# *A CRITICAL ANALYSIS OF SECTION 16 OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS ACT [Chapter 22:23].*

**BY**

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DEDICATION

To those who believe in me.

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CHAPTER 1: **INTRODUCTION**

Public procurement refers to the activity where government or other public entities contracts for the purchasing of goods and or required in the day to day functions[1]. Government can obtain its goods and services from both inside and outside sources and an example of outside source is private sector provision. It can also use its legislative powers to expropriate goods and services from private players. Government procurement is therefore of huge economic development of a country, particularly in respect of projects involving infrastructure and telecommunication.[2]

In the Zimbabwean context, public procurement is defined in section 2 of the PPDPA as the acquisition of goods, construction works or services. The process involves planning, placement of the contract and its administration. This also means stages in the procurement can be identified that is the pre tendering stage under planning process, tendering stage under contract placement process and contract post award stage under contract administration.

The role of public procurement in every economy cannot be underestimated. It has been argued that the cause for poor performing result from failing public entities. The failure has been largely attributed to the failure of public institutions to insist on correct procurement procedures which in turn invites laxity in ensuring that the suppliers behave scrupulously. An economy is largely built on public institutions with the hence the importance of public procurement.

Zimbabwe could not afford to be an exception and has a legal framework in place to regulate public procurement process. Section 315 in the Constitution deals with procurement and other governmental contracts. Subsection 1 thereof provides as follows;

*315 Procurement and other governmental contracts*

[1] Arrowsmith S (2010) Public Procurement relations, an introduction, EU Asia inter University Network
[2] Bolton P, PER/ PEL J 2006 (a) (2)

> *(1) An Act of Parliament must prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, and cost-effective, and competitive.*

In response to section 315, the legislature enacted the Public Procurement and Disposal of Public Assets Act [Chapter 22:23]. What runs through the Act is the need to achieve the five key principles espoused in section 315, fairness, transparency, cost effective, honesty, and competitiveness in public procurement. This is fortified in the objectives which appear on section 4 of the Act. Thereby reinforcing the principles set out in section 315. Under subsection 2 thereof procuring entities are required to implement the provisions of the PPDPA in a manner that achieves objectives espoused in section 4.

The researcher's focus is on section 16 of the PPPDPA *supra*. The section is new in the procurement law context. It was not part of the repealed Procurement Act *[Chapter 22:14].* It provides as follows,

> ***16 Duties of accounting officers and other persons to comply with Act***
>
> *(1) If an accounting officer is directed by-*
>
> *(a) a Minister or Deputy Minister; or*
>
> *(b) any other person with authority over the accounting officer; to do or omit to do anything in respect of procurement which the accounting officer believes he or she is not authorised to do in terms of this Act, he or she shall not comply with the direction but instead shall forthwith submit in writing to the Minister, Deputy Minister or other person in authority as the case may be his or her objections and the reasons for the objection.*
>
> *(2) If after receiving an accounting officer's objections and reasons under subsection (1), the Minister, Deputy Minister or other person instructs*

*the accounting officer, in writing, to comply with the direction concerned, the accounting officer shall comply with the instruction and shall immediately submit a written report thereon-*

*(a) to the Minister responsible for administering this Act; and*

*(b) to the Auditor-General; and*

*(c) where he or she is the accounting officer of a Ministry or department of government, to the Accountant-General; and*

*(d) where the instruction was given by a Minister or Deputy Minister, to the Secretary to the Cabinet: Provided that, if the Minister, Deputy Minister or other person fails or refuses to put the instruction in writing, the accounting officer shall not comply with it and, notwithstanding any term or condition of his or her employment shall not be liable to any penalty for such non-compliance.*

*(3) Subsections (1) and (2) shall apply, with any necessary changes, where an officer, employee, or agent of a procuring entity, other than an accounting officer, is directed by a Minister or Deputy Minister or any other person with authority over him or her to do or not to do anything in respect of procurement or the disposal of a public asset which he or she believes he or she is not authorised to do in terms of this Act.*

Section 16 is the focus of this research. Arguably, the equivalent of it section is section 14 (3) of the Public Finance Management Act *[Chapter 22:19] which* provides as follows,

*(3) If an officer is directed by a superior officer or by a Minister or Deputy Minister—*

*(a) to order or commit a payment which the officer believes he or she is not authorised to make in terms of this Act or any enactment; or*

*(c) to deal with public money in a manner which the officer believes he or she is not authorised to deal with in terms of this Act or any enactment;*

*the officer shall submit to his or her accounting officer in writing his or her objections and reasons therefor.*

*(4) If, after receiving any objections and reasons under subsection (3), the accounting officer or a Minister or Deputy Minister instructs the officer in writing to do anything referred to in subsection (3)(a), (b) or (c), the officer shall comply with such instruction and shall immediately submit a written report thereon to—*

*(a) the Accountant-General; and*

*(b) the Auditor-General; and*

*(c) where the direction that gave rise to the objections was given by a Minister or Deputy Minister, to the Secretary to the Cabinet;*

*and shall submit with the report a copy of the instruction concerned.*

The difference between the two provisions is that section 16 is broader whereas section 14 of the Public Finance Act supra, as would be implied from the title of the Act is limited to financial expenditure, while section 16 is not limited to expenditure. Both provisions show how subordinates can respond to illegal instructions albeit in a different context. Be that as it may, for the purposes of this research not so much will turn on section 14 of the Public Finance Management Act. Reference shall be made to it as and when it is necessary to do so.

Section 16 of the PPDPA *supra* provides that in the event of an instruction from a Minister or Deputy Minister or any superior to omit or to do anything which the accounting officer believes contravenes the provisions of the Public Procurement and Disposal of Public Assets Act *supra*. It puts in place a procedure to escalate a report when they are instructed to act outside the provisions of the Act. This same procedure extends to subordinates who are not accounting officers.

At first, the subordinate is supposed to respond writing to the superior. The subordinate should state his objections and if the Minister/Deputy Minister or superior insists, that instruction can only be implemented if it is put in writing whereupon the accounting officer is obliged to comply. Thereafter, the accounting officer is obliged to notify the Minister assigned to administer the PPDPA *supra*. Currently, it is the Minister of Finance and Economic Development. The notification should also be forwarded to the Auditor General.

Where the instructing superior is the accounting officer of a Ministry or department of government, the notification is to be given to the Accountant-General. Where the instructing superior is given by a Minister or Deputy Minister, the notification the Secretary to the Cabinet.

Two thing exercises the researcher's mind upon reading this provision. First is that this is self-defeating and it opens up a gap that may be exploited to defeat the objectives of the Act espoused in section 4 in their totality. The second thing is the absence of prescribed action to take once notification has been escalated in the context of that provision. It appears that the notification is in form as opposed to substance or that this is purely for record-keeping and nothing else. One would ask what the recipient of the escalation notice should do after receiving the notice. There is nothing in that provision spelling out the next procedure or step to take.

This is the case even when the Minister puts the unlawful instruction in writing. The written communication is shelved and no further. The most recent example is the case involving former Minister of Energy and Power Development, Minister Undenge. He dispatched a communication to Zimbabwe Electricity Supply Authority (ZESA) and its subsidiaries which include Zimbabwe Electricity Transmission and Distribution Company, Zimbabwe Power Company, and ZESA Enterprises (Pvt) Ltd instructing them

to work with Fruitful Communications (Private) Limited which was fronted by the Oscar Pambuka and Psychology Mazivisa.[3]

This was at the height of a government program code-named Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset).[4]The program had bearing on the energy Ministry as more fully appeared on the overall assumptions thus ensuring an increased infrastructural investments and ensuring that there is energy and power development, roads, rail, aviation, telecommunication, water and sanitation, through acceleration in the implementation of Public-Private Partnerships and other private sector-driven initiatives.[5]

The Minister argued in that letter that Fruitful Communications would enhance the energy sector visibility in the Zim Asset context. In the researcher's view two things were wrong with that approach. First, it appears that none of the entities needed the service. They all had fully equipped public relations departments which were supervised by the Group Stakeholder Relations Manager.[6] The second thing was that Fruitful Communications had not gone to tender. The rot was exposed by the Auditor General's forensic audit on ZESA and its parastatals for the year 2018.

The Minister was charged with abuse of public office in terms of the Criminal Law (Codification and Reform) Act *[Chapter 9:03].* This was years later, and government critics attribute this to changes in the political environment. The Minister was convicted and sentenced to imprisonment. Bringing the Minister to book could not have been easy had it not been for fact that the National Prosecuting Authority was inventive to fill in the gap left in the then Procurement Act. The current section 16 inherited the same weakness.

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[3] All the detail has been accessed from the Audit report on ZESA and its parastatals accessible on https://www.auditorgeneral.gov.zw/phocadownload/AG%20REPORT%20ON%20STATE%20ENTERPRISES%20AND%20PARASTATALS%202019.pdf

[4] Accessed on http://www.veritaszim.net/sites/veritas_d/files/Zimbabwe%20Agenda%20for%20Sustainable%20Socio-Economic%20Transformation%20%28ZIM-ASSET%29%20Oct%202013%20to%20Dec%202018.pdf.

[5] Ibid

[6] The information has been obtained from the Labour Court records in **Katsande v ZETDC LC/H/73/20**; **ZETDC v KATSANDE LC/H/ 79/20.**

The other striking feature of section 16 is that it is peculiar to Zimbabwe. Some other jurisdictions from which we heavily borrow our jurisprudence do not have a similar provision. This observation compounded the researcher's interest in exploring this provision further.

**STATEMENT OF THE PROBLEM**

The study seeks to explore whether section 16 is good or bad law. The central theme that will run through the research is that section 16 is self-defeating on all fronts and need to be revisited.

**RESEARCH QUESTION(S)**

a. Whether or not section 16 of the PPDPA Act supra is good law.

**JUSTIFICATION OF THE STUDY**

The study is critical in the fight against corruption in the public sector. The public sector is funded by the taxpayer's money. Corruption levels should be discouraged at the very least. The public officials interact daily with the business community and alike stakeholders in their quest to stock up on goods and services required for either their day-to-day operations or as part of service delivery.

On that score, public procurement becomes the attraction and increased chances of corruption cannot be ruled out. Huge amounts of money are sometimes involved if bigger projects are anticipated. Watertight legislation is therefore necessary for this area of the law hence this research. Beside the point, procurement processes are complex, and this may incentivize business people to engage in corruption so that they are free from rigorous and time-consuming processes.

To prove this, procurement is highly becoming a profession with professional courses being offered on the subject at all country's polytechnics, some private academies such

as Trust Academy,[7] and State Universities in Bindura and Lupane.[8] The area is becoming highly specialised and engaging in corruption provide the easiest route to circumvent the procedures.

Public officials are susceptible to corruption, especially in this jurisdiction where the issue of poor remuneration for public officials is well documented. The temptation is less likely to pass and this may have a negative influence in the manner they consider the bids. They would be loath to upset the hands that feed them. They will be conflicted and in the process, the principles that underpin public procurement which are espoused in section 315 of the Constitution and section 4 of the PPDPA supra are reduced to nothing.

This can only be countered by strong legislation. Failing that a lot of other vices may also emerge in the process which include price inflation, enlisting of people who do not meet the contract standards, and poor quality in respect of services and goods. There are also indirect consequences such as distortion of competition and limited market access.

Again, all this can be countered by strong and watertight legislation one which is not vulnerable as is the case with section 16 of the current PPPDPA. For that reason, the researcher respectfully submits that the research is critical and is of benefit to the current and future crop of lawmakers and public procurement practitioners.

**RESEARCH METHODS**

This will be a desk review characterized by reading of local and regional statutes, case law, textbooks and journals. This is an analytical legal research which is aimed at assessing a particular provision in the existing body of law.

**SUMMARY OF CHAPTERS**

[7] Information accessed from https://trustacademy.ac.zw/.
[8] http://www.lsu.ac.zw/, https://www.buse.ac.zw/.

**CHAPTER 2**

This chapter will set the stage by critically analyzing the procurement principles which emerge from section 315 of the Constitution. The write shall also demonstrate the manner in which the principles find application in the Public Procurement and Disposal of Public Assets Act) hereinafter referred to as the PPDPA.

**CHAPTER 3**

This chapter introduces the subject matter. It shall outline the broader framework of section 16 as interpreted in decided cases or legal tests. The researcher shall demonstrate at this stage the several considerations against which section 16 should be assessed.

**CHAPTER 4**

The chapter is devoted to a comparative study of various jurisdictions. Reliance will be placed on jurisdictions such as, Zambia, Ghana, Kenya and Botswana.

**CHAPTER 5**

Conclusion and recommendations

CHAPTER 2 REVIEW OF THE PROCUREMENT PRINCIPLES

## INTRODUCTION

The procurement principles emerge from section 315 of the Constitution. These are transparency, fairness, honest, cost effective and competitiveness. These principles run through the Constitution. They breathe in to the implementation of the provisions of the PDPA in general. It has been argued by Professor Sue Arrowsmith in ***Public Procurement Regulation: An Introduction*** the principles are a bedrock of procurement as they make corruption easily detectable.[9] The writer shall turn to explain each and every principle.

## TRANSPARENCY

According to the Oxford Learners Dictionary transparency is defined as the quality of something, such as a situation or an argument that makes it easy to understand.[10] On the other hand, the Cambridge Dictionary defines transparency as the characteristic of being easy to see through.[11] At the end of the day, one would argue that what characterizes transparency is openness and undisguised.

It has been argued that the main purpose of transparency is to promote openness in the public procurement system so that all the stakeholders will have access to information

[9] at page 19
[10] Oxford Leaner's Dictionary
[11] Cambridge Dictionary

about the procurement activities and thereby reduce potential public procurement corruption.[12] Dr. Kofi Osei-Afoakwa,[13] opines that,

> *'For this reason, transparency is considered a major component of good public procurement practice which, if applied properly, can lead to reduced corruption …. Lack of transparency is an enabling environment for corruption. Indeed corruption flourishes in opacity …,but transparency provides the searchlight which serves to expose the shadowy public procurement corruption which otherwise can blossom in phenomenal proportions. Since in a transparent system there is limited scope for discretion by procurement officials, there is virtually no need for participants to bribe officials before winning contracts and it becomes unprofitable to collude …. Again, when the players in a public procurement system are aware of the existence of transparency, the fear that they may be exposed and likely punished will compel them to desist from corrupt practices …. The 2004 Global Forum identified opacity in public procurement to be a major challenge in the effort to bring integrity to public procurement (Burton, 2005). Hence transparency has been recognized by the OECD as a major pre-requisite for enhancing integrity and deterring corruption in public procurement …. As estimated by …. the absence of transparency yielded more corruption in Africa and transition economies. The corollary is that transparency can lead to reduced corruption in Africa.'*

A transparent procurement means that when a public entity contracts with a private entity or another public entity this should be open to all. Procurement information must generally be accessible to all, public entity contracts must be advertised, the

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[12] Dr. Kofi Osei-Afoakwa, ***How Relevant is the Principle of Transparency in Public Procurement***
[13] *Supra*

procurement laws and regulations must be known by anyone interested, contractors and the public must access information on contract awards.

These essential elements are found in the provisions of the PPDPA. The first feature relates to the advertising of the tenders. This is referred to as invitations to bid under section 37 of the PPDPA. The provisions provides that a procuring entity shall initiate the process by inviting bidder through the publication of a bidding document. Section 38 (2) of the PPDPA provides that the invitation to bid shall be published in the Gazette and at least one national newspaper of wide circulation.[14] There is also provision for the invitation to be placed on the Public Procurement Authority of Zimbabwe website.[15]

A provision is made for the publication of the invitation over the radio or television. Without doubt these mechanisms are meant to widen scope of information dissemination. To fortify this point, section 38 of the PPDPA widely stipulates contents and publication of procurement notices. It is provided that the identification and contact details for the procurement entity and the contact person shall be included in the invitation.[16]

Further, the procurement authority is obliged under section 38 (1) (b) to provide a details of the contract, the place to deliver the goods or the services, the location and the time within which the procurement requirement is to be provided. The procuring authority is also obliged for how the bidding documents or the prequalification documents can be obtained and the price if these are obtained upon paying a fee.[17] The procuring authority should also provide for the place the place and the time within which bids or application to prequalify must be submitted.[18] They are also required to list all other matters as may be prescribed in the standard forms issued by the Public Procurement Authority of Zimbabwe.[19]

[14] See section 38 of the PPDPA
[15] See section 38 (2) (b) of the PPDPA
[16] Section 38 (1) (a) of the PPDPA
[17] See section 38 (1) (c) of the PPDPA
[18] See section 38 (1) (d) of the PPDPA
[19] See section 38 (1) (e) of the PPDPA

To reinforce transparency, the PPDPA under section 41 regulates the process of clarification and modification of bidding documents. The clarification needed by a bidder shall be communicated to all other contracting parties who similarly have expressed their interest in the invitation to bid. This is meant to ensure an even playing ground for the potential bidders. For the purpose of clarifying and modification of documents, the entity is allowed under section 41 (2) (2) to of the PPDPA to hold one or more meetings of contracting parties and conduct site visits and the procuring entity is obliged to involve all the bidders for that exercise.

As this is not enough, in modifying, which is essentially effecting changes on the bidding stipulations, section 38 (4) of the PPDPA requires the procuring entity to communicate the modifications to all the bidders. There is also a provision to extend the closing date for the bidding period by reason of modification. The all-inclusive approach is also witnessed in the provisions relating to communication were the procurement proceedings have been cancelled or rejection of bids under section 42 to all the bidders.

The other critical provision in enhancing transparency in procurement proceedings is section 46 which relates to the opening of bids. According to section 46 the opening of bids should be done in the public at the end of the bidding period or where necessary as soon as possible thereafter.[20] All the contracting parties or their agents should receive an invitation to participate during the opening process.[21]The employee of the procuring entity is obliged to call out the name of the bidder,[22] the total number of the bid,[23] any discounts or alternatives offered by the bidder,[24] whether or not the bid security has been given,[25] and any essential supporting documents.[26]

Besides these clear provisions which are bent towards instilling transparency in procurement proceedings, they are provisions in the PPDPA which indirectly enhances transparency. This is the case with provisions which allows challenging of the

[20] See section 46 (1) of the PPDPA
[21] Section 46 (2) of the PPDPA
[22] Section 46 (3) (a) of the PPDPA
[23] Section 46 (3) (b) of the PPDPA
[24] Section 46 (3) (c) of the PPDPA
[25] Section 46 (3) (d) of the PPDPA
[26] Section 46 (3) (e) of the PPDPA

procurement proceedings. Challenging of procurement proceedings is provided for under Part X of the PPDP and section 73 allows a potential or actual bidder in procurement proceedings who would have suffered or is likely to suffer, loss or injury as a result of non-compliance or breach of provisions imposed by the PPDPA to the procuring entity, to lodge a written notice with the procuring entity.[27] This can be done before the contract is awarded and even after.[28]

It appears that the challenge should relate to situations envisaged in section 51 and 52 of the PPDPA. These respectively relate to correction of errors and omissions in bids and enforcement of prohibition of negotiation regarding bids.[29] The challenge should be brought within fourteen days counted from the dates envisaged in section 51 and 52 referred above. The challenge should be taken in the manner prescribed in section 73 (4);

> ***'Part X***
>
> ***Challenge Proceedings***
>
> ***73 Challenge Proceedings***
>
> ***…***
>
> *(4) A challenge shall not be entertained unless-*
>
> *(a) in the written notice the bidder has identified the specific act or omission alleged to constitute a breach of duty on the part of the procuring entity; and*
>
> *(b) when lodging the written notice, the bidder deposits with the procuring entity a sum of money in the prescribed amount by way of security for costs.'*

[27] Section 73 (1) of the PPDPA
[28] Section 73 (2) of the PPDPA
[29] Section 73 (3) of the PPDPA

It suffices to state that the procuring entity may concede to the challenge under section 73 (5). The concession should be communicated within five days of receiving the challenge. This shall be communicated to the bidder and the Procurement Regulatory Authority of Zimbabwe.[30] It is also allowed to take whatever steps it considers necessary or as directed by the Procurement Regulatory Authority of Zimbabwe.

There is a run up to these challenges which is essentially a pointer to transparency. This relates to the requirement to keep records. See for example section 46 (5) of the PPDPA which requires a procuring entity to keep a copy of the record in relation to the opening of the bids. Equally important in this regard is section 69 (1) of the PPDPA which makes it mandatory for the entity to keep a record of what would have transpired during the procurement proceedings.

In section 69 (2) of the PPDPA it is provided that the record shall contain the following;

> *'(a) a description of the procurement requirement; and*
>
> *(b) a list of the participating bidders and their qualifications; and*
>
> *(c) any requests for clarifications and any responses thereto; and*
>
> *(d) where applicable, a statement of the reason for choosing a procurement method other than competitive bidding or request for proposals; and*
>
> *(e) the bid prices; and*
>
> *(f) a summary of the evaluation of bids; and*
>
> *(g) a summary of any review proceedings, and the resulting decisions; and*
>
> *(h) such other information as may be prescribed.'*

[30] Section 73 (4) of the PPDPA

Recording keeping is generally important and cannot be confined only for the purposes of challenging the procurement proceedings. It equally allows for auditing to establish whether procedures were followed which an essential aspect on the checklist for accountability. The importance of record keeping has been underscored by a Ghanaian author Dr. Kofi Osei-Afoakwa, ***How Relevant is the Principle of Transparency in Public Procurement***, as follows;

> *'To enable transparency in the public procurement system, the contract management processes should be well documented and widely publicised in a manner that ensures easy accessibility to all information by all the stakeholders.'*[31]

In the same vein, transparency in procurement proceedings is also influenced by stakeholder right to access to information. The right is enhanced by proper keeping of records. In the PPDPA the right appears in section 69 (3) which provides thus,

> *(3) The procuring entity shall, on request made at any time after a bid has been accepted in the procurement proceedings concerned, permit any person to inspect the procurement record and to make copies of any documents in the record:*
>
> *Provided that—*
>
> *(i) this subsection shall not preclude earlier disclosure of the record, where such disclosure is required by law or by order of a court or an arbitrator;*
>
> *(ii) such disclosure shall be made in a way as to preserve the confidentiality or proprietary commercial information.*

The inroads to the right which appear on sub proviso (i) and (ii) are, in the researcher's view, minimum. They do not displace generously given under section 69 (1). Further

[31]Osei-Afoakwa, ***How Relevant is the Principle of Transparency in Public Procurement*** Developing Country Studies www.iiste.org ISSN 2224-607X (Paper) ISSN 2225-0565 (Online) Vol.4, No.6, 2014, 2

and in any event, the right to access to information is guaranteed in terms of section 62 of the Constitution whose import is put into use through the Freedom of Information Act *[Chapter 10:33].* Section 7 off the Freedom of Information Act *supra* allows members of the public to request information from public entities which includes public procurement. It reads;

> ***PART III***
>
> ***Request for Access to Information***
>
> ***7 Requests for access to information***
>
> *(1) Any person who wishes to request access to information from any public entity, public commercial entity or the holder of a statutory office in accordance with the rights granted under this Act may apply in writing in a prescribed manner to an information officer of the public entity, public commercial entity or holder of a statutory office concerned.*
>
> *(2) On receipt of a request, an information officer must immediately provide a written acknowledgement of the request to the applicant.*
>
> *(3) If an information officer is able to provide an immediate response to an applicant that is to the satisfaction of the applicant, the information officer shall make the response.*

It has been argued by Dr. Kofi Osei-Afoakwa, ***How Relevant is the Principle of Transparency in Public Procurement***[32] that access to information in procurement proceedings enables *interested parties to participate in the proceedings.* It further ensures that there is the complaint procedures. It further allows monitoring and also putting corruption in check. Further he has named the principle of transparency among the most essential and notable principles of any system of public procurement.[33] The next principle to discuss is fairness.

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[32] Dr. Kofi Osei-Afoakwa, *How Relevant is the Principle of Transparency in Public Procurement supra*
[33] Ibid

FAIRNESS

Procurement proceedings should be held in a fair manner. This is a direct implication from the reading of section 315 of the Constitution. What constitutes fairness in so far as procurement proceedings are concerned maybe a perennial debate. But the existing body of law offer guidelines which if complied with may put to rest possible instances of unfair treatment during procurement proceedings.

Fairness in the context of the PPDPA applies in two distinct senses and the difference in the categories is demonstrated by Professor Sue Arrowsmith in ***Public Procurement Regulation: An Introduction*** at page 14 as follows;

> *The fair treatment of suppliers is also sometimes regarded as a separate value in the procurement process. This can involve, for example, concepts of procedural fairness … according to which supplies have a right to know the reasons for such decisions, a decision to debar from government contracts. It may even involve the concept of 'rights' for example, a firm's right to its reputation.*[34]

As more-fully appears in other sense the right to fairness relates to protection of rights and a reading of the PPDPA will reveal that this has a vertical and horizontal application. The former refers to the relationship between the entity and the bidder. The latter relates the relationship between the entity and private contracting parties in relation to each other.

In the former sense the procuring entity is supposed to treat potential contracting parties in a fair manner. This, for example, involves publicizing procurement proceedings. It obliges the procurement entity to employ means to ensure that the information is at the disposal of all the potential bidders. Arguably, this is what publication in the government gazette, newspapers and relevant websites which is envisaged in section 38 (2) of the PPDPA seeks to achieve.

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[34] Professor Sue Arrowsmith in ***Public Procurement Regulation: An Introduction*** at page 14

In the latter sense, the procuring entity is required to treat all the contracting parties in the same manner. This requirement eschews discrimination and preferential treatment of the contracting parties. Same yardsticks should apply to all the contracting parties. For instance the contracting parties should be subjected to same contents of the contract publicized in terms of section 38, the contracting parties should be subjected to the same bidding period which should be specified in terms of section 39 of the PPDPA. They are also entitled to be adjudged through the same template envisaged in section 40.

In all the two situations it follows that the discretion of the procuring entity or its agents is limited. It can be concluded that the in majority of the situations, if not all, the issue to look for is that of compliance with the enabling provisions of the law. The result, it is respectfully contended, is that fairness in these circumstances, cannot mean anything more than equal treatment of parties both as they relate to the procuring entity and as they relate amongst themselves.

This, in any event, is a Constitutional guarantee under section 56 (1) of the Constitution. The provision gives every person a right of equality before the law and concomitantly the right to equal protection and benefit of the law.[35] The import of this provision was explained in **Nkomo v Minister of Local Government, Rural & Urban Development & Ors** 2016 (1) ZLR 113 (CC) as follows;

> *'The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is*

[35] Section 56 (1) of the Constitution.

*to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.'*

After the protection of rights, the other category relates to procedural fairness. The law requires the contracting party to be heard before a judgment is passed by the procuring entity. This is the case with debarment proceedings envisaged in section 99 of the PPDPA;

***'99 Authority may declare person ineligible to be awarded procurement contract***

*(1) Subject to this section, if the Authority is satisfied that-*

*(a) a person who is or was a bidder has been convicted of an offence under this Act or of corruption in respect of any procurement proceedings; or*

*(b) any procurement contract between a contractor and a procuring entity has been cancelled or otherwise terminated on account of fraud or persistent underperformance or non-performance of the contract on the part of the contractor; the Authority p1ay declare the bidder, former bidder or contractor, as the case may be, to be ineligible to participate in procurement proceedings with any procuring entity for such period as the Authority may specify, which period shall not exceed three years.*

***(2) Before making a declaration, the Authority shall notify the contractor or former contractor concerned that it is contemplating making the declaration and shall ensure that it***

***is given an adequate opportunity to make representations in the matter.***

*(3) The Authority shall ensure that all procuring entities and the bidder, former bidder or contractor concerned are notified without delay of the terms of any declaration by the Authority.'*

*(4)* ***The Authority, on good cause shown, may at any time amend or revoke a declaration.***

*(5) During the period that a declaration is in effect, no tender or bid submitted by the bidder, former bidder or contractor concerned in any procurement proceedings shall be considered, and any procurement contract concluded between the bidder, former bidder or contractor and a procuring entity shall be void.*

*(6) This section shall not be construed as limiting any other provision of this Act or any other enactment under which a person may be declared ineligible to participate in procurement proceedings or to be awarded a procurement contract.'*

*[Underlining is for emphasis]*

Clearly, the section does not allow an adverse decision to be made against a contracting party for breaches of the provisions of the PPDPA before the affected contracting party could be heard. The right to be heard does not end there. It is still available even after a declaration has been made against the contracting party. They are allowed under subsection 4 to motivate the procuring entity to revoke or amend the bar.

This right to be heard, restates the common law principle of the audi *audi alteram* rule and this means that a person in a given situation should be given a proper opportunity to be heard in their defence. This has been held to be an integral part of achieving

fairness. The point is made in **Breen v Amalgamated Engineering Union and Others** (1971) ALL ER (1148). It was stated as follows;

> *It is now well settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, administrative on the other hand, or what you will. Still, it must act fairly. It must, in a proper case, give a party a chance to be heard…*

Related to the right to be heard is the right to be given reasons whenever a decision is made. This right runs through the PPDPA. It appears on section 42 of the PPDPA. The provision relates to cancellation of contracts wherein a procuring entity is obliged to notify all contracting parties of the cancellation. The notification shall be accompanied by detailed reasons for the cancellation.

Under section 42 (4), the contracting parties are entitled to reasons for the rejection of their bids and under section 42 (5) the contracting parties should be given reasons for their failure to succeed in the process.[36] Further, the right to be given reasons also appears in section 72 of the PPDPA. A review panel is obliged to give reasons for its decisions. The giving of reasons may act as a mechanism to detect instances where the discretion has been exercised capriciously or injudiciously.

It appears that reasons may still be given to the contracting parties pursuant to their right under section 68 of the Constitution;

> ***68. Right to administrative justice***

[36] This also appears to be a binding principle in the code envisaged in section 72 for employees' charges with monitoring procuring proceedings within the procuring entity.

*1. Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.*

***2. Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.***

*3. An Act of Parliament must give effect to these rights, and must—*

*a. provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;*

*b. impose a duty on the State to give effect to the rights in subsections (1) and (2); and c. promote an efficient administration*

The provisions of section 68 are enforced through the provisions of the Administration of Justice Act *[Chapter 10:28].* This is the piece of law envisaged under section 68 (3) above. The Act provides for the right to decisions that are lawful, reasonable and procedurally fair.[37] It also provides for the entitlement to written reasons for administrative action or decisions.[38] It further provides for relief against beaches of the provisions in the Act.[39]

*COST EFFECTIVENESS AND COMPETITIVE PRINCIPLE*

*This requires a double barrel approach as the principles are often intertwined. The meaning of cost effectiveness in public procurement context means that the process must be effective or productive in its costs. This means that the cost effectiveness of a process relates to the basis for a decision to adopt a course of action. The objective*

[37] See the long title of the Administrative of Justice Act
[38] Ibid
[39] Ibid

*of the process is to obtain value for money and according to De La Harpe Green*[40]*, cost effectiveness means that a tender offering the best value of money, should be the successful tender.*[41]

*De La Harpe Green also contends that when securing procurement tender, one has to look at the life cycle of product or service*[42]*, to put it simple, a more expensive product might last longer than a less expensive product.*[43]

*The value of money in this context is not necessarily limited to the fact that the costs of contract must always be low. It extends to the fact that the contract costs must meet the stipulations in the invitation to bid. There is mention of the value for money in the PPDPA in section 4 (1) (c) which is a guiding objective. Failure to give value for money can be a reason to reject a bid under section 67 (2) (c) of the PPDPA. Section 63 of the PPDPA places emphasis on the procuring entity to engage in negotiations aimed at achieving value for money.*

*Cost effectiveness is applicable on the stages during the procurement proceedings. These include but not limited to the planning stage, procuring process stage and after the award. Section 194 (1) (b) of the Constitution one of the basic values and principles governing public administration is promotion of efficient and economical use of resources.*

*Competitiveness being the fifth principle requires that the entity should attract as more bids as possible and contract the emerging winner. The PPDPA places emphasis on promotion of competition. This appears in section 4 (b) of the PPDPA. This is an integral consideration in, amongst other sections, selecting methods of procurement under section 30 and 31 of the PPDPA. Competition amongst the bidders is credited for fostering transparency as well.* [44]

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[40] *De La Harpe Green, Public Procurement page 66*
[41] Ibid
[42] Ibid
[43] Ibid
[44] Arrowsmith in ***Public Procurement Regulation: An Introduction***, 25

*The importance of competition is underscored by Prof Arrow Smith as follows;*

> *'Thus for example requirements for competition may help ensure that decisions are not influenced by corrupt or discriminatory motives or based on poor market information. …. Strict competition requirements with only limited exceptions based on verifiable criteria as found in the directives and many national laws may lead to more commercial procurement for those cases in which corruption, discrimination or bad judgment would otherwise led to an abusive or unwise choice ….'*[45]

*There is a perennial debate on the status of these principles in cases of emergency. Situations that may be characterised in this category vary according to circumstances. These may include;*

- Possible human injury or death
- human suffering
- deprivation of rights
- possible damage of property and animals
- threat to supply or provision of essential services
- possible compromise on the State security
- possible damage occurring to the environment.[46]

The prevailing situation should by its very nature be capable of being alleviated by the emergency measures before normal procurement could take place.[47] It also follows that the nature and extent of the work, goods or services required should also be capable of allowing an accelerated or normal procurement system to be used.[48] Katayana gives

[45] Arrowsmith in ***Public Procurement Regulation: An Introduction*** **a**t page 24
[46] I have relied on instances listed in *Supply Chain Management Policy* cl 265.
[47] Ibid

[48] Ibid

an example that during the 1st World War, many contracts in the United States were exempted from strict procurement on the grounds of emergency.[49]

Be that as it may, emergency procurement should not be used to evade the use of standard procurement procedures. It is important that the circumstances giving rise to an emergency were not foreseeable or did not arise from negligent conduct.[50] In any event some principles such as the one that requires cost effectiveness cannot be dispensed with. Procuring entities should still be required, in order to ensure compliance with, in particular, the principles of competitiveness and cost-effectives in section 315 (1) of the Constitution, to procure the necessary goods or services on the best possible terms.

In South Africa, the City of Cape Town Supply Chain Management Policy[51] makes provision for this and provides that in emergency situations, and where possible, at least three quotes must nevertheless be obtained, failing which the procedures followed must be formalized in a report to the city manager as soon as possible.[52] Procuring entities should, in the said cases of emergency carefully consider limiting themselves to the emergency at hand avoid overreaching to issues that should have been submitted to tender in the normal course.

HONESTY/INTERGRITY

The terms are often used interchangeably in procurement proceedings. According to Professor ArrowSmith they require that the procurement proceedings should be

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49 Katayama 1968-1969 *PCLJ* 240.

50 See also a 19(2)(a) of UNCITRAL http://www.uncitral.org 28 Oct; a 62(1)(4) of the new *Polish Public Procurement Act*; a 31(1)(c) of the EC Public Sector Directive; and a 40(3)(d) of the EC Public Utilities Directive.

51 City of Cape Town http://www.capetown.gov.za/ 4 Apr.

52 Cl 267. See also Anon 2004 *J of Public Procurement*. The author makes reference to a number of existing tools in the United States whose flexibility, in the author's opinion, may prove to be advantageous in the case of emergency procurements. Examples include: competition among pre-qualified sources; verbal solicitations; and limited source selections. See also Schwarts "Katrina's lessons"; and US FAR 6.302-2.

conducted free from corruption.[53] The result is that there must be *reliability from both the procuring entity and contractors. If integrity is to be upheld this instils confidence in the public process. When the invitation is made by the, the information contained in the invitation must correct and reliable.*

***CONCLUSION***

*It is now clear from the above demonstration that procurement proceedings are not free floating. It is a process guided by the law and at the end of the day in concluding the proceedings, one's worry should be also about achieving compliance with the above principles. With this mind, in the next chapter the researcher will turn to analyse the provisions of section 16.*

[53] Arrowsmith in ***Public Procurement Regulation: An Introduction*** **a**t page 8

## CHAPTER 3 SECTION 16 ANALYZED

### INTRODUCTION

This chapter contains the nub of the research. It seeks to explore the import of section 16 of the PPDPA. It has been stated earlier on that the provision is bad law in that it allows public officials to disregard the provisions of the PPDPA with impunity. The chapter shall outline the general framework of section 16. It is in this chapter that section 16 shall be analysed at length in the context of principles that underpins public procurement which have been explained in Chapter 2. Reference shall also be made to some relevant common law principles.

### SECTION 16: THE OUTLINE AND THE IMPORT

Section 16 allows a Minister or Deputy Minister[54] or any other person with authority over the accounting officer[55] to cause their subordinate officer to comply with a directive which is against the provisions of the Act. Put differently, an accounting officer may be required to do what the law say he/she must do or be prevented from doing something which he/she is supposed to do in terms of the law. These are on the face of it, illegal directives. The accounting officer has, in the first instance, choice not to comply with

[54] Section 16 (1) of the PPDPA
[55] Supra

the directive whereupon he shall submit to the Minister or Deputy Minister or other person in authority written objections.

After receiving the accounting officer's objections the Minister or his/her deputy or any person in authority may persist with the directive. The directive should return in written form. This is mandatory. The accounting officer shall after receiving the directive comply with the directives and thereafter he/she is expected submit a written report as follows;

a. to the Minister responsible for administering the PPDPA,[56]
b. to the Auditor General,[57]
c. where he/she is the accounting officer of a Ministry or department of government, to the Accountant – General,[58]
d. where the instruction was given by a Minister or Deputy Minister, to the Secretary to the Cabinet,[59]

The researcher observes in passing that the Act does not say what happens after the report is submitted to any of the officials outlined above. This may happen with impunity. In the PPDPA Bill, HB 5, 2016, which preceded the actual promulgation of the PPDPA, section 16 was justified as follows;

> *Clause 16 is directed at trying to prevent accounting officers and other officials of procuring entities from complying with illegal instructions given to them by their superiors. If they think an instruction is illegal they will have to tell the person who gave them the instruction, in writing, why they think it is illegal; if despite this the person orders them to comply with it they will have to do so but will report the matter to*

[56] Section 16 (2) (a) of the PPDPA
[57] Section 16 (2) (b) of the PPDPA
[58] Section 16 (2) (c) of the PPDPA
[59] Section 16 (2) (d) of the PPDPA

*the Minister and the Auditor-General and, in ce1tain cases, to the Chief Secretary to the President and Cabinet.*[60]

How section 16 works in practice is demonstrated by a few examples. The first is the one referred to earlier on and relates to the former Minister of Energy and Power Development Dr Samuel Udenge who wrote to ZESA Holdings directing them to engage Fruitful Communications (Pvt) Ltd fronted Psychology Mazibisa and Oscar Pambuka.[61] As was found in the Auditor General report pertaining to ZESA and its subsidiaries, engagement of Fruitful Communication was neither necessary nor fruitful. It amounted to wasteful expenditure.[62]

The second and most recent relates to the purchase of fire tenders from Belarus. The Local Government Ministry through the Permanent Secretary wrote to local authorities that is Urban, Rural and Metropolitan Councils advising them that they had been enrolled to procure fire tenders from Belarus on a government agreement. It was also advised in that letter the purchase consideration will be deducted from the devolution funds to which the local authorities are entitled in terms of the law.[63]

The third and again a recent event relates to the Concession Agreement between the City of Harare and Geogenix B.V. City of Harare procured services of waste management, in particular the recycling of waste.[64] The researcher is mindful that the matter is yet to be determined by the Courts, it is still pending. Ordinarily one would be bound by the principle of *sub judice* which mean that one should not comment on the matter that is pending before a Court of law. What is interesting to note is that proceedings before the Court turn on the legality of the meeting held by the councillor to approve the deal and not on the point of tendering.[65]

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[60] Public Procurement Bill and Disposal of Public Assets, HB 5,2016
[61] The information has been obtained from the Labour Court records in **Katsande v ZETDC LC/H/73/20**; **ZETDC v KATSANDE LC/H/ 79/20.**
[62] See **Katsande v ZETDC LC/H/73/20**; **ZETDC v KATSANDE LC/H/ 79/20.**
[63] The contents of the letter were extracted the Herald of 21st June 2022.
[64] Markham v City of Harare HC 2766/22
[65] Ibid

Be that as it may, the deal should have gone through tender. The nature of the services envisaged therein are covered by the definition of procurement under section 2 of the PPDPA. But for this particular case, the procuring entity played a second fiddle role in that the preamble of the agreement acknowledges that the terms of the agreement were approved at Cabinet level. The relevant part of the preamble states;

> ***WHEREAS:***
>
> ***A …***
>
> ***B…***
>
> ***C…***
>
> ***D …***
>
> ***E*** ***The project was approved by the Cabinet of Zimbabwe (details to be inserted), and is awaiting to get National Project Status as provided for in this Agreement (ref to be put)***[66]

Key stakeholders were mindful of the need to have the project submitted to tender. This appears from the letter penned from the Zimbabwe Investment and Development Agency established under section 3 of the Zimbabwe Investment and Development Act *[Chapter 14:37].* The body is charged with planning, promoting, and implementing investment promotion strategies to encourage investment by domestic and foreign investors.[67] They directed that the matter should be submitted to tender.[68] This was ignored.

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[66] The contract information was extracted from the High Court record in Markham v City of Harare HC 2766/22.
[67] See section 4 (1) (a) of the Act
[68] The information was extracted from High Court record in Markham v City of Harare HC 2766/22.

All the above instances will be above board if the provisions of section 16 are anything to go by. Who remains vulnerable is the employee to whom the directive is directed and he will be saved in the circumstances by written objections or report in the manner envisaged in section 16(2). Put differently, the implication of that provision which cannot escape scrutiny is that section 16 does not regulate the conduct of the superiors but that of the employees or subordinates. The superiors can act in the manner they want. Section 16 eschews nothing from their possible conduct.

Suffice to state that it is now an accepted principle in our law that the process of interpreting a statute borders on what is implied and not expressly said in a statute. For this proposition reference is made to the case of ***Rushesha and Others v Dera & Others*** CCZ 24/17;

> *'The interpretation of a statute and indeed a Constitution is based not only on what the provision says but also on what the provision does not say.'*

The result is that implicit in section 16 is that superiors are allowed to issue directives which are illegal and in contravention of the PPDPA. In turn section 16 seeks to protect the accounting officers and other subordinates envisaged under section 16 by stipulating what would be the best defence when asked to account for the breaches or contraventions on the provisions of the law.

Further, that the provision deals strictly with the conduct of duty by accounting officers and subordinates envisaged under section 16 (3) of the PPDPA appears from the heading of section 16. The heading relates to duties of accounting officers and other persons to comply with the PPDPA. The heading, in that form, is an indicator of the legislative intention and set in motion the central theme within which the sub provisions should be understood.

The point is made in ***Sagittarian (Pvt) Ltd v Workers Committee Sagittarian (Pvt) Ltd***[69]

> '*Other authorities emphasise the same point, in different words. In Thornton's Legislative Drafting" 2nd edition at p 60, it is stated:*
>
> > *"A section, of whatever length, must have a unity of purpose. It may consist of one sentence or more; but if it consists of more than one sentence, the general rule is that each should be placed in a separate numbered subsection. Separate subsections must all have some relevance to the central theme which characterises the section…"*

The Court also endorsed the dictum in **Director of Education (Transvaal) v McCagie, 1918 AD 616** where it was held as follows,

> *Where general words have a wide meaning, their interpretation must be affected by what precedes them; general words following upon and connected with specific words are more restricted in their operation than if they stood alone. They are coloured by their context and their meaning is cut down so as to comprehend only things of the same kind as those designated by specific words – unless there is something to show that a wider sense was intended.*[70]

The same conclusion that section 16 deals with subordinates' conduct as opposed to the superiors will be reached if reference to the memorandum on section 16 in the PPDPA Bill, HB 5,2016. The relevant portion in the bill has been set out above and it clearly states that section 16 shall provide the best defence. Legislative history is

[69] 2006 (2) ZLR 115 (S)
[70] Ibid

important and this is on the strength of the Supreme Court judgment in **Principal Immigration Officer & Anor v O'Hara & Anor** 1993 (1) ZLR 69 (S);

> *In the interpretation of statutes a court may have regard to those external or* ***historical facts,*** *such as the prior existence of some law, custom or practice, which are necessary for a comprehension of the legislation, and to consider whether the statute which is the subject matter of interpretation was intended to alter the existing law or merely to codify it.*

This leaves no doubt that the superiors can act in breach of the PPDPA provisions and this can still be sanitized under the ambit of section 16. Section 16 with respect, creates an absurd situation and at the same time it is self-defeating. All the progress brought by other provisions which have been explained in Chapter 2 above will tumble once section 16 is invoked. This is a typical case where the law gives rights by the right hand and takes away the same right by the left hand. Further and in any event, it appears there is no meaningful justification to section 16 at all.

There is no point in imposing obligations to accounting officers who are faced with the illegal directives and leave the rights and obligations which are established by the PPDPA vulnerable. More sense would have been achieved in clipping the wings of the superiors in the procurement proceedings context. This glaring absurdity can only be attributed to oversight by parliamentarians. Watchful parliamentarians would not have allowed section 16 to escape their attention.

One cannot match section 16 to principles which underpin the provision public procurement which are set out in section 315 of the Constitution as read with objectives of the PPDPA which appear in section 4 thereof which are listed as follows;

> ***4 Objectives of Act***
> *( l) The objectives of this Act are*

*(a) to ensure that procurement is effected in a manner that is transparent, fair, honest, cost-effective and competitive; and*
*(b) to promote competition among bidders; and*
*(c) to provide for the fair and equitable treatment of all bidders, leading to procurement contracts that represent good value for money; and*
*(d) to promote the integrity of, and fairness and public confidence in, procurement processes; and*
*(e) to secure the implementation of any environmental, social, economic and other policy that is authorised or required by any law to be taken into account by a procuring entity in procurement proceedings.*
*(2)The Authority, all procuring entities, and all other persons concerned in the implementation of this Act shall exercise their functions so as to give full effect to the objectives set out in subsection (1).*

For progressive jurists who may want to read into section 16 the import of section 315 of the Constitution and the general objectives envisaged in the PPDPA they are bound to hit a brick wall by reason that no one is allowed to read into a statute that which is not there. Words in a statute should be given their grammatical meaning. Not even the Court is allowed to supplement them.

For this proposition reliance is placed on the Supreme Court judgment by a full bench in **Thandekile Zulu v ZB Financial Holdings (Pvt) Ltd** SC 48/18. Suffice to state the judgment relates to the interpretation of section 14 of the Labour Act [Chapter 28:01] but the principle on the interpretation of statutes appears to be cutting across the jurisprudential divide. Writing for the whole bench in Zulu *supra* ***HLATSHWAYO*** JA, as he then was wrote as follows;

*A reading of this section shows that it is silent on the requirement for the employer to give notice to the employee before terminating employment under the section. In the absence of such a requirement, to hold that the employee ought to have been afforded a chance to be heard*

*before dismissal is tantamount to "reading into" and altering the clear language of the statute.*

*The remarks of GUBBAY JA (as he then was) in Nxumalo & Ors v Guni 1987 (1) ZLR 1 (SC) are apposite:*

> *"The language used is plain and unambiguous and the intention of the Law Society is to be gathered there from. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used."*

Further and in any event, it is maintained the circumstances envisaged under section 16 allows the principle of interpretation in **Zulu** *supra* to prevail, for the purposes of interpreting section 16 of the PPDPA prevails, over the exception to the literal rule of interpretation that appears in ***Chegutu Municipality v Manyora*** 1996 (1) ZLR 262 (S) which was stated as follows;

> *The issue which then arose was whether or not Mr Manyora should be paid back-pay and allowances from 26 June 1991 to 31 July 1993. In short, what is the meaning of "reinstated" in the context?*
>
> *There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in Grey v Pearson (1857) 10 ER 1216 at 1234, "unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further".*

Needless to mention, the duty to modify the language in order to avoid an absurdity an incident of inconsistency, of late has been recognized as subject to the language being capable of modification. The point was made in **Chihava & Ors v Magistrate Mapfumo & Anor** CCZ 6/15. After analyzing an influx of judicial decisions and legal writings the Apex Court summarized the principles of interpretation as follows;

> *The principles set out in the dicta cited above can aptly and instructively be summarized as follows:*
>
> *i) the Legislature is presumed not to intend an absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words that it uses in an enactment.*
>
> *ii) therefore, in order to ascertain the true purpose and intent of the Legislature, regard is to be had, not only to the literal meaning of the words, but also to their practical effect.*
>
> *iii) In this respect,*
>
> *a) **the words in question must be capable of an interpretation that is 'consistent' with the rest of the instrument in which the words appear;***
>
> *b) the state of the law in place before the enactment in question, is a useful aid in ascertaining the legislative purpose and intention, and*
>
> *c) where an earlier and later enactment (or provision) deals with the same subject matter, then, in the case of uncertainty, the two should be interpreted in such a way that there is mutual consistency.*

As has been said earlier on, section 16 is inconsistent with the rest of the PPDPA. There is however no way the provision could be modified without rewriting the substance of the section. It is trite that a Judge or a Court cannot legislate. This view is fortified by further observation drawn from the heading and the reading of the explanatory clause

in the Bill. The latter consideration holds true regard had been to the law set out in **WLSA & Ors v Mandaza** & Ors 2003 (1) 500 (H).

The long and short of that judgment is that in interpreting statutes, the Courts should interpret provisions in a statute to give effect to what the legislature had in mind and in this case, as revealed in the Bill, section 16 was meant to regulate the conduct of duty by accounting officers or other subordinates. The principle of interpretation was explained in **WLSA & Ors v Mandaza** & Ors *supra* as follows;

> *In **Kellaways** Principles of Legal Interpretation at para 40 on p 177 the learned author states –*
>
> > *"In the courts of Britain and South Africa it has often been said that if the 'intention' of the legislature is clearly expressed there is no need for any rules of construction, and that principles of interpretation are intended…as aids to resolving any doubts as to the Legislature's true intention.*
> >
> > *However Lord Watson said,*
> >
> > > *'The intention of the Legislature is a common, but slippery phrase, which popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it … What the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary*
> > > *implication'".*

*Then at p 178 the learned author concluded –*

> *"To conclude, when construing a statute it is a court's duty to so interpret it as to give effect to what the legislature had in mind in order to realise the purpose of the amendment".*

One may want to argue that the superior's action would then be dealt with under section 174 of the Criminal Law (Codification and Reform) Act *[Chapter 09:23]* which deals with abuse of office or authority by public officials. This is the provision that was relied on during the prosecution of Dr Udenge in connection with Fruitful Communications matter. The provision states as follows;

> ***'174 Criminal abuse of duty as public officer***
>
> *(1) If a public officer, in the exercise of his or her functions as such, intentionally—*
>
> *(a) does anything that is contrary to or inconsistent with his or her duty as a public officer; or*
>
> *(b) omits to do anything which it is his or her duty as a public officer to do;*
>
> *for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both.*
>
> *(2) If it is proved, in any prosecution for criminal abuse of duty as a public officer that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved,*

*that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.*

*(3) For the avoidance of doubt it is declared that the crime of criminal abuse of duty as a public officer is not committed by a public officer who does or omits to do anything in the exercise of his or her functions as such for the purpose of favouring any person on the grounds of race or gender, if the act or omission arises from the implementation by the public officer of any Government policy aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices.'*

The limitation in the use of that provision is that, it has a self-contained limitations. For prosecution to succeed, there should be an element of showing *favour or disfavour to any person*. This does not cover all issues that may potentially arise in the implementation of the PPDPA. The PPDPA covers from preparation to implementation stage. This aspect of favour or prejudice may only emerge depending on the stage.

For example where there is a directive to avoid the process all together thereby doing away with much needed competition in procurement matters it will be difficult to detect prejudice or favour. The result is that under section 174 of the Criminal Code the mere act of acting inconsistent with functions and their duties is not decisive. It is just a starting point. The decisive point is whether the prosecution established favour or prejudice on the other party. Reliance on section 174 of the Criminal Law Code is thus porous and cannot provide the much needed protection from superiors.

In the same vein, criminal law by its very nature seeks to regulate individual behaviour as more fully demonstrated by the recurrent forms of punishment such as imprisonment and payment of fines. Yet procurement matters exceed individuals as in the process it is the procuring entity that suffers and the result is often that in the case of money being paid the procuring entity will not receive value for money.

Further there is also element of society and community which is justified by the fact that public procurement thrives on tax payer's money. Section 174 of the Criminal Law Code does not take all that into account. This submission is motivated by an observation made in **ZESA v Dera** 1998 (1) ZLR 50 that,

> *So in a criminal case one is primarily concerned with doing justice to the accused. In a civil case one is concerned to do justice to each party. Each party has a right to justice, and so the test for that justice has to balance their competing claims. Hence the 'balance of probability' test.*

There was therefore need to make the entire piece of law water tight and in cases where discretion is allowed, this should have been followed up by inbuilt safety valves. The other inherent limitation that is apparent from utilizing this route is the fact that proof in criminal matters is higher as this requires proof. See section 18 of the Criminal Law Code *supra;*

> ***18 Degree and burden of proof in criminal cases***
>
> *(1) Subject to subsection (2), no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt.*
>
> *(2) Subsection (1) shall not prevent any enactment from imposing upon a person charged with a crime the burden of proving any particular fact or circumstance.*

This is the highest degree of proof, yet in civil matters one can be found guilty of wrong doing on proof being presented on a balance of probabilities. The latter is recognized as a lesser form as compared to the former.

**SECTION 16 AND COMMON LAW PRINCIPLES**

There are two common law principles which cannot ignored in this context. The first relates to the general functions of public officials that they should not ignore important provisions of a statute that imposes obligations on them. The principle was stated in **Johannesburg Consolidated Investment Co v Johannesburg Town Council** 1903 111 at page 114. The judgment is authority for the proposition that public officials can be taken on review based on common law grounds for failure by public officials to comply with provisions binding on them. This proposition is accepted in this jurisdiction. Generally see **John Basera v The Registrar of the Supreme Court & Others** SC 35/22.

Section 16 of the PPDPA is a stuck opposite of this common law proposition. It appears to be displacing the common law position. There is therefore a conflict between section 16 of the PPDPA and the common law position envisaged in **Johannesburg Consolidated Investment Co v Johannesburg Town Council** *supra*.

The second common law principle is derived from labour law principle in general which relates to the role of employees in obeying illegal instructions. The PPDPA envisages accounting officers and general officers who are employees of the procuring entity. See generally section 17 of the PPDPA which provides as follows;

> ***17 Procurement management unit of procuring entity***
> ***(1)*** *…*
> *(2) The accounting officer of a procuring entity shall determine the size, location and structure of the entity's procurement management unit, taking into account the entity's procurement requirements and the availability of trained and experienced persons to staff the unit.*

See also section 18 (1),

> ***18 Evaluation committees of procuring entity***

*(1) For each procurement above the prescribed threshold, the accounting officer of a procuring entity shall appoint an evaluation committee in accordance with this section.*

*(2) …*

*(3) …*

*(4) …*

*(5) In the exercise of its functions an evaluation committee shall be answerable to the procurement management unit or accounting officer of its procuring entity.*

Further attention is drawn to section 55 (5) which relates to the awarding of contract award;

***55 Contract award***

*(1) …*

*(2) …*

*(3) …*

*(4) Procurement contracts shall be signed by the procuring entity's accounting officer or a person delegated by him or her.*

Once this is established, the principal that applies in employment matters is that an employee is not under any obligation to act on an illegal instruction or directive. The illegality of an instruction is recognized as a complete defence to charges that border on disobedience of an instruction from a superior. Charges of that nature are replete and contained in almost every code of conduct. For example, see section 4 (b) of the Labour (National Employment Code of Conduct) Regulations, 2006 (Model Code);

***Misconduct***

*4. An employee commits a serious misconduct if he or she commits any of the following offences—*

*(a) any act of conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract; or*

***(b) wilful disobedience to a lawful order; or***

*(c) wilful and unlawful destruction of the employer's property; or*

*(d) theft or fraud; or (e) absence from work for a period of five or more working days without leave or reasonable cause in a years ; or*

*(f) gross incompetency or inefficiency in the performance of his or her work; or (g) habitual and substantial neglect of his or her duties; or*

*(h) lack of a skill which the employee expressly or implied held himself or herself out to possess.*

The meaning of this offence was given in the case of **Matereke v CT Bowring & Associates (Pvt) Ltd** 1987 (1) ZLR 206 (S) as follows,

*The requirement of "wilful disobedience" is not defined in the Regulations. But, having regard to the purpose of this piece of legislation as well as to the common law grounds for summary dismissal for wilful disobedience or wilful misconduct, the words in my view connote a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial - not simply an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and employee, going to the very root of the contract of employment. A See Woodman v Robinson (1891) 1 CTR 263 at 265; Moonian v Balmoral Hotel 1925 NPD 215 at 219; Citrus Board v S A Railways and Harbours 1957 (1) SA 198 (AD) at 204G; Bischoff Embroidery South Africa (Pty) Ltd v S A Railways and Harbours 1966 (4) SA 385 (W) at 395A-C; Laws v B London Chronile (Indicator Newspapers) Ltd [1959] 2 All ER 285 (CA) at 287B-I; Scoble, Law of Master and Servant in South Africa at p 145; Halsbury Laws of England (4 Ed) Vol 16 para 641. In Burnett v Standard Tobacco Co Ltd 1957 R & N 508 (SR) at 511 in fine - 512B, MORTON J expressed the view that disobedience to a lawful order*

*justified dismissal only if by its commission the employee evinces an intention to repudiate his contract of employment. With respect to the learned judge, it seems to me that this is too narrow a construction, for it overlooks that if the disobedience were sufficiently grave as to go to the root of the contract of employment, the employee would render himself liable to summary dismissal, albeit repudiation was not his intention. The concepts of an intention to repudiate, and a breach going to the root of a contract, are separate and by no means identical. The test for the latter is objective and not subjective, the intention of the employee being immaterial. See Yodaiken v Angehrn and Piel 1914 TPD 254 at 262; Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (AD) at 951 in fine -952B; Christie The law of Contract in South Africa at p 498.*

*The second requirement, that the disobedience be directed at 'a lawful order', means simply that the employee is not bound to obey an order to do something not properly appertaining to the character or capacity of his contract of employment. An order which involves a reasonable apprehension of immediate danger to the employee's life or injury to his person, not reasonably contemplated at the time he entered the employment, is unlawful and he is justified in refusing to obey it. For instance, an order to remain in a place in which his personal safety is endangered by violence or disease. See Bouzourou v The Ottoman Bank [1930] AC 271 (PC) at 276. The position would be otherwise were the employee a fireman, a policeman or a member of the armed forces. See Scoble op cit at p 147; Chitty on Contracts 25 ed vol 2 para 3510.*

These common law principles which have been explained above are immutable. The result is that the legislature is presumed to know the common law position at the time of enacting a statute. A legislature is to be presumed not to have intended to alter a common law position unless it expressly states that to be the case. A case in point is

section 128 of the Copyright and Neighbouring Rights Act *[Chapter 26:05]* which expressly ousters the common law position as follows;

> ***128 No copyright under common law***
>
> *Subject to this Act, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other enactment.*

This immutable position of common law principles is emphasized in the case of **Catering Industry v Catering & Hospitality Industry Workers Union** 2008 (1) 311 (S);

> *The legislature is presumed to be aware of the common law and any intention to depart therefrom must be clearly and unambiguously stated in the statute concerned. The following passage from Maxwell on the Interpretation of Statutes is instructive:*
>
> > *"It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are "fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law."* [Footnotes omitted]

This position at law has been followed in several judgments from our Superior Courts. See generally In **Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd** S-242-95, **Mahachi v PTC** 1997 (2) ZLR (H) 71 and **Don Nyamande & Anor v ZUVA Petroleum (Pvt) Ltd** SC

43/15. There is therefore no doubt that section of the PPDPA offends the two immutable common law principles explained above. In principle, it follows therefore, section 16 could be regarded as redundant but as long as it is still in statute book, it remains operational. This is of course subject to clever argument which seeks to subdue it in favour of common law positions.

The common law argument further enjoys constitutional protection. These breaches on the common law principle potentially offends section 56 (1) of the Constitution. The argument may be therefore cumulative. The right to equal protection before the law enjoins, it is respectfully submitted, the right that the public officials in the context of the PPDPA should remain with the confines of the law in **Johannesburg Consolidated Investment Co v Johannesburg Town Council** *supra a*nd the inherent principle inherent in employment matters that employees should not obey illegal instructions. But the whole question of constitutionality is addressed in the next section in this chapter.

SECTION 16 AND THE CONSTITUTION

There is no doubt that section 16 is ultra vires the enabling Constitutional provision which is section 315 of the Constitution. Firstly it should be noted that the PPDPA is a product of realignment of statutes with the Constitution of Zimbabwe. This is more-fully deduced from the objectives of the PPDPA which are set out in section 4 thereof as follows;

> ***4 Objectives of Act***
> *(1) The objectives of this Act are*
> *(a) to ensure that procurement is effected in a manner that is transparent, fair, honest, cost-effective and competitive; and*
> *(b) to promote competition among bidders; and*
> *(c) to provide for the fair and equitable treatment of all bidders, leading to procurement contracts that represent good value for money; and*

*(d) to promote the integrity of, and fairness and public confidence in, procurement processes; and*

*(e) to secure the implementation of any environmental, social, economic and other policy that is authorised or required by any law to be taken into account by a procuring entity in procurement proceedings.*

*(2)The Authority, all procuring entities, and all other persons concerned in the implementation of this Act shall exercise their functions so as to give full effect to the objectives set out in subsection (1).*

In the memorandum to the Bill the provision relating to the objectives of the Act were held to be aligning the Act with the provisions of section 315 of the Constitution. It was written;

*Clause 4 will set out the objectives to be achieved by the Bill most importantly to ensure that procurement is transparent, fair, honest, cost –effective, and competitive as required by section 315 of the Constitution.*

This is the first instance where the PPDPA brings itself within the province of Constitutional scrutiny. The second instance is the supremacy of the Constitution under section 2(2) of the Constitution;

***2. Supremacy of Constitution***

*1. This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.*

*2. The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.*

The result is that the section 2 sets a yardstick and or moral exhortation which every law in the legal system should comply with. Inevitably, it follows that every law that exists in the land should be consistent with the Constitution. The position was underscored by the Constitutional Court in **Mudzuri & Anor v Minister of Justice & Ors** CCZ 12/15;

> *The applicants were driven by the laudable motive of seeking to vindicate the rule of law and supremacy of the Constitution. It is a high principle of constitutional law that people should be in a position to obey laws which are consistent with constitutional provisions enshrining fundamental human rights and freedoms. They acted altruistically to protect public interest in the enforcement of the constitutional obligation on the State to protect the fundamental rights of girl children enshrined in s 81(1) as read with s 78(1) of the Constitution.*
>
> ….
>
> *The rule of invalidity of a law or conduct is derived from the fundamental principle of the supremacy of the Constitution. Section 2(1) of the Constitution provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with its provisions is invalid to the extent of the inconsistency. A court does not create constitutional invalidity. It merely declares the position in law at the time the constitutional provision came into force or at the time the impugned statute was enacted. The principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation.*

Once this is established, we turn to demonstrate how the provisions of section 16 can be deemed to be unconstitutional. Section 315 of the Constitution to which the PPDPA should be aligned to does not envisage a situation where the procurement principles set out in that provision will be limited by subsequent legislation. Further and in any event, as has been demonstrated earlier on section 315 institutionalizes other constitutional rights which indirectly have a bearing on procurement. This is the case with sections such as sections 56, 62, 68 and 191. These may be similarly offended.

For starters, section 315 is couched in peremptory terms. This appears from the opening remarks that ***an Act of Parliament must***. The dictionary meaning of **must** according to the Merriam Webster Dictionary is a command or an act of compelling. The result is that it denotes something which is imperative or indispensable. It is therefore peremptory. It holds true regard had been to the fact that the law in this jurisdiction has already recognized that must is different from ***may*** which is on its own permissive in nature.

The difference has been recognized in **Principal Immigration Officer & Anor v O'Hara & Anor** *supra,*

> *"Delegation", said WILLS J in Huth v Clarke (1) 25 QBD 391 at 395, "as the word is generally used, does not imply parting with powers by the person who H granted the delegation, but points rather to the conferring of an himself." If, therefore, the Minister was invested with the power to set "the conditions on which former residents of Zimbabwe may resume residence in Zimbabwe otherwise than as new immigrants or be deemed to have regained their domicile for the purpose of this Act", then so also, by delegation, was the immigration officer upon whom that function was conferred invested with the discretion of setting the appropriate conditions in each case.*
>
> *Now s 38 of the Regulations recites that:*

> *"38 (1) An Immigration Officer may endorse the passport relating to any alien referred to in paragraph (b), (c) or (d) of subjection (1) of section 15 of the Act who enters or has entered Zimbabwe and who is not domiciled in Zimbabwe with an alien's permit in the Form No IF 15". (emphasis added) In the interpretation of statutes words must bear their primary meaning unless the contrary is indicated. So notorious is this principle that authority is not required for its support. In ordinary English usage the word "may" is understood to be an enabling word giving an absolute discretion to the repository of a power whether he would or would not exercise that power. In the words of COTTON LJ in In re Bake: Nichols v Baker (1890) 44 ChD 262 (CA) at 270:*
>
> ***"I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may', it becomes his duty to exercise it."***

It is respectfully submitted that the framers of the PPDPA therefore overreached the enabling provision in the Constitution to the extent of including section 16. They went on to open room for which was never intended by section 315 in its peremptory form. Peremptory provisions require strict compliance therewith. The point is admirably expressed in **Ex-parte Sibonginkosi Ndlovu** HB 116/2004 as follows;

> *It is now trite that the categorization of enactment as peremptory or directory with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfillment will suffice no longer finds favour. The criterion*

*is not the quality of the command but the intention of the legislature, which can only be derived from the words of the enactment, its general plan and objects – Sterling Products International Ltd* v *Zulu* 1988 *(2) ZLR 293 (SC) at 301B*; *Lion Match Co Ltd* v *Wessels 1946 OPD 376* at *380*; *Swift Transport Services (Pvt) Ltd* v *Pittman NO & Ors 1975(2) RLR 226 (GD) at 228C-229C*; *1976 (1) SA 827 at 828 and Ex parte Ndlovu 1981 ZLR 216 (GD) at 217F-G*. The object of subsection (3) *supra, is fundamental to the policy of the Act and non-compliance with it defeats or frustrates the object.*

Further and still on the manner in which section 315 is designed, it should be noted that this is not a *subject to provision*. It stands on its own. It was therefore improper to open up for future discretion or limitations in the subsequent legislation which do not have the backing of the enabling constitutional provision. This is a clear case of overreaching an enabling constitutional provision.

For the avoidance a subject to provision is the one which is synonymous with opening up for future discretion or consideration. It conditions a provision which is subject of interpretation to some other provision or incident or considerations and therefore permitting the provision which is subject of interpretation to exceed its primary meaning in order to achieve a provision or incident or consideration to which the provision under interpretation is conditioned to. This is what subject to provisions stand for. The position was explained in **Chinamora v Angwa Furnishers (Private) Limited & Ors** 1996 (2) ZLR 664 (S).

In any event, one would reach the same conclusion which emerges from the above analysis by simply observing that if the framers of the Constitution had intended to leave the question of what should constitute the law to be passed in the Act of Parliament envisaged thereunder, they should have said so. There are few examples in the Constitution where the question of what should constitute a subsequent law has

been left to the discretion of the lawmaker. This is the case with section 48 of the Constitution which relates to the right to life;

> ***48. Right to life***
>
> *1. Every person has the right to life.*
>
> *2. A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and.*
>
> *a. the law must permit the court a discretion whether or not to impose the penalty;*
>
> *b. the penalty may be carried out only in accordance with a final judgment of a competent court;*
>
> *c. the penalty must not be imposed on a person—*
>
> *i. who was less than twenty-one years old when the offence was committed; or*
>
> *ii. who is more than seventy years old;*
>
> *d. the penalty must not be imposed or carried out on a woman; and*
>
> *e. the person sentenced must have a right to seek pardon or commutation of the penalty from the President.*

The researcher is fortified in this view that the framers of the Constitution could not have intended a law that attenuates the principles in section 315 by further observing several provisions in the Constitution which are supportive of principles envisaged in section 315. Some of these provisions appear in the National Objectives. See generally the objective that relates to good governance in section 9. Emphasis is on policies and legislation that develops efficiency, transparency, personal integrity and financial probity in all institutions and agencies of the government at every level and public institution.[71]

[71] Section 9 (1) of the Constitution.

The next provision which is similarly important is section 194 of the Constitution. It generally speaks to basic values and principles that govern public administration. This extends all tiers of government which include institutions, agencies of the State, government controlled entities and other public enterprises.[72] The referred entities are obliged in terms of that provision to be governed by the democratic values and principles which includes under paragraph h thereof transparency which extends to providing the public with timely, accessible and accurate information.[73] This dominant impression that runs through the Constitution puts paid the position taken.

## CONCLUSION

The chapter has outlined the import and general meaning of section 16. A critical analysis has been carried out regards its legality. This was on two fronts. The first was to measure it against the common law which indirectly attracts an argument under section 56 (1) of the Constitution. The second was to measure it against the direct provisions of the Constitution. It has failed in both fronts. The next chapter intends to carry out a survey from other jurisdictions whether they have similar situations or how generally they enforce provisions in their own procurement laws.

[72] Ibid
[73] Ibid

# CHAPTER 4 COMPARATIVE STUDY

## INTRODUCTION

To the extent of enacting section 16, Zimbabwe is in a world of its own. It is on the opposite of what other countries seeks to achieve in their jurisdictions. A survey on four jurisdictions from Africa shows that there is a growing consensus that the immutable procurement principles should be upheld in the form they manifest under their relevant statutes. Some countries have gone to the extent of criminalizing conduct of disregarding provisions in statutes similar to our PPDPA. The writer shall, herein below, explore the situation that prevails in the countries chosen.

## ZAMBIA

The Zambian Parliament enacted the Public Procurement Act of 2020 which provides for rules and principles of public procurement, methods and process of procurement and the monitoring and enforcement of compliance to the act among other things. Like our PPDPA, the Zambian statute places emphasis on the key principles. This appears in the long title;

> *An Act to revise the law relating to procurement so as to enhance transparency, efficiency, effectiveness, economy, value for money, competition and accountability in public procurement; regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public confidence in, the procurement process; promote the participation of citizens in public procurement; continue the existence of the Zambia Public Procurement Authority; repeal and*

*replace the Public Procurement Act, 2008; and provide for matters connected with, or incidental to, the foregoing.*

There are elaborate processes to be followed and implemented if the procurement process is to retain legality. These may not be necessary for the purposes of this chapter, what is of importance is how the statute ensures that there is compliance with its provisions. This is provided for under section 105. The statute criminalizes situations where a public official is prevented from performing functions as required by the law in that jurisdiction. It does not end, it further criminalizes conduct where a public official reneges from performing their functions.

The relevant parts in section 105 of the Zambian law reads;

***105. (1) A person commits an offence if that person —***

*…*

*(c) contrary to this Act, interferes with or exerts undue influence on any officer or employee of the Authority or a procuring entity in the performance of their functions or in the exercise of the powers under this Act;*

*….*

*(2) An office holder commits an offence if that office holder—*

*(a) due to recklessness or dishonesty, fails to exercise the powers as an office holder and to discharge duties in accordance with this Act;*

*…*

*(g) contravenes or willfully fails to comply with this Act.*

KENYA

Kenya has the Public Procurement and Asset Disposal Act No 33 of 2015. Like the Zambian law on procurement the Kenyan is also elaborate. According to section 3 of the Act, the law applies from procurement planning, procurement processing and contract management.[74] It aligns itself with international best practices in the sense the obligations arising from a treaty or international treatments will prevail in case of conflict between the provisions in the law and treaties which Kenya has ratified. This is of cause subject to the provisions in their Constitution. This appears in section 6 (1) of their Act;

> *6. Conflicts with international agreements*
>
> *(1) Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.*

There is no doubt that this provision offers great protection ever in in the enforcement of rights and obligations imposed by the statute. It keeps their laws abreast with developments at International stage thereby keeping the law closer to international best practices. It is a critical step towards ensuring that the public officials discharges their statutory duties in line with International best practices against which they will be measured.

As this is not enough, in the case of conflict with other Acts of parliament. It is provided that the Procurement Act shall prevail. This is under section 5 (1) provides as follows;

> ***5. Conflicts with other Acts***
>
> *(1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where*

[74] Section 3

*procurement of professional services is governed by an Act of Parliament applicable for such services.*

Again this this commendable codification of the procurement law. It ensures discoverability and certainty of law. One would imagine if the law was thrown all over, this is obviously a threat to the principles of certainty and discoverability of the law. Offenders, especially public officials who would have breached the provisions of the Procurement law, will go scot free as the task of bringing them to book will be subject to alert law enforcement agents who are able to bring the several pieces of law to one meaning.

Besides the above general observations, the Kenyan law criminalizes almost every breach of the Procurement laws. Offences are created under several provisions. For example section 53 on breaches related to procurement and disposal of assets planning. There is also section 65 criminalizes inappropriate influence on evaluations. Further to that there is section 66 which criminalizes corrupt, coercive and fraudulent practices and conflicts of interests. There are other offences under section 67 which relates to breach of rules of confidentiality among other provisions.

For those offences are created but are not accompanied with any form of penalty. There is a follow up provision under section 177 which stipulates the penalties, it reads as follows;

***177. General penalty and sanctions***

*A person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction—*

*(a) if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both; (b) if the person is a body corporate, to a fine not exceeding ten million shillings.*

This provides a complete code and further enhances the enforcement of the provisions leaving out discretion by the relevant key stakeholders. It concretizes deterrence to who would be offenders which is generally one of the objectives of criminal law. Besides creation of these general offences there are general offences created under section 176 of the Act. These generally eschews conduct which prevents other public officials from performing their duties arising out of the Act. See generally section 176 (1);

> ***176. Prohibitions and offences***
>
> *(1) A person shall not—*
>
> *(a) obstruct or hinder a person carrying out a duty or function or exercising a power under this Act;*

GHANA

In Ghana there is the Public Procurement Act of 2003 which provides for the establishment of the Public Procurement Board, rules of procurement, procurement structures and methods of procurement among other provisions. The Act strives to regulate provision of services and goods through the financing of public funds.

The Act equally criminalizes incidences of breach of its provisions. See generally section 89 which provides as follows;

> *"Any person who contravenes any provision of this Act commits an offence and where no penalty has been provided for the offence, the person is liable on summary conviction to a fine not exceeding 1000 penalty units or a term of imprisonment not exceeding five years or both."*[75]

The above provisions in the Public Procurement Act of 2003 show how non-compliance of the Act is susceptible to criminal liability and imprisonment and the principle of transparency in public procurement is reinforced through the undertaking of an

[75] Section 92 (1) of n7 above

investigation by the Board at the mere suspicion of non-compliance or violation of the Act.

MALAWI

Malawi has the Public Procurement Act Chapter 37:03. The piece of law is less elaborate as compared to statutes and statutes in jurisdictions referred to earlier on in this chapter. But in its preciseness it has extensively dealt with possible abuse of power by public officials in procurement proceedings. Section 18 therefore sanctions public officials involved in requisitioning, planning, preparing and conducting procurement proceedings.[76] Breach of obligations imposed by section 18 exposes the officials to criminal prosecution with the procuring entity further reserving the right to institute disciplinary proceedings.

Section 19 of the Malawi Act also deals with conflict of interest. It provides that f a public official or member of an Internal Procurement Committee, acquires any pecuniary interest, direct or indirect, in any matter to be determined by the Committee he or she shall declare the interest in accordance with the procedures set in the subsidiary regulations and shall recuse himself or herself from acting in any way in that matter and shall not take part in the consideration or discussion of, or vote on any question with respect to the matter. [77]The official shall be guilty of an offence and liable to a fine of and to imprisonment for two years.[78]

Further, it appears under section 42 of the Malawi Act, that a public official can be sued in their personal capacity in criminal or civil law in respect of acts or omissions done in bad faith. Only good faith provides the best defence under the circumstances.

CONCLUSION

[76] Section 18 of the Malawi Act.
[77] Section 19 of the Malawi Act.
[78] Ibid subsection 2

The laws of public procurement in the jurisdictions under study are clear and do not leave room which can be taken advantage of by unscrupulous characters. The principles of transparency, fairness, honesty, competition and cost-effectiveness are arguably reinforced. In these Acts, acts which are not authorized and in contravention of the Act will be penalized and unlike our jurisdiction, an administrative authority such as a Minister does not have the power to order an officer to an act which the officer is not authorized by the Act.

## CHAPTER 5: CONCLUSSION AND RECOMMENDATIONS

### INTRODUCTION

At the commencement of the study, a single question was raised. It relates to the legality of section 16 of the PPDPA. The question has been answered in the affirmative. The provision is illegal and contrary to the provisions of the Constitution. To further prove the point, a jurisdictional survey was carried out and the researcher relied mostly on African countries. The overwhelming conclusion from this survey is that we are in our own world. The provision is unique to us. Once this problem has been identified, solutions have to be proffered. This shall be the case in this chapter before we close the research.

### SUMMARY OF FINDINGS

As indicated earlier procurement proceedings are heavily regulated by the PPDPA. This is given. Emphasis is on the five principles that underpins procurement regulations. These are espoused in section 315 of the Constitution. The principles find expression in

several provisions in the PPDPA. If that was to end there, one would boastfully say that Zimbabwe has the best legislation in the region, if not in the world.

Section 16 of the PPDPA is oblivious of the vices that may arise from possible human interaction with the provisions of the law. It seems to sanitize the issuance of illegal directives. There are no considerations put in place to ensure that the instructions of directives, in turn are confined to the general objectives which are advanced in section 4 of the PPDPA as read with section 315 of the Constitution.

In the end, it was found that section 16 is just bad law in the sense that it contravenes several provisions in the Constitution. It also offend settled common law principles. It also fails the international best practice test and on that account it leaves us in a world of our own.

CONCLUDING REMARKS

It is felt that other progressive provisions in the PPDPA are vulnerable at the instance of section16. Section 16 is self-defeating and with respect bad law. Regarding the Constitutional inconsistencies which manifest in two way demonstrated under Chapter 3 it has emerged the law in Mudzuri s*upra* which says there is no point in seeking an invalidation order once there is an established instance of inconsistency between a statute and the provisions of the Constitution.

It is observed that the same approach was adopted by the Supreme Court in **City of Harare v Makungurutse & Ors** SC 46/18. The approach may invite laxity in that alert citizens may adopt a wait and see approach. These decisions represent one end.

On the other end, there are also decisions from the Supreme Court to wit **Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd** 1983 (2) ZLR 376 (S) which takes a particular view that every law or legislation should be presumed to be Constitutional. The judgment was endorsed by the Constitutional Court in **Democratic Assembly for Restoration & Empowerment v Saunyama N.O** CCZ 9/18.

The Mudzuriri and Makungurutse & Ors judgments are premised on the import and interpretation of the supremacy of the Constitution. Whilst the judgment in **Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd** supra may not have considered the supremacy of the Constitution despite that it existed under section 3 of the Lancaster House Constitution they still speak to a point regarding the validity of laws vis-à-vis the provisions in a Constitution. The old judgment has neither been vacated nor departed from. It is still part and parcel of the statute book.

What this means is that the judgments of the Court are conflicting on the point. I raise this point as this has bearing on the future of section 16 and suggest that it is safe to have the presumption of constitutionality demystified in a court of law. Than to wait and see the bad law thrive as there is a possibility which emerges from the demonstrated conflict.

RECOMMENDATION(S)

In the main, the solution is to have section 16 of the PPDPA should struck down by reason of unconstitutionality and be removed from statute book. The decree of Constitutional invalidity can be sought on the basis of the common law principles as read with section 56 (1) of the Constitution. The second stage on which a decree of constitutional invalidity can be sought is to argue direct conflict with section 315.

This is not the first case of its nature. Since the advent of the current Constitution of Zimbabwe, there are successful cases where the Court has struck down laws which are ultra vires the Constitution. This has happened in the case of **Mudzuri** supra, where the Court removed from the then Marriages Act sections which encouraged the child marriages. Fairly recent the Constitutional Court has in **Kawenda v Minister of Justice** CCZ 2/22 struck down provisions of the in the Criminal Law Code *supra* which provided for the age of minor children which was the eighteen years stipulated in the Constitution.

The other recommendation is to amend section 16 and instill some inbuilt limitations. It should be subjected to some limitations. Either to cater for emergencies or to generally condition it to the general objectives envisaged under section 4 of the PPDPA. There is need to clip the wings of superiors and ensure that their powers are not left unchecked.

The next recommendation is a wholesome amendment of the PPDPA. It should in every case where a public official is required to act, insert follow up provisions which are aimed at ensuring compliance. Like in the Zambia and Kenya context, it is suggested that there should be general provisions or clauses which generally criminalizes breaches of any magnitude done against the PPDPA. This is want is missing the conduct of public officials is largely unregulated and this can be a problem.

The other recommendation is to follow the Zambia and Kenya route and to criminalize, without exception, infractions to the PPDPA.

BIBLIOGRAPHY

Acts


1. Constitution of Zimbabwe
2. Lancaster House Constitution – repealed
3. Administration of Justice Act [Chapter 10:28]
4. Criminal Law Codification and Reform Act [Chapter 09:23]
5. Public Procurement Act
6. PPDPA[Chapter 22:23]
7. Public Procurement Act of 2020 – Zambia
8. Public Procurement Act Chapter 37:03 – Malawi
9. Public Procurement and Asset Disposal Act No 33 of 2015 – Kenya
10. Public Procurement Act of 2003 – Ghana

11. Public Finance Management Act *[Chapter 22:19]*
12. Copyright and Neighbouring Rights Act *[Chapter 26:05]*

Books


1. *Arrowsmith S. et al "Public Procurement Regulation: An Introduction" University of Nottingham 2010*
2. *Bolton P, The Law of Government Procurement in South Africa, 2007*
3. *De La Harpe Green, Public Procurement,*


*Cases*


1. Nkomo v Minister of Local Government, Rural & Urban Development & Ors 2016 (1) ZLR 113 (CC)
2. Breen v Amalgamated Engineering Union and Others (1971) ALL ER (1148).
3. Katsande v ZETDC LC/H/73/20
4. ZETDC v KATSANDE LC/H/ 79/20
5. Markham v City of Harare HC 2766/22
6. *Rushesha and Others v Dera & Others* CCZ 24/17
7. *Sagittarian (Pvt) Ltd v Workers Committee Sagittarian (Pvt) Ltd*
8. Director of Education (Transvaal) v McCagie, 1918 AD 616
9. Principal Immigration Officer & Anor v O'Hara & Anor 1993 (1) ZLR 69 (S)
10. Thandekile Zulu v ZB Financial Holdings (Pvt) Ltd SC 48/18
11. *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S)
12. Chihava & Ors v Magistrate Mapfumo & Anor CCZ 6/15
13. WLSA & Ors v Mandaza & ORS 2003 (1) 500 (H).
14. ZESA v Dera 1998 (1) ZLR 50
15. Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 111
16. John Basera v The Registrar of the Supreme Court & Others SC 35/22.
17. Matereke v CT Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S)
18. Catering Industry v Catering & Hospitality Industry Workers Union 2008 (1) 311
19. Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd S-242-95
20. Mahachi v PTC 1997 (2) ZLR (H) 71

21. Don Nyamande & Anor v ZUVA Petroleum (Pvt) Ltd SC 43/15
22. Mudzuri & Anor v Minister of Justice & Ors
23. Ex-parte Sibonginkosi Ndlovu HB 116/2004
24. Chinamora v Angwa Furnishers (Private) Limited & Ors 1996 (2) ZLR 664 (S).
25. City of Harare v Makungurutse & Ors SC 46/18
26. Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S)
27. Democratic Assembly for Restoration & Empowerment v Saunyama N.O CCZ 9/18.

Articles

1. Osei-Afoakwa, ***How Relevant is the Principle of Transparency in Public Procurement*** Developing Country Studies www.iiste.org ISSN 2224-607X (Paper) ISSN 2225-0565 (Online) Vol.4, No.6, 2014, 2

Websites

1. Auditor General's Report on ZESA and its subsidiaries accessed on https://www.auditorgeneral.gov.zw/phocadownload/AG%20REPORT%20ON%20STATE%20ENTERPRISES%20AND%20PARASTATALS%202019.pdf

2. ZIMASSET economic Blue Print accessed on http://www.veritaszim.net/sites/veritas_d/files/Zimbabwe%20Agenda%20for%20Sustainable%20Socio-Economic%20Transformation%20%28ZIM-ASSET%29%20Oct%202013%20to%20Dec%202018.pdf
3. Trust Academy - https://trustacademy.ac.zw/
4. Lupane State University http://www.lsu.ac.zw/
5. Bindura State University https://www.buse.ac.zw/
6. *Polish Public Procurement Act*; a 31(1)(c) of the EC Public Sector Directive; and a 40(3)(d) of the EC Public Utilities Directive http://www.uncitral.org
7. City of Cape Town http://www.capetown.gov.za/