

# **INVOCATION OF A STEP-IN CLAUSE IN PRISON PPPs: SUSTAINABILITY OR MANAGEMENT VAGARY?**

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The extension of the PPP procurement method to custodial services was met with a lot of resistance and disapproval from some quarters within and without the government circles in South Africa. The model utilized in the two facilities currently in operation is design, construct, finance, operate and maintain. The recent invocation of a “step-in” clause in one of the facility was regarded as a vindication that private operators are contextually unsuitable to manage the correctional facilities in South Africa. This research interrogated the monitoring mechanisms set up to oversee the running of the facility and the operational management pitfalls that necessitated this intervention. Through interviews with the private operators, consultants, government officials and the PPP Unit, proper insight was garnered about what could have gone wrong. It was demonstrated that private management is not foolproof against the challenges of managing a facility housing dangerous convicts. Because of the operational challenges encountered by private operators there was a strong advocacy for an adaptation of the PPP model where there is a hybrid in management, since South Africa initially entered into PPP arrangements due to lack of finance not due to ineffective management acumen. The study is instructive to future correctional services facilities and inspirational to other jurisdictions where the arrangement is currently mooted.

*Keywords:* Step-in clause, Management, Convicts, Custodial, Operational, Correctional.

## **1 INTRODUCTION**

Although PPPs have been utilized for the last fifteen years in South Africa, their adoption in the correctional services was vehemently resisted by some notable elements both within and without the government. With one of the highest crime rates in the world, and where violent crime is prevalent it was argued that private management of these facilities was bordering on compromising national security. The two pilot projects were procured using design, construct, finance, operate and maintain method. When the government invoked a “step-in” clause in one of the facilities the sustainability of these facilities was brought in the spot light. The Step-in Right is defined as the right of the customer, where the supplier defaults, to intervene in one or more of the supplier’s areas of responsibility (Scottish Government 2013).

## 2 LITERATURE REVIEW

Since the introduction of Public Private Partnerships (PPPs) in South Africa in 1997, intensive work has been done to refine and improve PPP legislation so as to promulgate a well-developed and clear procurement model. To a large extent the successful implementation of PPPs depends on the development of sound legislative frameworks, agreements and contracts that clearly define the relationship between government agencies and private parties (Pongsiri 2002). In South Africa prisons are called Correctional Centres, and the introduction of PPPs in this sector was to overcome overcrowding and funding challenges faced by the Department of Correctional Services (Goyer 2001). According to Brinkerhoff (2011) the prospective benefits associated with the use of the PPPs in achieving better service delivery than traditional procurement methods continues to seize the attention of policy makers and public administrators within governments. Although PPPs entrust the delivery of certain government services and administrative functions to the private party, the final accountability for efficient management of PPP facilities still resides with the government. Brinkerhoff (2011) argues that government's capacity to successfully participate and oversee the PPP arrangement can be significantly reduced with these arrangements. However, outsourcing the core functions of government facilities according to Tanner (2013) could prove to be problematic.

PPP Correctional Centres in South Africa were implemented 14 years ago prior to the promulgation of PPP legislation. The two pilot Correctional Centres (Mangaung Maximum Prison and Kutama Sinthumule) were not based on the proper legislative framework (PPP Unit 2009). Their implementation was aimed at "alleviating prison overcrowding", capital costs, rehabilitation and associated risks were to be borne by the private sector (Ramagaga 2011). Several other governments around the world had implemented this strategy as a way of reacting to the increasing number of offenders and the lack of funding available for new Centres (Goyer 2001). The former minister of correctional services Ndebele (2013) stated that the inception of PPP Correctional Centres was based on good intentions, however the experiment is failing to meet its desired objectives at the Mangaung Correctional Centre specifically, and this happens when other countries that had initiated similar facilities are beginning to realize that its implementation is flawed.

Although it is indisputable that the management of a PPP Correctional Centre is governed by sound regulatory frameworks; however, the events around the Mangaung Correctional Centre gave rise to concerns about the ability of a private party to manage a Correctional facility after the invocation of the "step-in' clause" at the facility. The government specifically had to intervene following reports of forcible injection of inmates with antipsychotic medication and using electroshocks to subdue and control them (Hopkins 2013). The National Treasury (2008) PPP standardized provisions states that a "step-in" by the institution can occur where there is a breach by the private party or when there is no breach by the private party. The 'step-in' without breach can be a case where the private party requests the institution to take over the facility temporarily due to difficulty in meeting certain service level outcomes (ibid). This "step-in' clause" states, according to Section 112 of the Correctional Services Act Section that (a) "If in the opinion of the National Commissioner in consultation with the Minister:

- i. The Director (the director referred to is a custodial official appointed by the Contractor, to serve as the head of the PPP Correctional Center) has lost, or is likely to lose, effective control of a public-private partnership Correctional Centre or any part of it and
- ii. If it is necessary, in the interest of safety & security to take control of such Correctional Centre or part of it. He or she may appoint a Temporary Manager to act as the head of that Correctional Centre and may replace custody officials with correctional officials to the extent necessary.”

Although the initial PPP contracts were signed and implemented outside the current legislative frameworks (Sekhonyane 2003). Intensive work has been done to refine and promulgate sound legislation frameworks, however the level of enforcement and effectiveness of monitoring mechanisms to ensure compliance of these frameworks is still ambiguous and unclear. The idea of PPP Correctional Centres in SA has received great skepticism from various stakeholders in the early stages of its conception, due to the financial burden on government funds and signing of the initial contracts without clear knowledge and research of the PPP process, however these concerns remained sidelined in over-optimism of the prospective benefits that would be retrieved from such a project (Nathan 2003). This research aimed to unearth the substantiveness of these concerns following Mangaung prison debacle.

### 3 METHODOLOGY

The philosophical grounding for this study was based on the interpretivist paradigm, which simply seeks to determine how people make sense of the world they live in and the events that unfold in it. The interpretivist approach implies that reality is multiple and relative. In the sense that there is more than one reality and there are various ways of analyzing that reality Carson et al.(2001). According to Saunders, Lewis & Thornhill (2003) instead of generalizing and making predictions of causes and effects an interpretivist researcher intends to understand and interpret the motives, implications and reasoning behind the occurrence of a phenomenon within a particular time and context. An exploratory approach, used under qualitative methodology was used to assess the legislative frameworks and monitoring mechanisms within PPP Correctional Centres. One of the main objectives of the study was to determine the significant role played by regulatory frameworks in influencing adherence to monitoring and evaluation procedures stipulated by legislations. Undertaking this research using this approach assisted in identifying other structural deficiencies that hinder the effective implementation of PPP Centres and that of monitoring and evaluation procedures.

Interviews were conducted as with them, the researcher has a certain level of control regarding the question addressed (Creswell 2003). The limitation of this method is that the respondent may be biased when divulging the information due to the presence of the researcher. Open-ended questions were used to give full understanding of the respondent's impression or experience, also allowing for a degree of flexibility and probing of new issues that may unveil (Knight and Ruddock 2008). The main interviewees constituted individuals responsible for the legislative and monitoring

systems for Correctional Centres such as the PPP Unit and civil societies. Perceptions were also obtained from people that have experience in the implementation of PPP contracts in the context of Correctional Centres. The targeted sample for the study was 15 respondents which were divided into 3 categories, namely the authorities responsible for monitoring and evaluation JICS, National treasury PPP Unit as the regulatory body, and companies that have experience in the implementation of PPP agreements.

#### 4 FINDINGS

Although fifteen people were targeted only 5 interviewees were available for this study. However these are very respectable people in the PPP arena in South Africa. An analysis of the findings for embarking on this approach to correctional services management is given in Table 1 below.

Table 1. Reasons for selecting PPP Procurement Method for Correctional Centre.

<b>Theme</b>	<b>Findings/Results</b>	<b>Respondents</b>
Reasoning behind PPPs CC in SA	Overcrowding	3
	Private Sectors has more to offer in terms of risk transfer than the public sector	2
	Budget constraints on the government	3
	PPP procurement process in quicker than the traditional method	1
	Political Agenda	2

Although the problem of overcrowding within Correctional Centres and budgetary constraints necessitated the rollout of new facilities few people appeared to be convinced on whether the private sector could actually deliver. Although the procurement process could drag on sometimes, the construction phase is quicker and could make a very good PR tool, which could be exploited politically. Table 2 below actually demonstrates the issues that were considered to have led to the management challenges during the operation of this facility.

Most of the respondents confirmed that within the contract there was a Service Level Agreement between the public institution and private party, where the private party commits to a certain quality of service and failure to do so may result in penalties which vary in severity depending on the breach. When asked about the challenges in implementing PPP contracts, 3 respondents agreed that there were no major issues in the implementation of the contract as the specification were of very high standard, ‘top-quality’ as one respondent described. Even Though all the respondents agreed that the PPP regulations were weak at that time of contract signature, this did not have a major impact on the implementation of the contract. Most of the respondents perceived current challenges to be residing with the management of the facilities, mainly due to over-subcontracting of the major responsibilities. Another important issue raised is the poor communication which led to the late reporting of challenges by the consortium to

the government. The fact that most consortium members were not operationally involved or updated regularly compromised a robust approach to challenges. Most of the respondents agreed that terminating the contract is not in the interest of both parties when challenges are encountered in a PPP, as this would imply that the government would still be liable to pay off the bond to the lenders as agreed in the contract. Most of the respondents suggested that the DCS should have control of correctional/custodial services. The other aspects of the service quality were of a high quality that some felt might not be easily emulated by the DCS. The government however argues that the newest government-run facilities are at par with the PPP centres. It was also noted that there is commonality in the operational challenges faced by PPP Correctional Centres and conventional Correctional Centres. The problem with Mungaung was the inexperience of the management level staff, as the turnover was too high.

Table 2. Implementation and management of PPP Correctional Centres.

Themes	Findings/Results	Respondents
Implementation and management challenges	Service Level Specification in place, hence management is contractually driven	3
	Lack of active participation from stakeholders	2
	Weak PPP regulations at the time of implementation	5
	No challenges in implementation due to specifications being of high quality	3
	Human relational and communication issues	3
	Lack of understanding of PPP process	2
	Challenges not contract related	3
	Change of leadership may have had an effect on management	1

## 5 CONCLUSIONS

Although there is a general consensus that the private players are delivering consistently better quality in prison management this comes at a high cost. This makes the pursuance of this approach debatable in a developing country. Although this is a continuing study, the evidence so far demonstrates that the political ramifications of any failure at a correctional are high. The following lessons were garnered:

- i. A “step-in clause” is a very useful mechanism and it was rightly deployed in the case study used for this study.
- ii. Contextual exigencies call for governmental involvement in the custodial management of inmates although other duties could be delivered through the PPP. Thus militating for a tailor-made mix of responsibilities.
- iii. The high cost with administering a correctional PPP facility might not be cost effective in the long run for most jurisdictions.

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