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CONTEMPORARY TRENDS IN THE DEVELOPMENT OF PUBLIC PROCUREMENT LAW IN SOUTH AFRICA

WSPÓŁCZESNE TRENDY W ROZWOJU PRAWA ZAMÓWIEŃ PUBLICZNYCH W REPUBLICE POŁUDNIOWEJ AFRYKI

This paper explores emerging contemporary trends in the development of South Africa's public procurement law. Using a doctrinal legal analysis, it identifies two main trends in such development post-democratization, one structural and one substantive. It argues that these two trends pose particular challenges to the public procurement system. At the structural level, the paper shows that while law has played a key role in the development of South Africa's public procurement system right from the outset, it constituted a light touch regulatory regime prior to the constitutional transition in 1994. The changes that the new constitutional dispensation brought about necessitated an adjustment in the regulation of public procurement as well. The development of public procurement law to effect such adjustment has, however, created a fragmented, uncoordinated and overly burdensome regulatory regime. At the substantive level, the paper argues that law has not managed to effectively create a framework for the use of public procurement for social policy purposes with specific reference to the pursuit of equality. Based on these findings, the paper argues that legal reform is urgently needed in order to avoid law undermining the public procurement function in South Africa.

Keywords: public procurement; South Africa; law; public finance management

Niniejszy artykuł podejmuje zagadnienie współczesnych tendencji w rozwoju prawa zamówień publicznych w RPA. Wykorzystując doktrynalną analizę prawną, zidentyfikowano dwa główne trendy rozwoju w tym obszarze po demokratyzacji państwa: strukturalny i merytoryczny. Te dwa trendy stanowią szczególne wyzwania dla systemu zamówień publicznych. Na poziomie strukturalnym w artykule ukazano, że chociaż prawo od samego początku odgrywało kluczową rolę w kształtowaniu systemu zamówień publicznych w RPA, to przed transformacją konstytucyjną w 1994 r. sfera ta nie była przedmiotem szczegółowej regulacji prawnej. Zmiany, które przyniosła nowa konstytucja, wymagały również dostosowania prawa w obszarze zamówień publicznych. Podejmowane w tym zakresie działania doprowadził jednak do powstania fragmentarycznego, nieskoordynowanego i nadmiernie uciążliwego reżimu prawnego. Na poziomie merytorycznym w artykule stwierdzono, że prawo nie zdołało skutecznie stworzyć ram dla wykorzystania zamówień publicznych do celów polityki społecznej, ze szczególnym uwzględnieniem dążenia do równości. Na podstawie tych ustaleń w artykule stwierdza się, że reforma prawa jest pilnie potrzebna, aby uniknąć sytuacji, w której prawo osłabia potencjał zamówień publicznych w RPA.

Słowa kluczowe: zamówienia publiczne; RPA; prawo; zarządzanie finansami publicznymi

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I. INTRODUCTION

The dramatic changes in the nature, characteristics and form of the democratic South African state, following its first democratic elections and the adoption of its first democratic constitution in 1994, also necessitated an overhaul of its public finance management structure. The post-1994 South African state included a completely new institutional landscape, with new provinces (nine compared to the pre-democratic four), the reintegration of the so-called Bantustans or homelands (territorial pockets earmarked for exclusive black occupation by the *apartheid* state), and a completely redesigned local government structure (both in constitutional status and geography). The new South African government also had a fundamentally different mandate aimed explicitly (inter alia by means of constitutional obligations) at development and addressing inequality embedded by centuries of colonialism and *apartheid*. Above all, the values underpinning the new democratic state were fundamentally different from those of the previous regime – focusing on human dignity, rule of law, accountability, responsiveness and openness. These institutional and functional changes required a revised approach to public finance.

Law played a key role in South Africa's general transition from an authoritarian state to democracy.[1] The negotiations between the conflicting parties – primarily the *apartheid* government and liberation movements – were characterized by the drafting of a new set of constitutional rules. It is accordingly not surprising that the overhaul of the public finance system was also premised on law. The bedrock of the change was the adoption of the Public Finance Management Act 1 of 1999 (PFMA), which came into operation on 1 April 2000. This statute introduced a highly managerial approach to public finance at national and provincial levels of government. Each distinct public entity, whether a government department or any of the large array of other types of agencies, had an accounting officer or accounting authority that became the prime holder of financial power of the entity within the system. The accounting officer/authority became primarily responsible for the financial management of that entity. This same approach was consequently applied to local government by means of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), which came into operation on 1 July 2004. The result of these statutory developments was a highly decentralized public finance structure, in which the administrative head of each public entity (as opposed to the elected, political head) was the most powerful financial actor in the system. While centralized financial oversight remained, primarily through national and provincial treasuries, the implementation power, such as spending public money, was almost exclusively placed in the hands of accounting officers/authorities.

Public procurement, as a key element of public finance, developed within this broad new public finance structure along its own trajectory. Like the

[1] Klug (2008).

rest of the system, public procurement in South Africa has also been largely shaped by law. However, unlike the overall public finance management structure, the law governing public procurement has been far from stable. This paper analyses the development of the public procurement system in South Africa through legal regulation. The aim of the paper is to identify the trends in that development that pose challenges in the continued development of the system from a regulatory perspective.

II. HISTORICAL BACKGROUND TO SOUTH AFRICA'S PUBLIC PROCUREMENT LAW SYSTEM

The South African public procurement system has been governed by dedicated legal rules from as early as 1913 (the Union of South Africa only having come into being in 1910). As a distinct administrative function, public procurement has thus always been premised on legal rules in South Africa. These were initially contained in tender board regulations issued in May 1913 under the Exchequer and Audit Act 21 of 1911.[2] In 1968, the State Tender Board and State Procurement Act 86 of 1968, later simply renamed as the State Tender Board Act, was promulgated. The Act was supplemented with detailed state tender board regulations, issued in 1965. The State Tender Board Act and its regulations created a free-standing regulatory regime for public procurement in South Africa.

The procurement system created by these enactments was a highly centralized one. At the national level, it consisted of a central state tender board that wielded both regulatory power and operational functions in respect of public procurement. That is, the state tender board had the power to create rules pertaining to how procurement was to be conducted as well as acquire goods and services on behalf of the state. Similar structures existed within each of the four provinces.[3] While the procurement system was explicitly founded on a legislative basis, the rules allowed a significant degree of discretion to the state tender board in how to procure. The board's operations were only broadly prescribed, and the regulatory regime did not contain any detailed rules on procurement procedures.

Over time, the high degree of centralization was somewhat relaxed by way of delegation of powers to various entities to conduct their own procurement.[4] Brunette et al. note that while strict centralization was initially motivated by concerns about corruption, the subsequent relaxation of centralization was driven by efficiency concerns.[5] Throughout these developments, public procurement very much remained a back-room administrative function. Procure-

[2] De La Harpe (2009).
[3] De La Harpe (2009); Brunette et al. (2014).
[4] Brunette et al. (2014).
[5] Brunette et al. (2014).

ment decisions were taken by administrators staffing the tender boards under the overall supervision of the Minister of Finance.

As noted above, democratization in 1994 also brought major changes to the regulation of public procurement in South Africa. In 1997 an important policy paper, the 1997 Green Paper on Public Sector Procurement Reform, was issued jointly by the Ministries of Finance and Public Works. It signalled the major reforms that were to come, inter alia by stating: 'Decision making within national regulations and guidelines will be delegated to accounting officers who will be responsible and accountable for all procurement expenditure incurred within their line of responsibility.'[6] These proposals became a reality with the promulgation of the PFMA in 2000 (for national and provincial governments) and MFMA in 2003 (for local government). In a parallel legal development, the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) introduced a regulatory framework setting out how public tenders must be adjudicated.

The regulations promulgated under the PFMA, MFMA and PPPFA created a detailed regulatory structure for public procurement decisions. Between them, these regulations set out the institutional arrangements for procurement decision-making, the procurement procedures to be followed and the adjudication methodology, including the criteria to be used in awarding procurement contracts. While the PPPFA regulatory regime has been revised no less than four times between 2001 and 2022,[7] the rules under the PFMA and MFMA have been largely static. Major reforms are currently afoot, with a draft Public Procurement Bill having been published for public comment in February 2020.[8]

III. CHALLENGING TRENDS IN PUBLIC PROCUREMENT LAW DEVELOPMENT

1. Increased granular regulation

The most striking regulatory trend in the contemporary development of South Africa's public procurement system is the tendency to create ever more detailed rules governing specific aspects of public procurement as opposed to a single, coherent overarching regulatory regime. Closely linked to this trend is the ever-increasing fragmentation of the procurement system.

As noted in the previous section, the South African procurement system is premised on a highly decentralized operational model. That is, procurement is done by each state entity on its own. Each government department at all three levels of government (national, provincial and local), each state-owned entity and each and every public agency, as well as each of the subsidiaries of these entities, has its own procurement unit and runs its own procurement

[6] Ministry of Finance and Ministry of Public Works (1997).

[7] Quinot (2018).

[8] Quinot (2020).

function.[9] The result is that there are hundreds of distinct procuring entities in the country[10] conducting procurement across millions of transactions annually.[11] Following the dismantling of the state tender board after the implementation of the PFMA, limited centralized procurement remained. The national and provincial treasuries do have the power to arrange so-called 'transversal contracts', which are centrally procured contracts to supply multiple organs of state.[12] However, public entities have a discretion to participate in such central contracts and they remain few in number. In its 2015 Public Sector Supply Chain Management Review, the National Treasury noted that it was managing 37 central contracts with an estimated value of R16 billion out of a total of R500 billion annual procurement spend. That is, only about 3% of the total procurement was done via central contracting.

The law governing the multitude of decentralized procurement transactions is also highly diffused. While the PFMA, MFMA, PPPFA and their respective regulations all contain legal rules governing public procurement, the actual rules governing a procurement transaction by a particular public entity are contained in so-called SCM Policies. Entities are empowered (and indeed obliged) to create such SCM Policies by the PFMA and MFMA. The SCM Policies are furthermore supplemented (often within the same document) by entity-level preferential procurement policies as mandated under the PPPFA. The rules contained in the SCM Policies (and accompanying preferential procurement policies) are legally binding and courts routinely pronounce on the legal validity of individual procurement decisions based on their adherence to the relevant SCM Policy.[13]

When this regulatory design was originally introduced between 2000 and 2005 under the PFMA and its regulations, it involved only a broad overarching central regulatory framework, while allowing entities to create the more detailed rules within their own context. Thus, the PFMA itself only contains the terse statement that 'the accounting officer for a department … must ensure that that department … has and maintains … an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.'[14] This one-line mandate to create entity-level SCM Policies was in 2005 supplemented by a single regulation in the Treasury Regulations made under the PFMA setting out a very broad framework that SCM Policies must comply with. This regulation did not, however, apply to all national and provincial public entities covered by the PFMA, but only a core subset.

The MFMA that was created after the PFMA to extend the new public finance management paradigm to local governments already contained significantly more detailed legal rules on public procurement. Compared to the

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[9] Bolton (2013); Fourie, Malan (2020).

[10] Judicial Commission of Inquiry into State Capture (2022).

[11] National Treasury (2018).

[12] Bolton (2013).

[13] Bolton (2013).

[14] PFMA s 38(1)(a)(iii), also see PFMA s 51 for the identically worded obligation of accounting authorities in respect of (non-departmental) public entities.

single subsection in the PFMA dealing specifically with public procurement, the MFMA contains an entire chapter devoted to the regulation of local government procurement. These provisions were supplemented by a complete set of regulations, the Municipal Supply Chain Management Regulations, 2005, that set out in considerable detail the rules that local governments must follow in their procurement function. While the MFMA thus retained the basic approach of obliging public entities to create their own SCM Policies to govern their procurement transactions, the legislation largely prescribed the content of such policies.

The trend to impose ever-more detailed procurement rules that emerges from these statutory developments has continued, and indeed greatly increased, over the last few years in the form of subordinate legislation. Over the last decade, there has been a very significant increase in binding instructions issued by the National Treasury governing specific aspects of procurement.[15] These have largely displaced decentralized legal rules and dictated rules for particular procurement practices with high levels of detail. Examples include rules on bid qualifications, deviations from procurement procedures and variations of procurement contracts. Discretion on the part of procurement officials has thus increasingly been limited, so that the system continues to become ever more rigid and mechanistic.

The same trend is observed under the PPPFA since its enactment in 2000, but with a very interesting recent reversal on the back of a judgment of the Constitutional Court. There have been four sets of regulations issued under the PPPFA, each replacing the former set.[16] Across the first three sets of regulations (issued in 2001, 2011 and 2017 respectively), the rules governing the content of public entities' preferential procurement policies became ever more detailed and prescriptive. The 2001 Preferential Procurement Regulations determined that an entity may provide preference to any bidder that is an historically disadvantaged individual (HDI), as defined, and/or for subcontracting with an HDI and/or for achieving any of a broad set of specified goals under government's reconstruction and development programme. This fairly broad framework for determining preferences in public procurement was significantly narrowed down in the 2011 Preferential Procurement Regulations. These regulations set out a rigid table prescribing in absolute terms the specific preference to be given to bidders, based on their formal broad-based black economic empowerment status certificate. This approach was retained in the 2017 Preferential Procurement Regulations. These regulations added an additional list of factors for setting aside specific tenders and for mandatory subcontracting. Each subsequent set of regulations thus contained more detailed and strict rules for implementing preferential procurement, increasingly reducing public entities' freedom to design their own approach. This development came to an abrupt end when the Constitutional Court ruled in 2022

[15] Anthony (2019); Quinot (2020).

[16] Quinot (2018).

that the regulations were *ultra vires* and accordingly invalid.[17] Interestingly, the basis of the court's finding was that the PPPFA granted public entities the power to determine their own preferential procurement policies and that the Minister of Finance thus did not have the power to prescribe what policies they had to adopt via the regulations.[18] Subsequently, a new set of regulations, the Preferential Procurement Regulations 2022, has been issued in which public entities have been given broad discretion to determine their own preferential procurement policies.

The multitude of instructions and circulars centrally issued by the National Treasury, especially under the PFMA and MFMA, remain highly fragmented with little coordination between them. The regulatory regime is accordingly highly fragmented. Currently, there are about 30 different primary statutes governing distinct aspects of public procurement, with dozens of subordinate instruments under them.[19] This is in stark contrast with many other legal systems in sub-Saharan Africa, such as Botswana, Ghana, Kenya, Madagascar, Malawi, Mauritius, Namibia, Nigeria, Rwanda, Tanzania, Uganda, Zambia and Zimbabwe, where there has been a very strong tendency to consolidate public procurement law in a single regulatory instrument. This is typically done by way of a primary statute with a single set of regulations under it, and is often highly influenced by the UNCITRAL Model Law on Public Procurement Law.

South African public procurement law remains an exception to the typical approach in sub-Saharan Africa. Unlike the consolidation that has happened in many other countries in the region, the trend in South African public procurement law has remained one of increasing fragmentation with detailed rules on specific aspects of public procurement being issued across a multitude of instruments. This is an unfortunate state of affairs that hinders efforts to increase integrity in the system and that undermines efficiency.[20]

The ongoing trend of increasingly strict procurement rules issued at a granular level, and aimed at addressing distinct procurement problems as they emerge, is not serving South Africa's best interest. There are many reasons why such a highly decentralized, fragmented and detailed regulatory regime is not ideal. It adds significant transaction costs to the procurement function, due to the complexity involved in (finding and) applying the rules, and the lack of uniformity in procurement rules across the system. The significant regulatory burden slows down the procurement process, affecting efficiency negatively. This is confirmed by Manyathi's 2019 study of the perceptions of public procurement officials in South Africa:[21] 69% of respondents in the study agreed that the fragmented regulatory regime delays service delivery. Procurement officials may become overly cautious when faced with the need to take decisions, given the extensive rules governing such decisions

[17] Minister of Finance v Afribusiness NPC 2022 (4) SA 362 (CC); Volmink (2022).
[18] Volmink (2022).
[19] Quinot (2020).
[20] Judicial Commission of Inquiry into State Capture (2022).
[21] Manyathi (2019).

and the inevitably increased likelihood of breaching one of these rules. In an appeal against holding individual procurement officials personally liable for litigation costs following the successful judicial review of a tender award, the appellant municipality argued that such an approach would have a 'chilling effect' on procurement decision-making and that officials 'would in future be unwilling to serve on committees if faced with the likelihood that any remissness on their part would render them liable for payment of legal costs'.[22] The High Court seems to have accepted this reasoning in upholding the appeal. Furthermore, procurement officials may become compliance-focused, at the expense of a focus on value. The detailed, strict rules deny procurement officials any meaningful discretion in pursuing the best value in procurement. It is accordingly not surprising that Lukhele, Botha and Mbanga identified the awarding of unproductive contracts as the top category of construction procurement irregularities in South Africa (representing about 47% of all irregularities in this sector identified in their study).[23] The result is that the procurement system is not cost-effective.

It can be a significant barrier to entry into the procurement market for small enterprises that do not have the expertise and capacity to navigate such complex regulatory environment. This creates an inherent bias in favour of large, established suppliers, especially those that are already active in the procurement market. Zwane's study on SME access to public procurement in South African water infrastructure projects confirmed the regulatory framework as one of the main barriers to entry.[24] In the context of land transport services, Walters and Heyns found that 'the complexities of involving small and informal operators in formal contracting regimens in South Africa has been a point of debate for a long time with no solutions evident in the short term.'[25] These findings echo those of an ILO study, which found that the majority of SMEs surveyed did not tender for government contracts.[26] Reliable, comprehensive data on SME participation in procurement in South Africa is not readily available, largely due to the absence of any consolidated procurement database and given the operational decentralization. In its 2018 national and provincial procurement spent analysis, the National Treasury indicated that while the vast majority of suppliers registered on the national, central supplier database (primarily used by national and provincial government entities) were SMEs (75.6%), they were awarded only 38% of procurement contracts in 2016/17.[27] The National Treasury thus noted that 'specific measures will have to be introduced to support SMMEs', including 'simplified administrative procedures for SMMEs to participate in procurement procedures'.[28] This bias

[22] eThekwini Municipality and Others v Westwood Insurance Brokers Proprietary Limited [2020] ZAKZPHC 2.

[23] Lukhele, Botha, Mbanga (2022).

[24] Zwane (2020).

[25] Walters, Heyns (2012).

[26] Christensen, Hegazy, Van Zyl (2016).

[27] National Treasury (2018).

[28] National Treasury (2018).

in favour of larger suppliers undermines the fairness, equity and competitiveness of the system.

The legal uncertainty created by such uncoordinated regulatory system may create significant risks for participation in public procurement transactions. Suppliers may accordingly decline to participate, resulting in a negative impact on competition. Alternatively, suppliers may increase prices to account for the increased risk, thereby having a negative impact on cost-effectiveness.

Oversight becomes considerably more difficult given the sheer volume of rules to be monitored and the difficulty in understanding how the system fits together. For example, given that every public entity procures in terms of its own SCM Policy, rather than in terms of a standardized set of rules, it is very difficult to build effective systems to routinely test procurement decisions against the applicable rules even where those rules are in substance very similar. This may make it very hard for civil society to monitor compliance. While it may seem counterintuitive, the increase in legal rules may reduce integrity, because of the increased challenges in implementing effective oversight. The transparency of the system accordingly decreases.

It is evident that the current structure of public procurement law in South Africa fails to achieve the requirement contained in section 217(1) of the Constitution of the Republic of South Africa, 1996, namely that procurement must be done in terms of 'a system which is fair, equitable, transparent, competitive and cost-effective'.

The consolidation of the highly fragmented legal regime into a single, overarching regulatory framework should be an urgent priority. South Africa should return to the principled point of departure to procurement regulation that is contained in section 217(1) of its Constitution.

2. Procurement as a policy instrument

Since democratization, public procurement has become a key policy instrument in South Africa.[29] The trend has been to employ public procurement as a mechanism to enhance social policy, especially the pursuit of equality and wealth redistribution, within an explicit legal framework.[30] More recently, public procurement has also been used as an instrument of economic policy, especially localization. The legal basis for this use of public procurement has been less certain and has all but disappeared following the replacement of the Preferential Procurement Regulations 2017 with the Preferential Procurement Regulations 2022.

South Africa emerged from colonialism and *apartheid* as one of the most unequal societies on the planet. Close to thirty years of democracy has not been able to significantly shift this state of affairs. The World Bank's Gini Index lists South Africa as the country with the highest level of income inequality

[29] Shai, Molefinyana, Quinot (2019).

[30] Quinot (2013).

worldwide in 2023.[31] It is accordingly not surprising that public procurement has been used to pursue equality in South Africa. The PPPFA introduced a legal framework for such use of procurement in 2000. This statute requires all public entities to have a preferential procurement policy that determines the implementation of preferences in favour of previously disadvantaged South Africans in the entity's procurement. The Act effectively provides for a price preference of 10% or 20%, depending on the value of the procurement, in favour of bidders that achieve particular goals in relation to the broad equality policy. As noted above, the rules governing such preferences have seen significant development since the PPPFA's enactment in 2000. Consecutive sets of Preferential Procurement Regulations have prescribed different approaches to framing the preferential scheme. The consistent trend has, however, been to focus specifically on social policy in procurement.

Notably absent from South Africa's public procurement policy landscape is attention to environmental considerations. Thus, while, in terms of law, public procurement is used extensively and explicitly as a policy tool in South Africa, this dimension of public procurement does not yet extend to environmental policy in any notable manner.[32] From a global perspective, one can perhaps understand this bias in favour of social policy in procurement as South Africa's response to the United Nations Sustainable Development Goals (SDG) 12's target 12.7, namely to 'promote public procurement practices that are sustainable in accordance with national policies and priorities'.[33] The national policy and priority in South Africa is clearly the pursuit of equality. However, the total absence of meaningful attention to environmental considerations suggests that South Africa still has some way to go in realizing sustainable public procurement.

Even within the narrow focus on social policy, South African public procurement law has struggled to get the balance right between competing considerations – equity, fairness, transparency, cost-effectiveness and competitiveness. The Judicial Commission of Inquiry into State Capture accordingly stated: 'This uncoordinated approach leaves a critical question unanswered: is it the primary intention of the Constitution to procure goods at least cost or is the procurement system to prioritize the transformative potential identified in section 217(2)? There is an inevitable tension when a single process is simultaneously to achieve different aspirational objectives … In the view of the Commission the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official.'[34] The legal rules facilitating the use of public procurement for policy objectives remain contested. This is best illustrated by the recently successful judicial challenge to the Preferential Procurement Regulations, 2017, made under the

[31] World Bank (2023).
[32] Stoffel et al. (2019).
[33] United Nations (2015).
[34] Judicial Commission of Inquiry into State Capture (2022).

PPPFA. The Preferential Procurement Regulations, 2022, that replaced the invalidated 2017 regulations are both broader and narrower in respect of procurement as an instrument to implement policy. The regulations are broader in that they do not prescribe a particular methodology for calculating the 10% or 20% price preference, leaving it entirely to public entities to formulate their own methodology, including the factors to be taken into account. However, the 2022 regulations have also narrowed the policy field by completely omitting the mandate for public procurement as a tool to support economic localization policy. The legal basis for such localization is accordingly now questionable, and it is to be expected that the use of public procurement for such economic policy purposes will greatly decrease (if not stop altogether).

It is evident that despite extensive experimentation with different approaches to facilitating the use of procurement for policy purposes, this aspect of public procurement law remains a challenge in South Africa. In a narrower perspective, the appropriate calibration of legal rules to achieve the specific social and economic policy objectives in pursuit of equality, as South Africa's primary national priority, remains elusive. In a broader perspective, the realization of truly sustainable public procurement that would meaningfully integrate social, economic and environmental policy objectives, seems a far-off goal for South African procurement law.

IV. CONCLUSION

Public procurement is globally a highly regulated administrative function[35] and South Africa is no exception. From the inception of South Africa as a sovereign state in the early twentieth century and even more so following democratization in 1994, law has played a determinative role in the development of the South African public procurement system. In democratic South Africa, public procurement is anchored in the Constitution, which sets out the core principles of the procurement system – fairness, equity, transparency, competitiveness and cost-effectiveness. However, despite this seemingly clear formulation of the point of departure, law has generally not served the public procurement system in South Africa well.

The analysis in this paper shows that the development of public procurement law in South Africa has resulted in both structural and substantive challenges in the procurement system. Structurally, the trend to create evermore detailed, granular rules in disparate legal instruments, in what can only be described as a band-aid approach to addressing problems in the procurement system through law, threatens to undermine the very constitutional foundations of the procurement system. Without comprehensive consolidation and rationalization of public procurement law leading to the creation of a single, overarching statutory framework for all public procurement, it is doubtful

[35] Quinot, Arrowsmith (2013).

whether the aspirational goal of a fair, equitable, transparent, competitive, and cost-effective procurement system can be realized. At a substantive level, the rules framing the use of public procurement for social policy objectives continue to be in flux. Without stability in these rules, it is doubtful whether the use of public procurement to pursue the important social policy objective of equality will be effective. Suppliers will simply not know how to adjust their behaviour in the absence of a clear, consistent regulatory framework.

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