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THE LEGAL NATURE OF SUPPLY CHAIN MANAGEMENT INSTRUCTION NOTES, PRACTICE NOTES AND CIRCULARS

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ABSTRACT

It has been the practice that many public bodies, including the National Treasury, have published instruments applicable to those involved in supply chain management or public procurement processes. These instruments are intended to assist in regulating and streamlining these processes. Often, however, many of these instruments have been contradictory either to other similar instruments or even contrary to legislation. Public officials are thus left with the dilemma of deciding which instrument trumps the other and ultimately which to comply with. The aim of this paper is to determine the legal nature of supply chain management instruction and practice notes and circulars. This is done by way of interpretive tools in order to establish whether the instruments published by public bodies are in fact subordinate legislation and thus mandatory to comply with or rules which are not legally binding.

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THE LEGAL NATURE OF SUPPLY CHAIN MANAGEMENT INSTRUCTION NOTES, PRACTICE NOTES AND CIRCULARS

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1 Introduction

Public procurement is a method used by the government to acquire, sell or let goods, services and works to or from the private sector. The latter party can also be used to act on behalf of the government in fulfilling its obligations.[1] In the field of public procurement or supply chain management as it is more generally known, there has been an increase of instruction notes, practice notes and circulars published by public bodies which are seemingly nationally applicable.[2] Public procurement is regulated by section 217 of the Constitution and one of the legislation applicable to this field is the Public Finance Management Act (PFMA)[3] which regulates finance at national and provincial government level. There are many other legislation which play a role in the regulation of public procurement, however, for purposes of this article, the PFMA is the most relevant as it provides the authority for the instruments analysed in this article. It should be noted that this article focusses solely on instruments pertaining to public procurement and only the authority provided by the PFMA to publish such instruments.

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[1] Bolton 2007: 1. Section 217(1) of the Constitution which regulates public procurement and requires that the process be fair, equitable, transparent, competitive and cost-effective.

[2] See http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx for all instruction notes published by the National Treasury.

[3] 1 of 1999. The purpose of the Act is stated as regulating financial management at the national and provincial government level; to ensure that all revenue, expenditure, assets and liabilities of these governments are managed effectively and efficiently; to provide for the responsibilities of the persons entrusted with financial management and to provide for matters connected therewith.

The question this article thus seeks to address is whether these instruments are "law" in lieu of the specific provision in the PFMA.

Its local government counterpart, the Local Government: Municipal Finance Management Act (MFMA)[4] has specifically been excluded from this article as it regulates government finance at local government level only. Rules created in terms of this Act therefore do not affect all government departments as the PFMA does. Furthermore, it is submitted that municipalities should have more flexibility in their regulatory frameworks in order to allow for the needs of specific local communities. This should of course still be done within the legal framework for public procurement in South Africa and its Constitution.

The PFMA grants authority to the National Treasury to publish instructions regarding matters concerning the PFMA for distribution to all spheres of government. These instructions are thus included in the legislation which regulates public procurement. This paper will examine the legal nature of these and similar instruments in order to determine whether they are legally binding. This stems from the plethora of not only legislation but instruction notes, circulars and best practice guidelines which must all be read together and implemented in ensuring that public procurement is carried out. This array of rules causes much confusion regarding which instruments are in fact legally binding and which constitute guidelines only.

In this paper, the relevant legislative provisions which provide the authority for publication of such instructions will be discussed, followed by the rules of interpretation of laws as a guide to how these instructions should be interpreted. The case will be made that the instructions are in fact equal in nature to subordinate legislation, but have not been promulgated correctly. The consequences thereof are examined next and include recommendations for these consequences. It is important to note that the arguments made in this article pertain specifically to instruction notes, practice notes, circulars and similar instruments which relate to the implementation of public procurement in South Africa. The article therefore does not propose that the approach

[4] 56 of 2003.

taken is applicable to all forms of subordinate legislation or those instruments similar to those discussed in this article in other fields of law.

2 Legislative provisions regulating publication of instruction and practice notes

In this section, the legislative provisions which regulate publication of instruction notes, practice notes and circulars will be explained. The aim is to establish whether these instruments have any legal force based on the law or laws which empower their publication. Section 76(1) of the PFMA provides that:

> "The National Treasury *must* make regulations or issue instructions applicable to departments, concerning-
>
> (a) any matter that must be prescribed for departments in terms of this Act;"[5]

Section 76(2) then provides that:

> "The National Treasury *may* make regulations or issue instructions applicable to departments, concerning-
>
> (a) any matter that may be prescribed for departments in terms of this Act;
> (e) fruitless and wasteful, unauthorised and irregular expenditure;
>
> (g) the treatment of any specific expenditure;
>
> (j) any other matter that may facilitate the application of this Act;"[6]

"Regulations", referred to in the sections above, are rules that add detail to the Acts in terms of which they are published and are thus subordinate legislation.[7] However, "instructions" in this section are somewhat vague and will be examined next in the context of rules of interpretation in order to adduce legal meaning to the word.

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[5] Own emphasis.
[6] Own emphasis.
[7] Also called "delegated legislation", Hoexter defines subordinate legislation as "legislation made under the authority of original legislation". See Hoexter 2012: 32.

3 Rules of interpretation – giving meaning to "instructions"

According to du Plessis, a "law text" connotes both "a text in accordance with the law" and "a text that has to do with the law".[8] These "law texts" can be statutes or the Constitution or as he states, texts that have to do with the law. For present purposes, that would include instruction notes and practice notes pertaining to public procurement. In order to determine what a "law text" means, it has to be interpreted.[9] Legal interpretation, in turn, means that the meaning of texts are not discovered in the text itself but determined in "dealing with" the text.[10] In the process of "dealing with" texts, various canons of interpretation are used.[11] These canons form part of:

> "…either the legislation or common law that 'every court, tribunal or forum' must interpret and develop in a manner promoting the 'spirit, purport and objects of the Bill of Rights'. This is cardinal because the canons of construction are infused with the value-laden ideas (and may in some instances even be replaced by the norms and principles) of the Constitution and constitutionalism."[12]

Instructions are not defined in any legislation pertaining to public procurement. Therefore, the rules of interpretation in determining the meaning of words may be used. The Oxford Dictionary defines "instruction" as a direction or an order.[13] Instruction notes and practice notes are thus permitted by s 76 of the PFMA since each of these can be interpreted as "instructions" as required by the section. The Act appears to classify regulations and instructions together by grouping them in one sentence. This is line with one of the canons of interpretation, which is grammatical interpretation. This canon involves interpreting a word according to the context in

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[8] du Plessis 2002: 1.
[9] To this end, du Plessis notes that "text" and "meaning" are related. Whatever is intelligible or understandable and thus interpretable is a text but it does not necessarily follow that a text is an autonomous bearer of meaning despite the fact that it is most often intentionally authored to convey meaning. He writes that the author of a text is not an autonomous subject controlling the meaning of the text. "A text, as signifier, in a complex interplay with other texts as signifiers and depending on the way it is read, rather *generates* or *produces* meaning." See du Plessis 2002: 7.
[10] du Plessis 2002: 8.
[11] These are often described as "the rules and presumptions of statutory interpretation" according to du Plessis 2002: 121. They are also referred to as canons of construction.
[12] du Plessis 2002: 125.
[13] Oxford English Dictionary 2008. The definition also includes "detailed information about how something should be done".

which it is found. In other words, before looking at the greater context of the word, the surrounding words in the phrase should be interpreted first in order to adduce a meaning to it as a whole.[14] This illustrates the *eiusdem generis* rule which means that a general word must be restricted to the same kind or genus as the list of specific words in the same phrase.[15] du Plessis notes that this rule applies:

> "to provisions made up of a phrase of general application preceded by a class or genus of words of a limited or particular meaning. The meaning possibilities of the general phrase are then restricted to the narrower, generic meaning possibilities of the preceding words heedful of the scheme of the provision in question."

He uses the following example:

> "In the phrase 'any place of entertainment, café, eating-house, race course *or other premises or place to which the public are granted or have access'* (own italics) the italicised words of general application were, for example, held to refer to premises or places or recreation only, and not to literally "any place". A courtroom and a police station were therefore held to be excluded."

This was illustrated and confirmed in *Moodley v Scottburgh Local Transitional Council.*[16] Mr Moodley was the treasurer of a local authority who negligently invested pension funds with a company which was subsequently liquidated. Mr Moodley admitted to such negligence and pleaded guilty to misconduct in terms of his Standard Conditions of Service at the time. The Town Board (predecessor of the defendant) instituted action against Mr Moodley to recover the amount lost, plus interest and costs. The question to be answered was whether Mr Moodley was guilty of misconduct in terms of section 37 of the Pensions Fund Act.[17] If he was guilty in terms of the Act, the defendant would be entitled to deduct the amount owed to it by Mr Moodley through payment from his pension fund upon termination of employment. Section 37 of the Pensions Fund Act provides that an employer may recover damages caused to it by

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[14] du Plessis 2002: 234.
[15] du Plessis 2002: 234.
[16] 2000 (4) SA 524 (D&CLD).
[17] 24 of 1956.

an employee by reason of theft, dishonestly, fraud or misconduct by such employee. Since there was no theft, dishonesty or fraud, the court was left with interpreting what constituted "misconduct" in section 37. The court held that:

> "To my mind the proper approach herein is to look at the whole section on the principle of *eiusdem generis*-a rule or principle which in turn has been described, *inter alia,* as follows:
>
> > 'This rule of restrictive interpretation (often referred to as "principle") holds that where words which have a limited or particular meaning are followed by a phrase of general application, the meaning of the said phrase is restricted to the generic meaning of the preceding words.'"[18]

The word "instructions" can therefore be accepted as subordinate legislation which is what "regulations" in the same sentence, preceding "instructions" constitute based on the *eiusdem generis* principle.[19] Even if this argument was unconvincing, the act of giving the executive (National Treasury) the power to create legal rules is generally known as delegation.[20] In other words, Parliament is delegating its power to make laws to the National Treasury. Rules made by National Treasury could thus constitute delegated or subordinate legislation. Therefore, when reading section 76 as a whole, the argument can be made that regulations and instructions are both to be treated as subordinate legislation.

The Interpretation Act[21] provides that the provisions of the Act apply to the interpretation of every law as defined in the Act. "Law" is in turn defined as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". Section 16 of the Act then provides that:

> "[w]hen any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister or by the Premier of a province or a member of the Executive Council of a province or by any local authority, public body or

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[18] 531 para A.
[19] The same approach was used in *S v Kohler* 1979 (1) SA 861 (T).
[20] Hoexter 2012: 51.
[21] 33 of 1957.

> person, with the approval of the President or a Minister, or the Premier of a province or a member of the Executive Council of a province, such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*."

The word "gazette" is in turn defined in section 2 of the Act as:

> "(c) in the case of laws, proclamations, regulations, notices or other documents published after the date of commencement of the Constitution and required under any law to be published in the *Gazette* or the *Provincial Gazette* or any other official *Gazette*, means the *Government Gazette* of the Republic or the relevant *Provincial Gazette,* according to whether the administration of the law concerned or, as the case may be, the law conferring the power to make or issue such a proclamation, regulation, notice or other document, vests in, or in a functionary of, the national government or a provincial government".

Section 16 of the Interpretation Act thus requires any rule or order such as National Treasury instruction and practice notes to be published in the *Gazette* in order to have the force of law. These notes are usually applicable to all accounting officers of departments and constitutional institutions, accounting authorities of public entities and head officials of provincial treasuries. Therefore, it is nationally applicable. It is also published by National Treasury which means that it must be published in the *Government Gazette.* In the absence of this, the instruction note does not have the force of law. Instruction and practice notes that are not published in the *Gazette* are therefore not legally binding. Section 239 of the Constitution defines national legislation as including subordinate legislation made in terms of an Act of Parliament, thereby suggesting that subordinate legislation can only be created in terms of original legislation. Such legislation must in turn be published in the *Gazette,* giving it the force of law.

The same argument could be made for best practice guidelines published for the purpose of public procurement by public bodies other than the National Treasury. For example, the Construction Industry Development Board Act[22] establishes the

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[22] 32 of 2000.

Construction Industry Develop Board (CIDB) as a juristic person. The CIDB is empowered in terms of the Act, to publish best practice guidelines for regulation of the construction procurement process. Therefore, it could be argued that these guidelines constitute subordinate legislation as in the case of instruction or practice notes published by the National Treasury.[23] However, section 16 of the Interpretation Act refers to publication in the *Gazette* of *inter alia* rules or orders made by a Minister or a member of the Executive Council or a public body or person with the approval of a Minister or a member of the Executive Council. Such guidelines or rules which are currently the most important rules for construction procurement law, in the absence of publication in the *Gazette,* are in effect not legally binding.[24]

In *National Police Service Union v Minister of Safety and Security*[25] the legally binding nature of a medical scheme was disputed. The court held that the rationalisation process in this matter was carried out in strict compliance with the requirements of the Interim Constitution[26] and the relevant Proclamation which constituted original legislation. A provision in the Proclamation provided for a "Fifth Scheme" to be established in terms of which rationalised posts were created. The court held that creating the Scheme was a step in an administrative process which was empowered by legislation. Bringing the Scheme into effect was, as the court held, an "administrative directive". However, the nature of the Scheme was not the kind that required promulgation. This is because it did not amount to a by-law, regulation, rule or order in terms of section 16 of the Interpretation Act. The court held that:

> "Section 14(6) of the Proclamation provided for the form of notification the administrative decision underlying the directive was to take - the members who might be affected thereby were to be informed. This was done. In the result promulgation, in my view, was not called for. The validity of the Fifth Scheme (as opposed to whether it had force and effect) has never been in issue, and

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[23] See also Hoexter 2012: 52 who notes that an array of terms are used for different types of delegated legislation such as rules, orders, directives, decrees and schemes.
[24] Hoexter 2012: 53 notes that "[u]nlike other administrative acts, legislation requires publicity in an official publication (such as the *Government Gazette*) in order to become valid". However, the argument could be made that since the CIDB Standard for Uniformity is published in the *Gazette,* the best practice guidelines as annexures to the Standard for Uniformity do not have to be individually published.
[25] 2000 (3) SA 371 (SCA).
[26] Constitution of the Republic of South Africa Act 200 of 1993.

> the legislative consequences that flow from it are not open to challenge. Questions of non-compliance with the rules of natural justice simply do not arise. Even if the Fifth Scheme amounted to a legal enactment which would normally require promulgation, there are sufficient indications in the Proclamation to infer an intention that promulgation was impliedly dispensed with (c*f* section 16 of the Interpretation Act and *Byers v Chinn* (*supra*)). The Scheme related to a limited class of persons (pre-rationalised members of the Service) and did not affect the public in general, or a large percentage or class of the public, requiring that they be given notice. The Scheme primarily conferred a benefit - that of incorporation in the fixed establishment - rather than imposing an obligation. Furthermore, the requirement in section 14(6) of the Proclamation, in express terms, that members who may be affected by a rationalisation scheme were to be informed of its contents, served the very purpose for which promulgation was intended. Being so informed through the available command structures of the Service would also amount to the most effective form of notification to its members. Promulgation would therefore not serve a purpose not already specifically catered for by the Proclamation."[27]

What distinguishes this matter from public procurement instruction notes, practice notes and best practice guidelines, is that the latter do in fact affect the public. These notes and guidelines are applicable to bodies which act in terms of rules which affect the public purse. Furthermore, the contractors which tender for contracts with the government form part of the public. Moreover, government spending on goods and services account for approximately 7,5% of South Africa's GDP,[28] therefore it forms a large part of the country's economy. In the case of construction procurement specifically, public-private partnerships in the industry contributed R16.5 billion or 1,7% of the total public sector infrastructure budget in South Africa in 2017.[29] Furthermore, the rules published by the National Treasury and other public bodies are intended to influence the conduct of those involved in financial management in the various spheres of government. Therefore, they cannot be equated to the scheme

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[27] Paras 20-22.
[28] See Statistics South Africa http://www.statssa.gov.za/?page_id=1854&PPN=P0441 (accessed 29 October 2019).
[29] National Treasury 2017.

rules in the *National Police Service Union* judgment as they have a much larger import and influence.

In addition to the above, Regulations as subordinate legislation are created in terms of original legislation. The purpose of Regulations is to add particular or specific detail to the broad framework provided for in original legislation. Therefore, it may be argued that the intention of documents such as circulars which are internal rules, as opposed to notes and guidelines, is to serve as practical guidelines rather than subordinate legislation. These are thus akin to internal office notes or memos which affect a small number of people for practical purposes only.

Giving such a strict interpretation to subordinate legislation is not uncalled for as legal certainty is required when rules are made. It is also important in light of the many instruction notes and practice notes continuously published by public bodies such as the National Treasury or CIDB to know which rules are applicable at a particular stage. In other words, proper repeal of old rules is required in order to avoid a conflict of rules. To this end, the Constitution provides a solution for conflict of laws in Schedules 4 and 5, however, this is applicable to original legislation only. Therefore, in the absence of a specific provision in the legislation stating that it repeals all previous rules, all published rules and orders remain in effect. If a court finds that publication in the Gazette is not a requirement, it is submitted that at the very least, public bodies who intend to publish such subordinate rules publish same for public comment and provide an opportunity for those to be affected by the rules to comment and make suggestions where necessary. This will ensure that the public body is aware of the practical considerations involved in implementing the rules and the constitutional principles of transparency and efficiency will be achieved.

4 Implications of improper commencement of laws

The question which arises next is what the consequences are for decisions made in terms of any instruction notes not properly promulgated. The Supreme Court of Appeal (SCA) has held that tenders, therefore public procurement, is a form of administrative

action.[30] Therefore, generally, any actions taken in terms of these notes would be considered to be invalid. This is based on the lawfulness principle that a public power cannot be exercised without being properly authorised.[31] Alternatively, it could be argued that a law remains in force until set aside by a court of law.[32] However, these instruction notes were not promulgated and consequently not "law" to begin with. The consequences of declaring all actions taken under instruction notes not properly promulgated invalid would, however, be far-reaching.[33] Although it is necessary that the process for bringing laws into existence be followed correctly, the consequences that would arise from unequivocally applying this rule in the case of ongoing public procurement matters may be dire. Not only have our courts warned against preferring form over substance,[34] but they have also stated that when interpreting a law, courts should do so in accordance with constitutional values.[35] Therefore, it will be necessary to approach compliance with these rules applied in the past, contextually rather than strictly grammatically. Section 39(2) of the Constitution enjoins the courts when interpreting legislation, to do so in accordance with the spirit, purport and object of the Bill of Rights.[36] This form of interpretation was further confirmed by the court in *Natal*

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[30] See *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* 1997 2 All SA 548 (A) paras 552-553; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) para 23; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 5; *Metro Projects CC v Klerksdorp Municipality* 2004 1 SA 16 (SCA) para 12.

[31] The lack of authorisation in this case lies in the absence of a law permitting the actions taken by administrators based on the argument that the instruction notes do not have the force of law due to lack of proper commencement procedures.

[32] See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 3 SA 481 (CC) para 65 in which the Constitutional Court held that an organ of state must formally apply to court to have a decision set aside. Once a subject has relied on the decision, the government cannot ignore what has been done. Even if the decision is defective, it may have consequences which make it undesirable or even impossible to set aside.

[33] The normal course of events in declaring administrative acts to be invalid is that such acts cease to have legal effect and are treated as if they never existed.

[34] See for example the latest judgment in which the court confirmed this principle in *Adcock Ingram Critical Care Proprietary Limited v Tiagen Industrial Proprietary Limited* (3900/2018) [2019] ZAECPEHC 9 (12 February 2019) para 13.

[35] As stated in the *Endumeni* case below.

[36] To this end, du Plessis notes that meaning has to be attributed to section 39(2) according to constitutional interpretation. Whatever meaning is given to it, is bound to have an impact on the manner in which legislation is interpreted. du Plessis 2002: 133. Therefore, any legislation which is to be interpreted, must be in line with Constitutional values. Singh writes in her dissertation that "[t]he transformative nature of the Constitution has resulted in a new jurisprudence which requires a new methodology for the process of interpretation. Section 39(2) – which clearly mandates a value-based methodology – has been largely instrumental in what these rules ought to be…In order to achieve social, economic and political justice, these rules and principles must embody moral and ethical considerations and obligations…". See Singh 2014: 100.

Joint Municipal Pension Fund v Endumeni Municipality[37] that statutes are to be interpreted contextually and in line with constitutional principles. Furthermore, where both an unconstitutional and constitutional interpretation could be given to a statute, the constitutional interpretation should naturally be preferred.[38] The Constitutional Court has held that:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is an issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[39]

Therefore, declaring actions and/or decisions made in terms of these instruction notes to be invalid, may lead to the infringement of tenderer's constitutional rights where decisions may be sought to be overturned by organs of state.[40] This infringement lies in the legitimate expectation of tenderers that the public procurement process be conducted in terms of section 217(1) of the Constitution. In other words, in a manner which is fair, equitable, transparent, competitive and cost-effective. Such a procurement process requires that the rules are clear, unambiguous and fairly applied to all tenderers. This in turn means that if any rules are incorrectly applied, or applied when they should not have been, it means that tenderers will have relied on an unlawful process which leaves the procuring government entity susceptible to litigation for lack of a procurement process which is in line with section 217(1).

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[37] 2012 (4) SA 593.

[38] As du Plessis states, the Constitution decidedly impacts upon the interpretation of statutes. It sets the "scene for" and limits to statutory interpretation. He notes that "[n]ot only are statutes subject to the Constitution, but they also have to be read in the light of the Constitution in several ways." See du Plessis 2002: 133.

[39] See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Other v Smit NO and Others* 2001 1 SA 545 (CC) paras 21-22.

[40] See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC) in which the court held that organs of state may challenge the lawfulness of their own decisions only by way of the principle of legality and not based on the Promotion of Administrative Justice Act 3 of 2000. The rule of law is a part of this constitutional principle which, as noted above, includes the requirement that public power should be exercised only when lawfully authorised. In the absence of proper authority, organs of state may thus challenge decisions made based on the instruction notes and other practice guidelines which have not been promulgated.

More pertinently, the court in *The Commissioner for the South African Revenue Service v Bosch*[41] held that:

> "There is authority that, in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation."[42]

Therefore, instruction notes, practice notes and public procurement practices can and seemingly should be taken into account when interpreting legislation, including compliance with such legislation. The court further held that when it comes to substance over form,[43]

> "…simulation is a question of genuineness of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction."[44]

The court then referred to a judgment[45] in which it was held that:

> "…the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which

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[41] 2015 2 SA 174 (SCA).
[42] Para 17.
[43] Ger 2013 writes that the substance over form doctrine in encapsulated in the maxim *plus valet quod agitur quam quod simulate concipitur* means 'what is actually done is more important than that which seems to have been done". He writes that this has been understood to mean that courts may prefer the substance of a transaction over its form if the nature of the transaction is in dispute. It has also been referred to as simulated transactions in the field of commercial contracts.
[44] *CSARS v* Bosch para 40.
[45] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 4 SA 319 (SCA) para 37.

> the parties intend to implement it, before determining in any particular case whether a transaction is simulated."

A court, when faced with a challenge regarding the legality of decisions made under instruction notes not properly brought into effect, may thus take into account the *bona fide* belief that the notes in fact had the force of law by virtue of section 76 of the PFMA. This, and the practical and financial implications of contracts which may have been completed and those still in progress will be surrounding circumstances considered in not declaring those actions to be invalid.[46] Moreover, the presumption that the legislation is not invalid or purposeless should be upheld.[47] This, du Plessis states, further restrains interpretations of legislation that lead to their nullity rather than validity.[48]

In 2018, the Constitutional Court seemed to disagree with the court in *Bosch* by saying that a unilateral practice of one arm of government should not play a role in the determination of a reasonable meaning of a statutory provision.[49] This may, however, be justified where the practice is evidence of an "impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties."[50] It is submitted that this conclusion by the court is not applicable in the instances where organs of state may apply to have decisions made on the basis of instruction or practice notes, aside. This is due to the fact that a tenderer's constitutional rights will be negatively affected by setting aside the administrative action. Furthermore, the affected tenderers will have a right to be given an opportunity to be heard even where *ex parte* applications are made by organs of state. Moreover, reliance on the instruction notes are practised by all involved in public procurement matters, not only some. Therefore, it cannot be regarded as a "unilateral practice…established by one of the litigating parties".

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[46] See for example *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 2 SA 638 (SCA) and *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 2 SA 481 (SCA) in which the court held that it has a discretion not to set aside administrative action where doing so will achieve no practical purpose.
[47] See du Plessis 2002: 141 and De Ville 2000: 167.
[48] du Plessis 2002: 141.
[49] *Marshall and Others v Commissioner for the South Africa Revenue Service* (CCT208/17) [2018] ZACC 11(25 April 2018) para 10.
[50] Para 10.

Should an organ of state wish to set aside such decisions, based on the controversial *Gijima* judgment,[51] an organ of state will have to rely on the principle of legality and not on the Promotion of Administrative Justice Act (PAJA)[52] to have its own decisions reviewed and set aside. This principle entails *inter alia* that decisions cannot be arbitrary which they will not have been in relying on the instructions. They must also be rationally related to their purpose which will have been the case. Therefore, the prospects of success in such a matter are rather low if the law is correctly applied. This thus refutes a possible argument that the decision is unlawful for lack of proper authority. However, when it comes to future decisions or actions to be made in terms of instruction notes, it should be ensured that these are promulgated in accordance with the Interpretation Act. As the Constitutional Court in *Kirland* held:

> "Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[53]

Alternatively, a court could declare the actions taken in terms of the instruction or practice notes invalid but decline to set the unlawful acts aside. This can occur in instances where due to the effluxion of time or where it would be impracticable or overly disruptive or unjust and inequitable to do so.[54] This especially occurs in tenders.[55] In *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) the court did not set aside the tender based on the important service that was being rendered that could not be interrupted. In this matter, the court considered the interests of the disqualified tenderer, the successful tenderer, the public and the public purse. Regarding the last two interests, the court held that the risk of harm to the public involved in canceling the tender was too high and that awarding the tender to the actual winning tenderer would

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[51] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 33 (CC).
[52] 3 of 2000.
[53] Para 82.
[54] Bleazard & Budlender 2015: 247.
[55] See for example *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) in which the court refused to set aside a tender based on impracticability. By the time the matter was reviewed by the court, a significant amount of work had already been done.

mean contracting for the services at a much higher price than the current performing tenderer was doing.[56] This is a possible way of handling unlawful acts which may result from rules not correctly brought into operation. However, it would amount to the court allowing the continuance of countless unlawful contracts which is not a favourable precedent the court should set. The first possibility of interpreting the actions to be lawful rather than unlawful, should thus be preferred. As du Plessis states:

> "A generous reading, could, for instance, sustain and enhance provisions of statutes that were designed to promote constitutional imperatives, such as the achievement of equality and the prohibition of unfair discrimination, access to information or just administrative action."[57]

5 Conclusion

Some uncertainty regarding the legal nature of instruction and practice notes published by either National Treasury or other public bodies has existed for a while. The Interpretation Act requires that all rules or orders such as instruction or practice notes, and by analogy best practice guidelines, must be published in a *Gazette,* whether national or provincial in order to be considered law. Based on general rules of interpretation, instruction notes, practice notes and best practice guidelines can be considered to be subordinate legislation. However, circulars, should be interpreted as notices for practical purposes only. Therefore, in the absence of the required publication, these documents cannot have the force of law which means that they are in fact not legally binding. This means that the authority given in section 76 of the PFMA does not negate the need for proper publication. However, the countless number of tenders approved and other public procurement actions that have been exercised under these notes in the past, cannot simply be declared invalid. In order to avoid this, a contextual approach to the instruction notes should be applied. This means that the surrounding circumstances such as the materials, resources and public funds expended during these processes must be considered. Such a rule would go a long way in ensuring legal certainty in the rules of the public procurement process. It will further prevent the publication of rules at a rate making it very difficult for

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[56] See paras 25-30 of the judgment.
[57] du Plessis 2002: 141.

procurement practitioners to know which rules are applicable to the process at what time. On the part of the National Treasury and other public bodies, it will drive home the importance of these rules and prevent contradictory rules being in operation at once time due to lack of repeal of previous rules. This current practice exacerbates the current fragmented regulatory framework of public procurement in South Africa. However, when it comes to future instruction notes, National Treasury and other public bodies should ensure that the correct processes are followed in order to give proper legal effect to its subordinate legislation.

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