required to eliminate the legislative impediments that prevent PPPs from being successfully implemented.[756] This coordination comprises simplifying and harmonizing approval procedures that may be affected by numerous layers of legislation, either within the same level of government or across separate levels of government.[757] The government can help create a favourable atmosphere for PPPs, assuring a smooth implementation process, lowering administrative burdens, and speeding up the delivery of crucial infrastructure projects, by encouraging better coordination and streamlining.[758] Such proactive actions allow investors to engage with confidence, promote economic expansion, and improve the delivery of services by the government.

The legal framework for PPPs in South Africa is likely to be effective when a balanced approach is established between the interests of investors, who are represented by the private partner, and end-users, who are represented by the public partner. Even though maintaining this equilibrium may be challenging, it is strongly advised that all parties involved in PPP projects go above and beyond to ensure the success of each attempt while maintaining this balance.

4.4.2 Ensure that the government has the fundamental institutional responsibilities and capabilities it needs.

The planning and execution of a PPP project, which involves multiple agencies, stakeholders, and cross-functional teams, is a challenging and complex process that requires the

753 Inter-American Development Bank, 'Public-Private Partnerships to Promote Transparency available at https://publications.iadb.org/en/public-private-partnerships-promote-transparency (accessed 09 July 2023).
754 Inter-American Development Bank, 'Public-Private Partnerships to Promote Transparency available at https://publications.iadb.org/en/public-private-partnerships-promote-transparency (accessed 09 July 2023).
755 Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 9.
756 Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 9.
757 Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 9.
758 Organisation for Economic Co-operation and Development -From Lessons to Principles for the use of Public-Private Partnerships (2011) 9.

establishment of an appropriate governance structure.[759] To successfully implement PPP projects, planning for PPPs and other substantial infrastructure projects requires a variety of interconnected workstreams.[760] However, there is a tendency for different workstreams to work independently which hinders productivity.[761] It is recommended an environment where each coordinator and management is held accountable for all actions taken should be created.[762] Holding management accountable encourages a higher level of commitment, encouraging individuals to take responsibility for their actions and strive for excellence in their work.[763] Working efficiently fosters a collaborative environment, which leads to improved outcomes for the project.[764] Promoting accountability results in a collaborative environment that has a favourable impact on project outcomes.[765] There will be less confusion, which will swiftly improve decision-making, when the roles and responsibilities of each department have been precisely defined, involving all stakeholders, and clarifying their unique obligations under the governance structure.[766]

The government must proactively implement measures through efficient project management to promote productive collaboration.[767] The establishment of a Project Management Office (PMO) with responsibility for organizing, managing, and overseeing the PPP preparatory process is recommended. The PMO ought to advance the entire planning process with an authoritative and attentive approach.[768] Consistent communication with government officials, prominent experts, and all relevant stakeholders is crucial to secure unwavering support for PPP projects throughout their execution.[769] Engaging in consistent and frequent

[759] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 23.
[760] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 23.
[761] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 23.
[762] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 23.
[763] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 24.
[764] World Bank *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12* (2015) ch 2.
[765] World Bank *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12* (2015) ch 2.
[766] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 24.
[767] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 24.
[768] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 24.
[769] World Economic Forum - Strategic Infrastructure Steps to Prepare and Accelerate Public-Private Partnerships (2013) 24.

communication fosters collaboration assures alignment of goals, and maintains a strong network of support for the successful implementation of the project.[770] Collaboration is facilitated and the sharing of knowledge, ideas, and expertise is made possible through fostering effective communication between teams and the governing board.[771] This alignment of project goals with stakeholders' priorities ensures their enduring commitment.[772] The mutual understanding guarantees that everyone is working towards the same goals, strengthening coordination, minimizing miscommunications, and improving project productivity throughout.[773] Moreover, excellent collaboration and communication create an environment where emerging risks and challenges can be immediately detected and effectively managed.

PPP projects' major strategic objectives must be established and aligned to provide a clear direction.[774] Choosing the right metrics for assessing the project's success is essential for determining feasibility and satisfying stakeholder interests, including those of the general public.[775] Stakeholders should continually assess how the project is progressing in comparison to the original plan, making sure that best practices and pertinent PPP standards are being followed.[776] This evaluation procedure highlights areas that need development and keeps the project on track, ultimately producing the best results for all parties involved.[777]

To carry out a thorough feasibility analysis, it is highly recommended to employ a sequential strategy with gateway reviews and a consistent approach that is relevant to all projects.[778] This approach guarantees an in-depth assessment of all relevant information before taking action.[779] Additionally, defining the key deliverables and deadlines for the entire feasibility study creates

[770] World Bank *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12* (2015) ch 2.
[771] World Bank *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12* (2015) ch 2.
[772] World Bank *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12* (2015) ch 2.
[773] World Bank *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12* (2015) ch 2.
[774] Elyse Maltin What Successful Public-Private Partnerships Do available at *https://hbr.org/2019/01/what-successful-public-private-partnerships-do* (accessed 11 July 2023).
[775] Elyse Maltin What Successful Public-Private Partnerships Do available at *https://hbr.org/2019/01/what-successful-public-private-partnerships-do* (accessed 11 July 2023).
[776] Elyse Maltin, What Successful Public-Private Partnerships Do available at *https://hbr.org/2019/01/what-successful-public-private-partnerships-do* (accessed 11 July 2023).
[777] Elyse Maltin What Successful Public-Private Partnerships Do available at *https://hbr.org/2019/01/what-successful-public-private-partnerships-do* (accessed 11 July 2023).
[778] South African Institute of International Affairs - Best Practices on PPP Infrastructure Development in SADC Countries (2020) 104-105.
[779] South African Institute of International Affairs - Best Practices on PPP Infrastructure Development in SADC Countries (2020) 104-105.

clarity and creates a clear project plan.[780] Effective project management is facilitated by setting realistic milestones and deadlines. It also makes it easy to compare projects and makes the process of making informed decisions better by utilizing uniform benchmarks and criteria.[781]

4.4.3 Putting people first

PPP processes must prioritize the welfare of individuals by strengthening accountability and transparency in projects, particularly benefiting those who are socially and economically disadvantaged.[782] The original goal of PPPs was to reduce the financial strain on the government, ensure that it satisfies public demands, as well as improve service delivery.[783] However, because the public is deprived of the opportunity by not being engaged in the implementation of PPP projects, they are denied the chance to express their wants and needs, and as a result, this goal fails to gain support from the public.[784] Concerns have been expressed regarding the potential loss of government control over essential services like health, water, and education when PPPs are employed.[785] As a result of this loss of authority, concerns about accountability, transparency, and the government's ability to appropriately address the demands of every citizen arise.[786] Problems may also arise over the likelihood of increasing expenses, deteriorating service quality, and a lack of direct public supervision in the provision of these essential services under PPP contracts which leads to a lack of public support and delays in the implementation of PPP projects.[787]

Governments should prioritize the needs of the people in policy discussions to provide an inclusive and transparent procedure that reduces doubts and addresses challenges.[788] It is possible to identify and address the end user's ambitions, requirements, and concerns within

[780] South African Institute of International Affairs - Best Practices on PPP Infrastructure Development in SADC Countries (2020) 104-105.
[781] South African Institute of International Affairs - Best Practices on PPP Infrastructure Development in SADC Countries (2020) 104-105.
[782] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 59.
[783] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 59.
[784] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 59.
[785] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 59.
[786] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 59.
[787] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 60.
[788] United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 60.

the PPP framework by including service providers and end users.[789] Given that PPPs are frequently viewed as another type of privatization, consultation processes must provide thorough information regarding PPPs to clarify misconceptions and biases.[790] Increasingly, both public and private providers should take people's preferences and needs into account.[791] By providing more options, governments can encourage service providers to improve performance and service quality because funds will be allocated by beneficiary demands.[792] This strategy will motivate service providers to place a higher priority on customer care and participate in consultations to improve

4.4.4 Ensure that the PPP projects are economically viable and subjected to transparent handling within the budgetary procedure.

The affordability of an investment project is determined by determining if it fits within the government's current budgetary and revenue parameters while taking into account both immediate expenses and potential future liabilities.[793] Furthermore, it must be credibly projected that current levels would remain stable in the future.[794] For governments, the budget is the most important policy document because it provides the foundation for translating policy objectives into practical actions.[795] Budget transparency requires thorough, timely, and organized disclosure of all relevant financial information. This guarantees that financial decisions are made in a transparent and accountable manner, aligning with policy objectives, efficiently allocating resources, and reducing financial risks associated with these projects.[796] The budget documents must fully include all pertinent information relating to the costs and liabilities associated with PPPs, both present and future, to ensure transparency.[797]

The disclosure should provide comprehensive details regarding the precise timing and method of government payments.[798] It is of utmost importance to emphasize the payment schedule specified in the government's PPP contract, especially if it entails a delayed payment

789 United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 60.
790 United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 61.
791 United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 61.
792 United Nations Economic Commission for Europe *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) 61.
793 OECD *From Lessons to Principles for the use of Public-Private Partnerships* (2011) 11.
794 OECD *From Lessons to Principles for the use of Public-Private Partnerships* (2011) 11.
795 OECD Best Practices for Budget Transparency (2002) 7.
796 OECD Best Practices for Budget Transparency (2002) 7.
797 OECD Best Practices for Budget Transparency (2002) 7.
798 OECD Best Practices for Budget Transparency (2002) 12.

structure.[799] Additionally, it is recommended that this information be made accessible concurrently with the results of the long-term fiscal study, which illustrates the long-term effects of both new and existing PPP contracts on the financial standing of the government.[800] It is vital to maintain control over PPP operations through rules that govern both the supply and demand of PPPs in cases where there are implicit or explicit central government guarantees for sub-national governments.[801] The Ministry of Finance shall keep an up-to-date record of all PPP liabilities that affect the interests of the central government.[802]

4.5 Conclusion

In conclusion, PPPs are becoming increasingly popular because of their ability to improve public service delivery while reducing the government's financial burdens. These projects have the potential to significantly improve the general public standard of living, create jobs, and offer basic amenities like electricity, water, and healthcare. Despite ongoing efforts to increase investment and fight poverty across the African continent, obstacles like legal and regulatory restrictions, inadequate public input, a lack of transparency, and financial and political crises continue to stand in the way of advancement. Overcoming the challenges encountered in implementing PPPs requires addressing legal and regulatory barriers, encouraging greater public participation, improving transparency, and managing political and financial crises.

Addressing and learning from global experiences, policymakers must consider integrating the lessons into their decision-making processes to strengthen South Africa's PPP framework. By aligning with established best practices and implementing recommended measures, the country can enhance the effectiveness of PPPs, ensure global standards alignment, and unlock the full potential of PPPs for driving socio-economic development, improving service delivery, and creating a better future for its citizens.

The next chapter will summarise the findings from the study, draw conclusions and make final recommendations

[799] OECD Best Practices for Budget Transparency (2002) 12.
[800] OECD Best Practices for Budget Transparency (2002) 12.
[801] OECD Best Practices for Budget Transparency (2002) 13.
[802] OECD Best Practices for Budget Transparency (2002) 13.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Investment in today's world is an essential factor that boosts a country's economy. It not only accelerates economic growth but also provides opportunities for employment for the youth, thereby increasing the people's standards of living.[803] An ideal investment will result in the development of infrastructure which improves the quality of peoples' lives. Vice versa, infrastructure development is the key to enabling sustainable economic growth, raising the standard of living, and attracting more foreign investment to countries.[804] Governments must increase their financial allocations for infrastructure projects to boost economic growth.[805] However, there has been a noticeable lack of infrastructure growth, notably in developing countries, particularly in sub-Saharan Africa, where the demand is highest.[806] Governments face significant hurdles in Sub-Saharan Africa while developing advanced infrastructure to meet the expanding needs of their citizens.[807] While the public sector is responsible for enhancing infrastructure and providing essential services like water, power, and transportation to citizens, deteriorating infrastructure poses significant hindrances to economic expansion in South Africa.[808] Publicly owned and run utilities in the region struggle with budgetary constraints, operational shortcomings, and poor management.[809]

African countries are recognising PPPs as a viable approach to overcoming regional developmental challenges.[810] PPPs have become universally acknowledged as the ideal approach for delivering advanced infrastructure projects due to their ability to address financial issues, ensure timely project completion, and attract investments for large-scale initiatives without straining government finances.[811] The widespread recognition of PPPs as a practical approach signifies a shift in African countries' objectives toward embracing innovative infrastructure development techniques.

803 See Chapter 1.
804 See Chapter 1.
805 See Chapter 1.
806 See Chapter 1.
807 See Chapter 1.
808 See Chapter 1.
809 See Chapter 1.
810 See Chapter 1.
811 See Chapter 1.

The potential of PPPs to attract investment, advance infrastructure development, and guarantee access to essential services for all South Africans, regardless of financial constraints, was thoroughly examined.[812] Chapter 2 began with a historical overview of investment in South Africa. The apartheid regime, which persisted in racial segregation, intended to maintain the separation of different races in all aspects of life, including public services, employment, housing, and education.[813] As a result, the non-white population suffered from widespread discrimination, violence, and economic exploitation, while the white minority benefited greatly. As part of bringing in inclusivity, significant legislative changes have been implemented since the election of South Africa's first democratic government in 1994.[814] These changes have been made to rectify historical injustices and ensure every citizen, irrespective of race, has access to equal opportunities and an adequate standard of living.[815] This analysis demonstrates the fundamental changes that have impacted the country's economy and attest to South Africa's ongoing efforts to promote social justice and increase its citizens' living standards.[816]

5.2 Summary of Findings

Chapter 2 highlighted PPPs' crucial role in attaining successful infrastructure development. A thriving economy is contingent upon the availability of investment and adequate infrastructure that can effectively support diverse sectors.[817] Realizing that public investment cannot fully meet infrastructure demand, private sector participation becomes crucial.[818] This chapter also emphasizes the significance of creating a robust legal system and ensuring the efficiency of the public sector to encourage infrastructure investment.[819] Transparent decision-making processes, standardized PPP regulations, and effective evaluation criteria are essential for selecting projects. Disclosure, prioritizing public interaction, and considering investors' and operators' interests are vital to ensuring equitable risk allocation and lowering expropriation risk.[820] The quality and experience of public institutions responsible for planning and

[812] See Chapter 2 paragraph 2.1.
[813] See Chapter 2 paragraph 2.2.
[814] See Chapter 2 paragraph 2.2.
[815] See Chapter 2 paragraph 2.2
[816] See Chapter 2 paragraph 2.4.
[817] See Chapter 2 paragraph 2.3.
[818] See Chapter 2 paragraph 2.3.
[819] See Chapter 2 paragraph 2.5.
[820] See Chapter 2 paragraph 2.5.

overseeing PPPs also play a pivotal role in attracting PPP providers, addressing gaps in the legal framework, and fostering an enabling environment.[821]

South Africa aims to use the private sector's resources, expertise, and creativity to address infrastructure gaps and offer essential services to the general public by investigating the potential of PPPs.[822] This proactive stance is consistent with the nation's dedication to ensuring inclusive development and fostering socioeconomic advancement. Private entities can considerably advance the Sustainable Development Goals by offering resources like funds, knowledge, implementation and enforcement skills, reliability, and expertise.[823] These PPP-facilitated partnerships between the public and private sectors increase the return on investment by combining the knowledge and skills of both parties in terms of innovation. The legal framework governing PPPs in South Africa has been criticised due to its complexity and lack of clarity, posing significant challenges for both public and private stakeholders in comprehending and effectively navigating the PPP process.[824] This complexity had led to delays and challenges in managing projects.[825] Furthermore, the absence of transparent and well-defined procedures within this legal framework has given rise to concerns about corruption, mismanagement, and favoritism in the allocation of PPP projects.[826] These concerns not only reduce public confidence but also raise doubts on the fairness and integrity of the broader governance system overseeing PPPs.

Chapter 3 discussed the critical success factors for successfully implementing PPP projects. Compared to standard public sector projects, PPP initiatives require a more comprehensive range of determinants due to their complexity.[827] PPP projects must be supported by establishing solid institutions and adequate, favorable legal and regulatory frameworks, an enabling environment, appropriate risk allocation, and good governance.[828] Governments may create an atmosphere encouraging to implement PPPs by concentrating on the CSF, which will ultimately promote infrastructure development and enable sustainable socioeconomic progress.[829] Specialized PPP units with a clear mandate, expertise, and technical support are

[821] See Chapter 2 paragraph 2.5.
[822] See Chapter 2 paragraph 2.6.
[823] See Chapter 2.
[824] See Chapter 2.
[825] See Chapter 2.
[826] See Chapter 2.
[827] See Chapter 3.
[828] See Chapter 3 paragraph 3.2.
[829] See Chapter 3 paragraph 3.1.

essential to enhancing the institutional capacity of the public sector.[830] These organizations ought to assist government organizations in developing effective PPP procurement strategies. Furthermore, it is essential to have enabling laws that protect parties' rights and promote effective dispute-resolution procedures.[831] To achieve openness and fairness, governmental organizations that enforce the law must act independently and without political influence. It is essential to have a comprehensive legal framework that outlines explicit procedures for project specification revisions and clarifies procurement processes.[832] This encourages excellent governance, lessens the need for repeated renegotiations, and creates favorable conditions for PPP implementation.[833]

Kenya has been used as a case study to demonstrate CSF's importance, which leads to economic progress.[834] Investment in human capital, public spending, and financial openness are critical factors in promoting economic development.[835] Policies focused on increasing these factors are essential for maintaining and advancing the nation's economic growth.[836] Kenya's government's involvement in promoting investment inflows is vital, and policymakers should prioritize developing a solid legal system, taking market size into account, preserving political stability, and promoting an open economy.[837]

The findings of this study highlight how crucial it is for the South African government to draw lessons From Kenya and implement strategic policies and measures to foster both local and foreign investment.

Chapter 4 provides a comprehensive overview of the current infrastructure situation in Africa, with a particular focus on South Africa.[838] The chapter highlights the alarming statistics reflecting the continent's inadequate infrastructure.[839] To address this challenge and attract more investment, the chapter highlights the opportunities presented by the successful

[830] See Chapter 3 paragraph 3.4.
[831] See Chapter 3 paragraph 3.4.
[832] See Chapter 3 paragraph 3.2.
[833] See Chapter 3 paragraph 3.2.
[834] See Chapter 3 paragraph 3.4.
[835] See Chapter 3 paragraph 3.4.
[836] See Chapter 3 paragraph 3.5.
[837] See Chapter 3 paragraph 3.5.
[838] See Chapter 4.
[839] See Chapter 4 paragraph 4.2.1.

implementation of PPPs.[840] Governments will able to address citizen demands without being restricted by financial barriers imposed by budgetary limitations by utilizing PPP projects, and will ultimately enhance service delivery.[841]

The chapter also discusses the challenges governments encounter in implementing PPP projects effectively and efficiently.[842] By looking at local and international best practices, this chapter offers valuable insights that can enhance the efficiency and success of PPP initiatives.[843] Drawing lessons from best practices and adhering to recommendations will contribute to improved infrastructure and economic growth for African countries.[844] South Africa will develop an environment conducive to implementing PPPs by adopting, executing, and improving the legislative framework. Such development has the potential to boost the economy and serve as a model for other developing and the least developing countries.

5.3 Recommendations

Based on the research findings, it is recommended to implement the following changes to enhance the effectiveness of the current PPP legal framework in South Africa.

5.3.1 Enhancing Community Participation

Accountability would be considerably improved by introducing a built-in system to promote public participation at each stage of the PPP process. A thorough and inclusive decision-making process that considers the viewpoints of all stakeholders, including those who could experience detrimental consequences, should be implemented. A participatory framework that goes beyond the current guidelines established must be developed in light of the inherent limits of the lower representation and involvement of the general public that prevent successful community engagement

Public participation and consultation should be considered crucial in PPP projects, and a transparent procurement procedure should be implemented. Before the commencement of the bidding process and following the public entity's approval of the PPP project, these consultations should take place. In addition, the general public should be kept up to date with

[840] See Chapter 4 paragraph 4.2.
[841] See Chapter 4 paragraph 4.2.
[842] See Chapter 4 paragraph 4.3.
[843] See Chapter 4 paragraph 4.4.
[844] See Chapter 4 paragraph 4.4.

regular or quarterly progress reports. Engaging with relevant stakeholders will help achieve integrity and transparency, and rectify any legal discrepancies inconsistent with South African democratic ideals of human dignity, equality, and freedom. These procedures are essential to sustain the fundamental values of integrity, transparency, and accountability.

5.3.2 Strengthen Legal and Regulatory Frameworks

The Intergovernmental Relations Act 13 of 2005 established a framework that the national, provincial, and local governments must follow to coordinate the implementation of laws and policies. In light of this, it is advised that forums be established at every level of government to address alignment, integration, and coherence concerns relating to PPPs. One modification that can be made is to create a national PPP legal framework that promotes uniformity in procurement across all governmental domains. Clarity, consistency, and flexibility would be guaranteed by this framework, which would offer an extensive and uniform set of regulations applicable to all public institutions. Adopting and harmonizing generally recognized legislative principles and methods for PPPs within the South African setting is crucial to promote international best practices and accountability. The current PPP policy guidelines should also be codified and revised regularly to reflect the lessons learned from previous PPP implementations. This will maintain consistency between PPP operations and policy.

5.3.3 Ensure Transparent Procurement Procedures

A competent legal and policy framework must be established in light of Section 217(1) of the South African Constitution's mandate for transparency and accountability in PPP procurement. This framework should include simplified and transparent legal procedures, accessible procurement procedures, a reliable assessment system, and meaningful community involvement. Contract negotiations will move swiftly, and transaction costs will be reduced by using an efficient and effective procurement procedure. The following vital elements should be taken into account to promote transparency in PPPs : (i) to guarantee that all stakeholders are informed of the development and implementation of PPP projects, the information provided to stakeholders should be accurate, (ii) there should be transparency in terms of location, language, and cost, and timeliness of PPP projects and (iii) the availability of remedies for dissatisfied stakeholders is essential in establishing confidence to the aggrieved party that disagreements will be resolved amicably. One approach to enhance information disclosure is establishing adequate procedures within the legislation for identifying, evaluating, and selecting tenders and defining criteria for assessing the bidding process. Introducing a two-step tendering process can minimize costly design exercises in the initial stage and encourage broad participation from private bidders by eliminating expensive design requirements. PPPs' transparency, performance, and accountability can be significantly improved by domestic governments putting constitutional provisions into place and fostering an environment more conducive to successful partnerships.

5.3.4 Setting up a system that monitors and evaluates projects to draw lessons for better project planning and implementation.

Although the PPP Manual strongly emphasizes the administration and monitoring of PPPs, it is crucial to create an efficient monitoring and assessment framework within the law. It is recommended that the principles and guidelines for auditing PPPs from the International Organisation of Supreme Audit Institutions (INTOSAI) should be adapted and implemented in the South African context to promote openness, accountability, and value for money.

The Auditor-General should be able to identify, investigate, and manage PPP outcomes, including environmental, administrative, and managerial challenges, in addition to the financial and monitoring control. To improve communication between government agencies and the general public, the Auditor-General's office should serve as a focal point for complaints or issues that necessitate an inquiry into accountability in PPPs.

To ensure adherence to the regulations, appropriate disciplinary or remedial actions should be taken in cases of non-compliance. It is advised that public officials involved in PPP contracts undergo a thorough background investigation. This will serve as a preventative measure against unlawful conduct and act as a deterrent for potential offenders. Individuals with a history of fraudulent behaviour should be barred from participating in PPP projects. Given the significant financial investments made in PPP development, the National Treasury should keep a system in place to keep track of individuals and organizations that have misappropriated funds or contributed to failures in PPP projects at all levels of government.

To prevent political intervention in PPPs, several measures can be adopted. These include utilizing pre-qualification standards, open bidding processes and review panels comprising professionals from relevant fields. Action should be taken against those who are aware of interference but fail to report it. Reporting channels can be defined within the contractual framework. The suggested thorough vetting process can help identify potential conflicts of interest for individuals involved in PPP projects. These mechanisms help ensure fairness, transparency, and expertise in the selection and evaluation of private partners for PPP projects. By incorporating these practices, the risk of political interference is minimized, and decisions are based on objective criteria rather than political considerations. Accountability and responsible conduct can be encouraged in PPP projects by implementing these measures, reducing risks, and fostering successful results.

In conclusion, through involving the public, putting in place efficient monitoring systems, and making sure that procurement is transparent, South Africa can fully harness the significant potential of PPPs for investment and infrastructure development. These measures improve accountability, draw in more investors, and ultimately empower the nation to advance its infrastructure, benefiting both the economy and its citizens.

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