

# INFRASTRUCTURE *Dialogues*

## “Failing Forward”: How we turn mistakes into stepping stones 16 August 2018

### 1. Introduction

Infrastructure investment is an important enabler for economic growth and job creation in South Africa. Compared to other forms of public spending, infrastructure development has a slightly higher multiplier and pro-poor effect, and is less skills intensive, so skills can be easily sourced from the local economy. However, challenges facing the implementation of infrastructural developments in municipalities include a lack of skills and institutional capacity, and shortcomings in governance. As a consequence of failing governance, corruption has been able to flourish between construction companies and local governments. And over the past eight years, national and local government, and the Competition Commission have investigated the construction industry’s anti-competitive practices.

In the context of infrastructure development, “failing forward” refers to finding ethical, collective and sustainable solutions to problems and challenges within the procurement and tendering process. Examples of “failing forward” can be found in the construction industry. Through a process facilitated by the United Nations Global Compact, the construction industry and government endorsed an integrity pact that includes a commitment to create and strengthen platforms where the private and public sectors can collaborate on anti-corruption initiatives. The pact also calls for companies and government to educate and raise awareness among employees about the need for anti-corruption initiatives in the industry. “Failing forward” can only work when all stakeholders are in it together for a common purpose. The 48<sup>th</sup> Infrastructure Dialogue explored how corruption has manifested between the private sector and local government, and what has been done to address this. During the open and robust discussions, participants shared examples of corruption and ways in which stakeholders involved in rolling out municipal infrastructure can learn from their mistakes in this process known as “failing forward”?

The Infrastructure Dialogues are hosted jointly by the [Development Bank of Southern Africa](#) (DBSA), the [South African Cities Network](#) (SACN), the [National Business Institute](#) (NBI) the [Performance Monitoring and Evaluation Department in the Presidency](#), and the [Department of Economic Development](#), with the [Engineering News](#) as media partner.

### 2. Programme and Panellists

**Danga Mughogho** of the SACN welcomed the audience to the 48th Infrastructure Dialogue and introduced the partners. The facilitator was **Richard Goode** of DBSA who introduced the panel.

Mziwodumo Rubushe	Principal Analysis Infrastructure Industries, Competition Commission of South Africa
Steve Nicholls	Climate Change, Water and Green Economy Programme at the NBI
Ibrahim Seedat	Director: Public Transport Network Development, National Department of Transport

### 3. Overview

# FAILING FORWARD

HOW WE TURN MISTAKES INTO STEPPING STONES



## STEPS TO RECOVERY

#### 4. The Case of the Construction Industry

The Competition Commission of South Africa's focus is on investigating certain priority sectors, including the construction industry. Other sectors are food and agri-processing, ICT, energy and banking. In September 2009, the Competition Commission began a full-scale investigation of the construction sector over the 2010 FIFA World Cup stadiums, after discovering that the depth and level of collusive tendering was higher than had been suspected. The Commission embarked on a fast-track process, inviting companies implicated in the construction cartel to come forward voluntarily and to settle in return for lower penalties. The process started in April 2011 and (in July 2013) culminated in 15 companies agreeing to pay a collective penalty of R1.4-billion. Those companies that did not participate in the fast-track process were investigated separately and eventually (in 2014) paid settlements amounting to R84-million. After engagement with the Department of Economic Development, six of the companies agreed to contribute R1.5-billion towards a socio-economic development programme called the Voluntary Rebuilding Programme, and to sell shares to and mentor black companies in the sector. The intention is to transform the construction industry.

The investigation brought into sharp focus the role of the industry body, the Construction Industry Development Board (CIDB) and its grading system, which may have aided and abetted collusive tendering and bid rigging. It also raised questions about whether or not the legislation in place is tight enough to prevent collusion, and identified issues that may facilitate cartel conduct at local level: the lack of capacity within local government, the role of consultants and the attachment of conditions to tender adverts (e.g. bidders must belong to a certain association in order to be eligible to submit a tender).

Collusive tendering is a problem that has huge implications not only for government but also for the private sector. The consequence of collusion in the construction industry was that the state paid far more than it should have for the World Cup infrastructure – at the time, government had budgeted R787-billion. In other words, the collusive tendering led to consumers' (taxpayers') money going into private pockets.

In terms of failing forward and lessons learnt from the Commission's investigation, various legislative and regulatory weaknesses are being addressed.

- A review of the CIDB regulations is underway.
- National Treasury is working on a procurement amendment bill.
- The Competition Commission initiated an advocacy drive, to train procurement officials from local, provincial and national government to identify anti-competitive conduct and collusive tendering at the evaluation and adjudication stage. If capacity is built at this stage, steps can be taken to prevent collusive tendering or bid rigging from even happening.
- In conjunction with National Treasury, the Commission introduced the Certificate of Independent Determination (known as the SBD9), which is a declaration by bidders that they have not communicated with each other before submitting their bids. Again, the purpose is to prevent collusive tendering from happening before the fact.

## 5. The Water and Sanitation Sector

Infrastructure development is a critical element of building South Africa's economy, creating employment and lifting people out of poverty, but it is hampered by capacity challenges and exacerbated by widespread corruption. The water and sanitation sector is a case in point.

- Nearly half (46%) of water service authorities self-declare themselves to be in crisis and are desperate for support.
- At the Department of Water Services and Sanitation, a third of engineering posts are vacant, and many municipalities (e.g. Rustenberg) do not even employ a water engineer.
- Over half (56%) of wastewater treatment facilities in South Africa are in critical or very poor state.
- The average water loss in municipalities stands at 36%.
- The water sector has a funding shortfall of R33-billion.

In one municipality, the capital budget item for maintaining and upgrading its wastewater treatment facility was used to build a wall between the inlet pipe and the outlet pipe because the facility was in such a poor state that the sewage wasn't being treated but was polluting the plant – the wall diverted the sewage round the plant and into the river. That such an item was in the budget and audited needs to be addressed.

“A mayor of a small town deliberately sabotaged the town's water supply because he was running a water supply business on the side. He was destroying the infrastructure that brings water to your taps, so that you would have to go and buy from his tanker down the road.”

## 6. Coalitions of Greed

Terms such as “state capture” suggest that the corruption is more complex than it actually is, when it is simply coalitions of greed, pure stealing and straight-up pilferage. Coalitions of greed know how to work the system. For instance, they took advantage of much of the R6-billion made available through the Public Transport Network Grant (PTNG) that was intended to consolidate the funding aimed at improving public transport in 13 South African cities. Cities chose high specifications and imported components – one example is Cape Town's purchase of imported electric buses, which cost R11.5-million each, despite no evidence of a proper lifecycle model or serious energy savings. Coalitions of greed are not scared of the system because the Auditor-General of South Africa (AGSA) does not have enforcement powers, and people usually resign before the facts emerge. However, certain red flags are indicative of potential problems.

- Founding project leader/officials leave (this happened in Johannesburg, Tshwane and Ekurhuleni).
- A procurement management unit (PMU) is established. Although PMUs have their place, often the contract is for a wide range of services that are badly priced and have inflated budgets and costs, covering everything from infrastructure management, to secretariat, legal and IT services. The municipality ends up paying (e.g.) R10-million per month before the project is even operational.
- Financial transactions that are outside usual patterns (“follow the money”).
- Officials who don't take leave because they don't want to lose control over what's happening.

What is needed is to get the institutions, accountabilities and repercussions right, especially because the fares do not cover the costs of city public transport networks – even legally overpriced public transport contracts are putting pressure on both taxpayers and the farebox.

“Subsidies are a juicy target for coalitions of corruption. [...] Coalitions of greed are not going to go away. [...] Everyone is looking for any loophole, any scam as long as the guillotine or repercussions are not there timeously and seriously.”

## 7. Fighting Corruption: Individuals or Society?

The discussion evolved into a philosophical reflection about the role of individuals and/or society in promoting (or fighting) corruption. All agreed that corruption is a complex topic and cannot be reduced to a polarised “us versus them” discussion, between those who judge themselves to be free of corruption and those condemned as corrupt. Such an approach creates the impression that others somehow perpetuate the problem of corruption, when it is not so simple. Indeed, the general consensus was that it starts with the individual. The root of the problem is that individuals break the law because they think that they are not going to get caught. For instance, when South Africans get caught for speeding, they complain about the police who caught them – when they were the ones speeding because they thought they wouldn’t get caught.

People need to ask themselves how, in their sphere of influence, they can shine their light on the dark corners of corruption by behaving with excellence and integrity. Being those lights can start a butterfly effect and help overcome the culture of indifference that prevails throughout South African society. However, it is not always easy, as illustrated by the example, of a conference organised on a ship in Barbados. The conference turned out to be fake and just an excuse for professors to go and have a party in the Caribbean. When questions were asked by a member of the panel charged with assessing which professors can spend money on going to overseas conferences, the response was to stop rocking the boat.

Overcoming this culture will require deep reflection and a return to basic values – and understanding what happened to change those people who were once held in such high esteem. It will also need leaders with high personal integrity to set an example, as individuals tend to look up to and behave in a similar way to their leaders. Leaders set the tone for society. Yet at the same time, institutions and systems must enforce the law, as they guide and shape people’s behaviour based on what society has agreed upon.

## **8. Failing Forward or Learning from our Mistakes**

The discussion highlighted four areas for failing forward: procurement, skills and capacity, legislation and trust.

### **Centralised and transparent procurement**

Corruption is less likely in a culture of openness and transparency that encourages questions to be asked about expenditure. A good example is the Gauteng open procurement system whereby all proposals are accessible to the public, which allows a high degree of engagement and transparency. Another example cited was that of the United Kingdom's Hinkley Point nuclear power plant plan, for which the UK government released enough data to allow the financial sector to work out the cost per kilowatt – a sharp contrast to South Africa's nuclear plans, for instance.

Having a centralised procurement system would increase the fairness of the procurement process. For example, in the case of energy efficiency infrastructure, a central procurement panel could be created to procure a range of energy efficiency providers. Then, when a municipality puts out a request for proposals, pre-vetted people can submit a bid – the challenge would be to ensure that whoever is on that initial panel follows a fair access process. There are also clever financial mechanisms that can be used and would reduce risk. For instance, National Treasury could provide a grant to a municipality for infrastructure spend, but the funds goes into a special purpose vehicle (SPV), not into the municipal budget. Then the funds from the SPV are only disbursed once measurable service delivery has been achieved.

### **Skills and capacity**

Government lacks skills, whereas SETAs have lots of money. The suggestion was made to find a way to cross-pollinate using TVET colleges to close the skills gap within municipalities. The call was made to bring back the professionals to local government – appointing the right people to run municipalities would help address the danger of local government being controlled by political cabals. At the same time, outsourcing and duplication need to stop.

An assessment of municipal capacity in response to energy efficiency infrastructure found that asset management is a challenge. Very few municipalities, even the large metros, know where all their assets are. For example, a building burned down in one metro, but no-one knew that in fact the building belonged to the city. If cities do not know what their assets are, it's difficult to prevent corruption. Linked to the asset management is the focus on building new infrastructure rather than maintaining and refurbishing existing infrastructure, mostly because politicians want to see new projects, as it is not politically expedient to talk about repair and maintenance.

### **Legislation**

Collusion is something that happens all over the world and has been happening in SA for a long time. The difference is it has become more overt. A finding from the investigation into the construction industry collusion was the ineffectiveness of the certain provisions in legislation covering (i) the

blacklisting of firms who engage in collusion, and (ii) regulations governing industry bodies. In the first case, National Treasury can only blacklist a company if the client (e.g. municipalities and provincial governments) has first blacklisted the company. The client has to inform the company in writing of the intention to blacklist it, giving 14 days for the company to make representation, after which the client writes to National Treasury giving reasons for the blacklisting. However, clients often do not do this, sometimes because they do not understand the process, but National Treasury does not have the power to blacklist on its own. In the second case, the CIDB board is made up of industry players who are also in charge of enforcing the regulations, meaning that they would be imposing fines on themselves, which is problematic. Another challenge is that the legislation tends to focus on imposing administrative penalties on companies rather than individuals. Yet, as the construction industry investigation revealed, consultants play a role in facilitating collusive tendering. To address these weaknesses, amendments to legislation and regulations are being explored, including the introduction of criminal penalties.

### **Trust between citizens and the state institutions**

The general sentiment was that, over the past decade in particular, South Africa's governance system has been weakened, and a culture of impunity has developed, where people get away with whatever they want. On the one hand, a culture of indifference exists, while on the other hand people are scared to speak out. Although whistleblowing is encouraged, in practice support for whistleblowers is absent. There is a trust deficit between citizens and state institutions that does not encourage whistleblowing, especially when incidents occur such as the person in witness protection being left unguarded in a safe house. The risk of being left to their own devices does not inspire confidence in citizens that it is safe to be a whistle-blower, especially given the deluge of scandals over the past five years. A whistle-blower needs to believe that they are reporting to an agency that has total political backing to clean up the corruption. This has not been the case with the Hawks, National Prosecution Authority etc., although journalists have played their part. In the case of the Competition Commission, the legislation was crafted to protect whistle-blowers. Any third party can submit a complaint to the Commission, but the Commission also has the power to initiate an investigation. What this means is that a whistle-blower can provide information, which the Commission uses to launch the investigation (and is the complainant). Therefore, the third party's name does not appear, which protects the whistle-blower.

Nevertheless, the trust deficit is one of the biggest challenge facing South Africa. The only way to build trust is to rebuild confidence in state institutions. For this, an engaged citizenry is needed that holds government to account.

“People are scared to speak out [...] and we tolerate corruption. [...] We have a silent majority that is not speaking out through fear.”

## 9. Consequences, What Consequences?

The question was asked why the construction colluders were not blacklisted. The response was that the government chose to engage with the colluding firms and come to an agreement, rather than blacklist them because they were South Africa's "big eight" construction companies and needed to build the country's next phases of infrastructure. All eight firms are classified by the CIDB as Grade 9 (the highest grade). Firms classified as Grade 7 and 8 do not have the necessary capacity, capital or experience to take on big projects.

The example was made of Russia, where Putin's government simply expropriated the companies that were found to be colluding and fired the top management. It sent a very clear message. However, as participants points out, South Africa is a constitutional democracy and so has to adhere to the Constitution and the law of the country. Procedures have to be followed in order to fire someone – and South Africa does not have any legislation that permits the expropriation of a firm.

## 10. Conclusion

State capture is real, and recapturing public institutions is both necessary and essential for South Africa to move forward. People need to have confidence that public institutions are able to perform effectively. The first step in any recovery is to recognise the problem, but dwelling on problems does not help. The 48<sup>th</sup> Infrastructure Dialogue focused on "failing forward", seeking solutions. What emerged from the discussions is that tackling corruption starts with the individuals, but also requires leaders with high integrity, to set the standard and tone. A culture in which people are allowed to ask questions needs to be encouraged, as does the entrenchment of accountability – this does not necessarily mean having to create new systems but rather closing the gaps in existing systems.

The discussion covered examples of corruption and ways in which we can learn from our mistakes in "failing forward". There was consensus that, as individuals, we have to take responsibility and action to address corruption. A suggestion was made to launch a national campaign calling on citizens to take responsibility and not pay the bribe/break the law. At the same time, we need to look at what works institutionally. Tackling corruption and restoring trust in state institutions will require not only individuals taking responsibility but also creating an environment where whistle-blowers are safe. Above all, the culture of indifference and tolerance to disobeying the law must change. It is hoped that the learnings which emerged from reflections at the 48<sup>th</sup> Infrastructure Dialogue, will inform plans for improving the functioning of the economy and society, as well as the quality of our public institutions.

"One of the big issues – the elephant in the room – is corruption."

## Intermediate Cities as Destinations for Investment

### Speakers Biographies

**Mziwodumo Rubushe** is a Principal Analyst at the Competition Commission of South Africa. Before joining the Commission, he worked as a researcher for the South African Human Rights Commission in the Promotion of Access to Information Unit. He co-drafted the Section 10 Guide of the Promotion of Access to Information Act of 2000, and he drafted the Certificate of Independent Bid Determination (SBD9) used in public procurement in South Africa as a tool to deter bid rigging or collusive tendering. Mziwodumo has a Bachelor of Commerce degree majoring in commercial law from the University of Transkei. He also studied competition law at the University of Pretoria and, in 2007, attended the EU Competition Law Summer School at Cambridge University (UK). In 2013, he won the International Competition Network (ICN) Competition Advocacy Award. Mziwodumo is member of the Compliance Institute of South Africa.

**Ibrahim Seedat** is Director: Public Transport Network Development at the National Department of Transport where he has worked for 21 years. Over the past 13 years, Ibrahim has worked with the 13 cities that receive the Public Transport Network Grant to implement integrated public transport networks. This close encounter with municipal implementation – especially in the past five years – has underlined the absolute need for ethical political and bureaucratic leadership that needs to answer the “What if this were my personal money” question at all times.

**Steve Nicholls** leads the Climate Change, Water and Green Economy programmes at the National Business Initiative (NBI), with an emphasis on harnessing the collective effort of business across these thematic areas. His key focus areas include the strategic business case for environmental management and the impacts of ill treatment of the environment on society and the economy. Steve has worked mainly in the consulting industry in the United Kingdom and South Africa, on projects based in Europe and Southern and East Africa and across a number of sectors including mining, energy, telecoms, government, oil and gas, financial services and retail. Prior to joining the NBI, Steve headed the sustainability services function for Accenture across Africa, and he has also worked within KPMG’s advisory and assurance team. His speciality is the integration of sustainability issues into governance, risk management and strategy. Steve holds an MSc from Stellenbosch University and has completed an executive education programme at WITS Business School. He has lectured on sustainability and business at a variety of universities including GIBS, WITS, Stellenbosch and the University of Pretoria.

# INFRASTRUCTURE *Dialogues*

## Intermediate Cities as Destinations for Investment Dialogue in Pictures

**Picture below:** 48<sup>th</sup> Infrastructure Dialogue speakers  
From left to right: Richard Goode (DBSA), Mziwodumo Rubushe (Competition Commission) and Steve Nicholls (NBI)



**Pictures below:** 48<sup>th</sup> Infrastructure Dialogue – Dialogue participants



**Launch of the 2017/2018 Compendium at the 48<sup>th</sup> Infrastructure Dialogue**

