

**The use of Standard Form Contracts in the procurement processes of the  
South African Police Service**

by

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## SUMMARY

The research in this dissertation focusses on an assessment of the standard form contracts used by the South African Police Service (SAPS), which is a government department and is obliged to use the standard form contracts prescribed by National Treasury and other government departments. The challenges that the SAPS is faced with regarding procurement are the many disputes resulting in litigation mostly in the form of review applications by and against the SAPS, that arise as a result of allegations of irregularity in the awarding of tenders, where breach of contract is alleged, as well as irregular expenditure incurred by the SAPS.

In assessing the standard form contracts, the study focusses on the requirement of consensus and formalities for a valid contract. In determining consensus the bidding documents, to include offer and acceptance, are analysed to determine the existence of a *pactum de contrahendo*. To meet the requirement of formalities the regulatory framework relating to government procurement is unpacked in detail.

The standard form contracts namely, the Standard Bidding Documents (SBD's), General Conditions of Contract (GCC), Joint Building Construction Committee (JBCC), Pincipal Building Agreement, Standard Professional Services Contract and State Information Technology Agency (SITA) Business Agreement, are assessed in accordance with the principles of of the law of contract, to include an interpretation of the intellectual property and copyright clauses.

Specific clauses relating to intellectual property and copyright that formed the subject of litigious matters for the SAPS are interpreted, highlighting the problematic provisions in the prescribed standard form contracts and recommendations made to improve such clauses.

The challenge with the JBCC Principal Building Agreement are also elaborated on, together with proposals on remedying such.

The legal principles of drafting and interpretation of contracts to include presumptions, implied- and express terms, the parol evidence rule, classification, concretisation, and determining the meaning, are expanded upon.

## LIST OF ACRONYMS AND ABBREVIATIONS

<b>Abbreviation/Acronym</b>	<b>Definition</b>
AGSA	Auditor General South Africa
BBBEE	Broad Based Black Economic Empowerment
CC	Constitutional Court
CIDB	Construction Industry Development Board
DPW	Department of Public Works
GCC	General Conditions of Contract
IT	Information Technology
JBCC	Joint Building Contracts Committee
PFMA	Public Finance Management Act
PPPFA	Preferential Procurement Policy Framework Act
SAPS	South African Police Service Act
SBD	Standard Bid Documents
SCA	Supreme Court of Appeal
SCC	Special Conditions of Contract
SCM	Supply Chain Management
SITA	State Information Technology Agency
SME	Small and Medium Enterprises



## 1. CHAPTER 1 : INTRODUCTION

### 1.1 Introduction

In an article, by Peter Leon, an attorney from Herbert Smith Freehills African Practice, that appeared in the Business Day of 19 June 2019,<sup>1</sup> headed: “Judgements put a question mark over validity of public sector contracts”, it is contended that South Africa is grappling with large scale public sector corruption which has severely undermined the Government’s procurement system. There appears to be serious political will to root out corruption as is evident from the recent developments being the court ordered commission on state capture and recent court judgements, namely, *Sita v Gijima Holdings*<sup>2</sup> and *Buffalo City v Asla Construction*.<sup>3</sup>

The Constitutional Court found in both cases that the Promotion of Administrative Justice Act<sup>4</sup> does not apply to self review cases. The court in *Gijima*<sup>5</sup> declared the contract invalid and set it aside as it had not been awarded in compliance with Section 217(1) of the Constitution of the Republic of South Africa.<sup>6</sup> In the *Buffalo City*<sup>7</sup> matter the court declared the scope extension invalid on the basis of legality but did not set it aside.

Private parties are generally free to decide whether, with whom, and on what terms to contract. However there are some restrictions that apply by virtue of the concept of

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<sup>1</sup> *Business Day* ( 2019/06/19) 7.

<sup>2</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (641/2015)[2016]ZASCA. 143;[2016]4 All SA842(SCA);2017(2)SA 63 (SCA)(30 September 2016).*

<sup>3</sup> *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd.*<sup>3</sup> (5668/2018)(5246/2015)[2016]ZAECGHC 55,[2016]4 All SA 9ECG)(29 July 2016).

<sup>4</sup> Act No 3 of 2000 (hereinafter referred to as PAJA).

<sup>5</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd supra.*

<sup>6</sup> Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

<sup>7</sup> *Buffalo City Metropolitan Municipality v Asla Construction supra.*

illegality, which may render wholly or partially ineffective agreements involving a contravention of a specific rule of law, or which is contrary to public policy<sup>8</sup>.

As a general rule however, private parties have what is referred to as “freedom of contract,” their powers are inherently unlimited.<sup>9</sup> The same cannot be said of government. One of the core values of the South African Constitution is the supremacy of the Constitution and the rule of law<sup>10</sup>.

The Constitutional Court in *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*<sup>11</sup>, explains that the rule of law includes “at a minimum” the principle of legality. Legality in turn requires the government, the legislature and the courts to act in accordance with the legal principles and rules that apply to them.<sup>12</sup>

In the government procurement context therefore organs of the state must comply with not only the five principles in section 217(1)<sup>13</sup> of the Constitution when procuring goods and services, they are also bound by the principle of legality<sup>14</sup>. Government procurement therefore is afforded constitutional status in South Africa.

In the famous case of *AllPay Consolidated Investment Holdings (Pty) Ltd and another v Social Security Agency and Others*,<sup>15</sup> the court held that the tender process

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<sup>8</sup> Bolton P *The Law of Public Procurement in South Africa* (2007) 35.

<sup>9</sup> Bolton P *The Law of Public Procurement in South Africa* (2007) 35.

<sup>10</sup> Section 1(c) of the Constitution.

<sup>11</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and others*, (1998) 12 BCLR 1458(CC).

<sup>12</sup> *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others supra*.

<sup>13</sup> Section 217(1) of the Constitution.

<sup>14</sup> Section 217(1) of the Constitution.

<sup>15</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and another v Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC).

preceding the award of the tender must be in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

Section 217 of the Constitution provides that the state must contract for goods or services in a manner which is fair, equitable, transparent, competitive and cost effective.<sup>16</sup> Section 217 sets out the basic procedural and substantive requirements that must guide the state when it procures goods and services.<sup>17</sup>

A number of statutes have been enacted to reflect the constitutional status of procurement in South Africa. The general rules of Constitutional and administrative law also apply to government procurement. In addition to these statutes, government procurement decisions and procedures are regulated by the common law.

The SAPS is a government department and therefore has to ensure compliance with the Constitution and the regulatory framework that includes the relevant legislation and policies in its procurement prescripts. The SAPS procures a variety of goods and services to include immovable assets, leases, construction and Information Technology (IT). This requires compliance with a variety of relevant prescripts and completion of prescribed documents. The standard form contracts are many and are ambiguous, confusing, are not in compliance with contract law principles and are contributing to the many court battles that the SAPS is facing.

Therefore, this research seeks to assess the standard form contracts prescribed for government procurement by interpreting the provisions of such contracts and in so doing identifying any shortcomings and making appropriate proposals.

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<sup>16</sup> Bolton (2007) v.

<sup>17</sup> Section 217 of the Constitution.

As a starting point the requirements for an agreement which include consensus and formalities are explained with reference to the *pactum de contrahendo* created during the tender process. Thereafter the legislative prescripts are set out and specific legislation elaborated on.

There are many prescribed standard form contracts prescribed by National Treasury. Since the standard form contracts are a *pactum de contrahendo*<sup>18</sup> the standard form contracts need to be compliant with contract law principles. Sometimes the standard form contracts become the final contract itself.

This research in the main interprets the standard form contracts to determine whether they meet the standard of contractual law principles. The contract documents to include the Standard Bidding Documents (SBD's), General Conditions of Contract (GCC), the Joint Building Contracts Committee (JBCC) Principal Building Agreement, the Professional Services Contract and the State Information Technology Agency (SITA), Business Agreement are interpreted. Two court cases that SAPS litigated on are discussed.

Although the GCC is prescribed and provisions are made for Special Conditions of Contract (SCC), it will be shown that certain express terms in the GCC do not specifically protect copyright. Although in terms of construction contracts the JBCC contract is used, it does not meet the requirements of the SAPS.

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<sup>18</sup> *Steenkamp No vs Provincial Tender Board, Eastern Cape Provincial Govt, 2007 (3) SA (3)SA 121 (CC).*

## 1.2 Background

The SAPS is a government department created in terms of Section 205 of the Constitution<sup>19</sup>. The objects of the SAPS are to prevent, combat and investigate crime.<sup>20</sup> The SAPS is required to comply with the provisions of the Constitution, relevant legislation relating to procurement, the general rules of Constitutional and administrative law, common law, the law of contract and the law of delict in its procurement process.

The SAPS constructs a plethora of contracts to include procurement contracts, local and international agreements, intergovernmental agreements, labour contracts and service level agreements. For the purpose of this research the focus will be on procurement contracts.

In compliance with treasury prescripts,<sup>21</sup> the documents included in the procurement procedures include the GCC generally known as public sector procurement contracts, SCC, Standard Bidding Documents (SBD's) and service level agreements. In the case of the built environment the GCC are prescribed by the Construction Industry Development Board Act<sup>22</sup> and in case of information technology in accordance with the State Information Technology Agency Act.<sup>23</sup>

When a tender is advertised the general and where necessary, special conditions of contract and or service level agreements are published with the tender. Once the tender is awarded the successful bidder is called upon to sign the documents

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<sup>19</sup> Section 205 of the Constitution.

<sup>20</sup> Section 205 of the Constitution.

<sup>21</sup> National Treasury Practice Note No 8 of 2007/2008.

<sup>22</sup> Act No 38 of 2000 (hereinafter referred to as the Construction Industry Development Act ).

<sup>23</sup> Act No 88 of 1998, as amended by the SITA Amendment Act 38 of 2002 (hereinafter referred to as the SITA Act).

concerned, SBD 7.1 -7.4 and this becomes the contract between the parties. A letter of award is also furnished to the successful bidder.

With IT contracts in addition to the general conditions of contract and once the contract is awarded, then a further contract is entered into between the parties, or in the case of services provided by SITA it is a service level agreement. In the case of building tenders there are prescribed contract documents in terms of the JBCC.

The SAPS spends billions of Rands of its budget on procurement. Therefore there has to be value for money. In the government procurement context, cost effectiveness can be said to find application throughout the procurement process that is during the planning stage, the process of procurement and contract maintenance, or contract administration<sup>24</sup>.

In the *Sanparks vs MTO* case,<sup>25</sup> the Appeal Court found that the contractual power exercised by a public body in the variation of a contract constituted an administrative action and that contractual rights may be exercised within the administrative justice framework. Where the procedural fairness requirement is not observed the administrative action was reviewed and set aside.

The *Sanparks*<sup>26</sup> case relates to an accelerated tree felling programme that was initiated by Sanparks. Review proceedings were instituted by Parkscape on the basis of procedure. The High Court found that Sanparks' authority and obligation in respect of the Tokai forest, including the authority deriving from the lease agreement, were an exercise of public power conferred on it under the National Forest Act<sup>27</sup> and National

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<sup>24</sup> *Bolton P (2007)1*.

<sup>25</sup> *South African National Parks (Sanparks) vs MTO Forestry (Pty)Ltd and another (446/ 2017)*.

<sup>26</sup> *Sanparks supra*.

<sup>27</sup> *Act 84 of 1998*.

Environmental Management: Protected Areas Act.<sup>28</sup> The court found that the approval of the felling schedule was an administrative action. As Sanparks had failed to consult the public prior to granting approval, its decision was reviewed and set aside.

The appeal was on the question whether the appellant, Sanparks, had a duty to consult the second respondent (Parkscapes), prior to allowing the first respondent (MTO Forestry) to vary a previously agreed tree felling programme in the Tokai forest, Cape Town in terms of a lease agreement between the two. The approval was reviewed and set aside by the High Court at the instance of Parkscape for procedural unfairness. The High Court then interdicted and restrained MTO Forestry from felling the trees in terms of the revised tree felling programme. In terms of administrative law the<sup>29</sup> question was whether the management framework and previous public participation was a proper basis for a legitimate expectation. The court found that a legitimate expectation was created.

So even though it is a contract between two parties, the state and another, a third party may be involved in such a review process.

Sanparks argued, in addition to other arguments, that its decision to allow MTO Forrestry to accelerate the tree felling schedule and to exit the lease prematurely was made in terms of a lease agreement. Therefore there was no public obligation on it to consult the public prior to granting the request for variation.

On appeal by Sanparks against the decision of the High Court, the Appeal Court found that having considered Sanparks' statutory obligations and the principles set out in

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<sup>28</sup> Act 57 of 2003.

<sup>29</sup> Sanparks *supra*.

case law, it was clear that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the decision was made.

In the *Allpay* case<sup>30</sup> applicants brought a review application of the decision by SASSA to award a tender to Cash Paymaster Service for the payment of social grants. The applicants contended that the tender was flawed fundamentally as follows:

The whole process from the TOR, the procedure, evaluation, and adjudication was flawed. The tender specifications were amended in the last minute. The bidders were misled about the criteria. The process lacked transparency. The process was inherently unfair. The presentation process was fatally irregular. The applicant's score was altered. The decision to appoint CPS was bias, in bad faith and with an ulterior purpose.

The court stated that Section 217 of the Constitution sets out the basic procedural- and substantive requirements that must guide the state when it procures goods and services.

The tender process preceding the award of the tender must be in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The process followed by SASSA in reducing the applicant's score was irrational, unfair, and inconsistent with the requirements of section 217 of the Constitution, the PFMA and PAJA.

The court declared the tender process invalid and set the award to the third respondent aside and ordered the respondent to pay costs.

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<sup>30</sup> *All Pay Consolidated Investment Holdings (Pty) Ltd and the Social Security Agency and Others supra.*



### 1.3 Problem Statement

The challenges facing the SAPS are the following:

During the past two financial years the SAPS received a qualified audit from the Auditor General of South Africa (AGSA).<sup>31</sup>

The common findings from tender processes in the past two financial years of 2017/2018 and 2018/2019 are as follows :

- SAPS is not complying with Treasury Regulations 16.A.6(4);
- deviations are not supported by National Treasury prescripts;
- procurement is uncompetitive and unfair procurement processes are followed;
- one tender was not audited, incomplete information was submitted;
- three written quotations not invited for bids under R500 000.00;
- irregular expenditure disclosed as condoned, not approved in terms of National Treasury Guidelines.<sup>32</sup>

The irregular expenditure is as follows for the financial years as reflected:

2013/14	R 285 million
2014/2015	R 281 million
2015/ 2016	R 20 million
2016/2017	R 20 million
2017/2018	R 19 million restated to R 1.1 million
2018/19	R 1.1 billion. <sup>33</sup>

<sup>31</sup> Auditor General South Africa Report (AGSA ) (2018/2019).

<sup>32</sup> AGSA Findings supra 2018/2019.

<sup>33</sup> AGSA Findings supra 2018/2019.

The root causes as identified by AGSA for the qualified audit inter alia includes the blatant disregard for control, non-compliance with legislation and AGSA recommendations. Unethical behaviour in administration and by political leaders.

The reason for the qualified audit is the irregular expenditure as a result of payments made by the SAPS in respect of procurement contracts entered into between SITA and service providers on behalf of the SAPS and also the expansion of contracts beyond the permitted variation of 15% in respect of movable assets and 20 % in terms of immovable assets.

In terms of the SAPS' delegations any variations on the contract including expansions and unforeseen expenses up to 15% can be approved by the Bid Adjudication Committee (BAC) in respect of fixed term contracts. According to the SAPS the amount was approved by the BAC and is therefore not an irregular expenditure. However, according to AGSA such deviation must be approved by National Treasury.<sup>34</sup>

### **1.3.1 Alleged breach of contract: SAPS and service providers**

The SAPS is faced with many disputes in the form of litigation relating to procurement contracts. As indicated earlier, depending on the nature of the goods and services being procured, there are prescribed standard form contracts that must be signed by the parties. Furthermore, under certain circumstances additional contracts may be required to be signed.

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<sup>34</sup> AGSA Findings supra 2018/2019.

The reason for the disputes may be that the contracts that the SAPS is constructing, are not in compliance with the legislative prescripts, the principles of contract law and in particular the principles related to the interpretation of contracts. Could the standard form contracts prescribed by the different applicable legislation in respect of government procurement be the cause of the high incidence of litigation?

The courts are responsible for the interpretation of contracts in the event of a dispute. Therefore the SAPS, in constructing such contracts, should ensure that the principles of contract law including the principles of interpretation are complied with.

### 1.3.2 Non compliance with contract law principles in drafting

Creating the express terms of the contract constitutes the essence of legal drafting and gives expression to the common intention of the parties.<sup>35</sup> The operative parts are not contained in a single document, they are contained in different documents namely Request for Bid (RFB), GCC, SCC and other tender documents. They are not read together as a single document. This presents difficulties in drafting as the drafter must take into account each of the different documents to ensure that they are compatible and do not contradict each other.

The procurement process in government up to the awarding of tender is a *pactum de contrahendo*, as was held in *Steenkamp NO vs Provincial Tender Board: EC*.<sup>36</sup> The requirement is that documents compiled must comply with the principles of contract law as they form part of the contract documents, signed. Is the SAPS complying with drafting principles?

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<sup>35</sup> Cornelius SJ (2016:148 ).

<sup>36</sup> *Steenkamp supra*

### **1.3.3 Problematic Clauses**

There are problematic clauses in the GCC, CIDB as well as SITA prescripts. These clauses include copyright that poses a challenge to the SAPS. The express terms are not clear.

### **1.3.4 Standard Bidding Documents**

Various SBD's are utilised for different purposes. The completion of these large volume of documents are impacting negatively on suppliers and is also an administrative burden on Supply Chain Management practitioners responsible for the invitation of written price quotations and competitive bids.

## **1.4 Conclusion**

In this Chapter the entire content of this dissertation was introduced to include a discussion of the requirements of consensus and formalities for the validity of a contract, the interpretation of certain standard form contracts and the discussion of litigation that the SAPS was faced with. Moreover the challenges faced by the SAPS in effectively drafting and interpreting contracts were elaborated on.

## CHAPTER 2: REQUIREMENT FOR A VALID CONTRACT: CONSENSUS

### 2.1 Introduction

The law of contractual principles in South Africa are derived from the common law.<sup>37</sup>

The common law co-exists with the constitutional democracy. The Constitution requires that all law, including the common law, must conform to it.<sup>38</sup>

The common law fundamental foundational concepts of contractual law are consensus and reliance.<sup>39</sup> The other four cornerstones of the law of contract are freedom of contract, sanctity of contract, good faith and privity of contract.<sup>40</sup>

Freedom of contract forms the foundation of the classical theory of contract, which still informs the South African law of contract regardless of the fact that social and political values have changed.<sup>41</sup> The second cornerstone, sanctity of contract, entails that obligations in terms of a contract must be honoured because the contract was entered into voluntarily.<sup>42</sup> This principle is known as *pacta sunt servanda*.<sup>43</sup>

The notion of sanctity of contract goes hand in hand with freedom of contract. These two principles seem to be in conflict with the foundational principle of good faith and fairness<sup>44</sup>. The principle of good faith requires that all dealings in a contract must take place in an honest manner.

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<sup>37</sup> Hutchinson and Pretorius (eds) (2011)2.

<sup>38</sup> Section 2 of the Constitution.

<sup>39</sup> Hutchinson and Pretorius (eds) (2012)21.

<sup>40</sup> Hutchinson and Pretorius (eds) (2012)21.

<sup>41</sup> Hawthorne (1995)157.

<sup>42</sup> Hawthorne (1995)173.

<sup>43</sup> *Everfresh Market Virginia (Pty)Ltd v Shoprite Checkers(Pty)Ltd* 2012(1)SA256 (CC) 2016 (47).

<sup>44</sup> Hutchinson and Pretorius (eds) (2012)22.

The notion of good faith has an objective content that includes other abstract values such as justice, reasonableness, fairness and equity.<sup>45</sup>

Hutchinson states that the final cornerstone is the privity of contract which means that a contract creates rights and obligations exclusively for the parties to that contract and does not include random third parties.<sup>46</sup> In the Sanparks case,<sup>47</sup> the Appeal Court found contrary to the privity of contracts as submitted by Hutchinson<sup>48</sup> as follows: “that having considered Sanparks’ statutory obligations and the principles set out in case law it was clear that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the decision was made”.

Nagel et al<sup>49</sup> explains that, “a contract is an agreement (based on consensus between legal subjects who have contractual capacity to do so and which is lawful, physically possible, and complies with prescribed formalities) reached with the intention of creating a legal obligation with resulting rights and obligations”.

Hutchinson<sup>50</sup> defines a contract as an agreement entered into by two or more persons, with the intention of creating a legal obligation or obligations and one that the law recognises as being binding on the parties.

The five requirements for the conclusion of a valid contract as contained in the preferred definition of a contract by Nagel<sup>51</sup>, are legal subjects with contractual capacity, consensus, legality, physical possibility and formalities.

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<sup>45</sup> *Everfresh Market Virginia (Pty)Ltd v Shoprite Checkers(Pty)Ltd supra.*

<sup>46</sup> Hutchinson and Pretorius (eds) (2012)21.

<sup>47</sup> *Sanparks vs MTO supra.*

<sup>48</sup> Hutchinson and Pretorius (eds) (2012)22.

<sup>49</sup> Nagel (2006) 36.

<sup>50</sup> Hutchinson (2016)4.

<sup>51</sup> Nagel (2006) 36.

## 2.2 Government Contracts

Procurement in the South African context refers to instances where the government acquires goods and services and when it sells or lets assets.

There are three stages in the government procurement process, namely the planning stage, the process of procurement which includes the selection of a contractor to provide the goods and services required and the conclusion of a contract with that party and the final stage is the contract maintenance and contract administration phase.<sup>52</sup>

The law that applies to government procurement in South Africa will be determined by the stage or period of the procurement process.<sup>53</sup> To give effect to the Constitutional status of government procurement, Parliament has established a legislative regime for the procurement activities and procedures of government. A number of statutes have been enacted to give effect to Section 217 of the Constitution. The most important statutes include the Public Finance Management Act<sup>54</sup>, the Promotion of Administrative Justice Act,<sup>55</sup> the Preferential Procurement Policy Framework Act,<sup>56</sup> the CIDB Act<sup>57</sup>, the SITA Act and the BBBEE Act<sup>58</sup>

There are two ways in which government procurement can take place. The first being for goods and services below R500 for which three quotations are required and the successful service provider signs the SBD's which is the contract. For goods and services above R500 000 a tender process is followed and bids are advertised. The

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<sup>52</sup> Bolton (2007) 9.

<sup>53</sup> Bolton (2007) 10.

<sup>54</sup> Act No 1 of 1999 as amended by Act No 29 of 1999 (hereinafter referred to as the PFMA).

<sup>55</sup> Act 3 of 2000 ( hereinafter referred to as PAJA).

<sup>56</sup> Act 5 of 2000 (hereinafter referred to as the PPPFA).

<sup>57</sup> Act No 38 of 2000 (hereinafter referred to as the CIDB Act).

<sup>58</sup> Act No 53 of 2008 (hereinafter referred to as the BBBEE Act).

successful bidder is required to sign the SBD's, the GCC and in certain instances the SCC and in other instances the standard form contracts.

### **2.3 Standard Form Contracts**

As put by Hutchinson<sup>59</sup>, the classic model of contract is based on the assumption that the contracting parties have a freedom of choice. Hutchinson<sup>60</sup> further elaborates that this is based on other assumptions that the parties enjoy more or less equal bargaining power, there is no perfect or near perfect competition in the market, the parties actually negotiate the terms of their contract.

It is widely recognised that in many everyday situations these assumptions are simply not correct. There are many developments that challenge the traditional contract theory. Of the related developments none has done more to undermine genuine freedom of contract than the standard form contract characterised by its take it or leave it nature. In an age of mass production and mass consumption of goods and services, considerations of cost and convenience have necessarily led to mass contracting on terms and conditions that are standardised and simply imposed on the other party usually a consumer.<sup>61</sup>

Express terms in standard form contracts, also called imposed terms, are in one important aspect dealt with differently from express terms negotiated by the parties. Standardised, also called standard form contracts, are commonly used by larger corporations and public entities. This also finds application in Government

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<sup>59</sup> Hutchinson (2016) 24.

<sup>60</sup> Hutchinson (2016) 24.

<sup>61</sup> Hutchinson (2016) 25.



procurement where standard form contracts are prescribed as will be discussed hereunder.<sup>62</sup>

Standard form contracts are frequently complex and are often not read or understood by the party to whom they are presented and usually their terms are not negotiable. A party presenting a standardised contract to another for signature is expected to draw attention to any term one would not expect to find in a contract. If this is not done, the party sought to be held bound might successfully contend that since he or she had not expected such an unusual term, it does not bind him or her<sup>63</sup>.

The SAPS' tender process consists of several written standard form documents and contracts.<sup>64</sup>

The standard form contracts include the SBD7, GCC, JBCC Principal Building Agreement, JBCC Professional Services Contract and SITA Business Agreement.

Hutchinson<sup>65</sup> submits that where any standard form contract or other document, prepared or published on behalf of the supplier is ambiguous, the ambiguity must be resolved to the benefit of the consumer.

In *Kempston Hire v Snyman*<sup>66</sup> where Snyman working as a security guard signed an invoice for the hire of a vehicle that was delivered to the company, there was a provision that imposed personal liability on the signatory. This was on the back of the invoice in small print.

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<sup>62</sup> Hutchinson (2016) 25.

<sup>63</sup> Hutchinson (2016) 25.

<sup>64</sup> National Treasury Practice Note 2007/2008.

<sup>65</sup> Hutchinson (2016) 47.

<sup>66</sup> *Kempston Hire (Pty)Ltd vs Snyman 1998 (4)SA 465(T)*.

When the company closed down Kempston Hire sought to hold him accountable. The court held that that the defendant was misled as to the content of the document as the defendant thought he was signing a receipt. The court agreed that the document was a receipt and not a contract.<sup>67</sup>

## **2.4 Requirement of Consensus**

As indicated earlier Huchthinson<sup>68</sup> contends that a contract is formed when the parties reach agreement on all the material terms of the contract, provided that all the requirements for validity are met. The process of reaching agreement involves mutual declaration of intention by the parties. These declarations are usually analysed in terms of the rules of offer and acceptance. The primary basis of contract is consensus.<sup>69</sup>

## **2.5 Interpretation of calls for tenders**

Cornelius<sup>70</sup> indicates that in the process of interpreting there are four steps, namely classification of the contract (determining the nature of the contract), concretisation (identifying the terms of the contract), determining the meaning of the terms and finally applying the meaning to the facts. The steps do not necessarily follow each other, they could all apply simultaneously as you draft or interpret.<sup>71</sup>

There is little difference in the interpretation of various types of contracts. The principles of contract will also apply to tender documents.

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<sup>67</sup> *Kempston Hire supra.*

<sup>68</sup> Huchthinson (2016) 47.

<sup>69</sup> Huchthinson (2016) 47.

<sup>70</sup> Cornelius (2016) 120.

<sup>71</sup> Cornelius (2016) 120.

## **2.6 Classification**

Classification, elaborates Cornelius<sup>72</sup>, takes place by means of an evaluation of the characteristics of a document. Each kind of document has a specific combination of and relation between certain characteristics that make it unique and distinguish it from other similar documents. The criterion for the classification of a document are the following: form, author, addressee, intention of the author, purpose of the document, commencement and nature of the document. By classifying a document, the interpreter of such document can determine which terms, rules and substantive law will apply to the document.<sup>73</sup>

The starting point for interpretation would be to start with determining the documents relevant to the contract and putting it together.<sup>74</sup>

### **2.6.1 Advertisement**

The general rule in our law is said to be that an advertisement constitutes merely an invitation to do business rather than an offer.<sup>75</sup> In order to initiate the tender process an advertisement will be placed in the Government Gazette as well as a local newspaper. The advertisement will consist of a short summary of the invitation to tender, a tender deadline and the contact details of the particular state organ. The advertisement will furthermore mention where and when bid documents can be collected and when a briefing conference and/or on site visit will be conducted.<sup>76</sup>

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<sup>72</sup> Cornelius (2016) 120.

<sup>73</sup> Cornelius (2016)120.

<sup>74</sup> Cornelius (2016)120.

<sup>75</sup> Croxley vs Rex 1909 TS 1105.

<sup>76</sup> Government Procurement Procedure by the Department of Government Communication and information System < [http://www.gcis.gov/content/about-us/procurement /procurement](http://www.gcis.gov/content/about-us/procurement/procurement)> (accessed on2018/09/30).

### **2.6.2 Invitation to tender / calls for tender**

An invitation to the public to submit a tender for work to be done is not an offer that is open to acceptance by the highest tenderer. At most it is an invitation to potential tenderers to make offers that will be considered after the closing date for a particular tender.<sup>77</sup> In normal practice an invitation to tender will consist of the published advertisement, and if necessary a briefing conference and a site visit.<sup>78</sup>

The tender documents include the GCC, as published by National Treasury in July 2010<sup>79</sup>. Bolton indicates that a call for tenders is an invitation to do business, the submission of a tender amounts to an offer, and only once a tender has been accepted, and such acceptance has been accepted by the tenderer in no uncertain terms, does a contract come into being between the organ of the state and the contractor.<sup>80</sup>

### **2.6.3 Request for proposal / expression of interest**

According to Bolton,<sup>81</sup> a call for tenders can be used by an organ of the state to solicit “expression of interest” or “proposals” from interested parties. In such a case, the tenders received do not amount to “offers” which upon acceptance give rise to a legally binding contract. The tenders received instead serve as a first step in the negotiation process.

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<sup>77</sup> Hutchinson (2016) 52.

<sup>78</sup> Government Procurement Procedure by the Department of Government Communication and information supra.

<sup>79</sup> <http://www.gcis.gov.za>.

<sup>80</sup> Bolton (2007) 28.

<sup>81</sup> Bolton (2007) 28.

#### 2.6.4 Offers to the public

Although one cannot contract with the general public one can address an offer to the public at large or to a segment of the public and then conclude a contract with the specific members of the public who respond to the offer.<sup>82</sup>

#### 2.6.5 What is an offer

An offer is a proposal to contract. It is a declaration of intention by one party (the offeror) to another party (the offeree), indicating the performance that he or she is prepared to make, and the terms on which he or she will make it.<sup>83</sup> When submitting a tender the bidder is actually making an offer in line with the invitation to tender. The bidder is required to comply with the tender conditions.

#### 2.6.6 Acceptance and awarding of the tender

After the closing date for submitting of the tenders, the submitted tender must be opened, recorded and evaluated. A tender may only be awarded to a bidder if the offer made is in compliance with the invitation to tender. In practice in South Africa once the offer has been accepted, or even made, the parties enter into an ancillary agreement concerning the main agreement that might follow. These ancillary agreements, an offer to conclude another contract, are known as a *pactum de contrahendo*.<sup>84</sup> The acceptance letter is posted by registered post or hand delivered to the successful bidder. In the SAPS, once the offer is accepted or the bid awarded,

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<sup>82</sup> *Carlill vs Carbolic Smoke Ball Company* (1893) 1 QB 256.

<sup>83</sup> Hutchinson (2016) 46.

<sup>84</sup> Hutchinson (2016) 46.

the successful bidder is called in to sign the contract documents and the GCC which becomes the contract between the parties.

## **2.7 *Pactum de Contrahendo***

Hutchinson<sup>85</sup> states, very often in commercial practice, before an offer has been accepted, or even made, the parties enter into an ancillary agreement concerning the main agreement that might follow. These ancillary agreements concerning an offer to conclude another contract are known as *pacta de contrahendo*, contracts about contracting. According to *Hutchinson*<sup>86</sup>, a *pactum de contrahendo* is a contract aimed at concluding another contract. There are two types *viz* option contracts and contract of preference. An option contract being that a grantor's right to revoke his or her offer is restricted and a contract of preference in which a grantor gives a preferential right to conclude a specific contract should the grantor decide to conclude the contract.<sup>87</sup>

Bolton refers to the case of *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George and Others*<sup>88</sup>, where the court held that prior to the actual award of a tender there is no contract. The decision to award the tender in the present case was not communicated to the applicant and all the conditions were not complied with. The court held that an organ of state is regarded as being *functus officio* only once a final decision has been taken. The authority may at any time revoke a decision before the actual exercise of a power in terms of an empowering law.<sup>89</sup> Therefore, according

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<sup>85</sup> Hutchinson 2016 ( 78).

<sup>86</sup> Hutchinson 2016 ( 78).

<sup>87</sup> Hutchinson 2016 ( 79).

<sup>88</sup> 2005 (JOL ) 13628(C).

<sup>89</sup> Bolton (2007)15.

to Bolton the pre-award period of the government procurement process is regarded as pre-contractual in nature.

In *Steenkamp NO v Provincial tender board Eastern Cape*,<sup>90</sup> Harms JA held the following:

“Seen in isolation the invitation to tender is no doubt an offer made by a state organ not acting in a position of superiority or authority by virtue of its being a public authority, and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private person who does so on an equal footing with the public authority.” The judgement has the effect of the tender process itself becoming a contract.

The formal contract comes into being in two ways. Firstly, the tender process itself can form the entire contract and the terms and conditions will be established and obtained from the invitation to tender, the submitted tender and the acceptance letter. In other words the *pactum de contrahendo* itself becomes the formal contract. A second way would be the negotiation and formalisation of a final contract after the awarding of the tender. The condition will need to be expressly stated in the invitation to tender as a term in the *pactum de contrahendo*.<sup>91</sup>

The *pactum de contrahendo* comes into existence through the completion of three stages. Firstly, an invitation to tender must be advertised and comprehensive bid documents must be drafted. Secondly, bidders must timeously submit tenders and ensure that the submitted tender complies with the invitation to tender. Thirdly, the

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<sup>90</sup> 2006 (3) SA151 SCA .

<sup>91</sup> Hutchinson & Pretorius (2012) 63.

State organ may award a tender in writing to a successful bidder after an evaluation process in accordance with the Preferential Procurement Regulations.<sup>92</sup>

The *pactum de contrahendo* will form the basis of formal contract and/or the negotiations thereto and must therefore be sound in law. This means it must comply with the principles of contract law.

It is therefore clear from the *Steenkamp* judgement that the invitation to tender and the submission of a tender is a *pactum de contrahendo*, similar to an option contract. An option contract consists of two elements, namely an offer to enter into a main agreement and an agreement to keep the main offer open for a certain period of time.<sup>93</sup>

## **2.8 Conclusion**

In this chapter the requirement of consensus was discussed as an element for validity of a contract. Consensus is determined by interpreting the offer and acceptance, which is the commencement of the tender process in the SAPS. It is also concluded that the process of advertisement up to the offer to do business is a *pactum de contrahendo*.

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<sup>92</sup> Hutchinson & Pretorius (2012) 63.

<sup>93</sup> Hutchinson & Pretorius (2012) 63.



## CHAPTER 3: FORMALITIES FOR A CONTRACT

### 3.1 Introduction

As indicated earlier the requirements for the validity of a contract are contractual capacity, consensus, legality, physical possibility and formalities. The requirement of consensus was also discussed in Chapter 2. The requirement of compliance with certain formalities is discussed hereunder.

Bolton explains that various statutes require that certain types of contracts should comply with prescribed formalities. One of the requirements may be that the contract be in writing. This aspect is discussed in Chapter 4 under the interpretation of standard form contracts.<sup>94</sup>

To ensure that the formalities are complied with, the relevant legislative prescripts must be determined. Therefore as a starting point, it is vital that the applicable legislation and prescripts that govern government procurement are identified.

In constructing, drafting or interpreting a contract one needs to know the law that relates to that contract. It is vitally important for drafting and interpretation for one to be aware of the relevant legislation as it will guide the drafting and interpretation of the specific contracts.

In addition to the legislation relating to government procurement the drafter has to acquaint him- or herself with the specific legislation applicable to the subject matter of the contract. The law must be researched.<sup>95</sup>

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<sup>94</sup> Huchinson and Pretorious (2016) 160.

<sup>95</sup> Cornelius (2016) 21.

Kollamparambil<sup>96</sup> is of the view that government has ensured that sufficient, all embracing guidelines have been laid down to streamline the process of public procurement of goods and services, but the ability or will to apply these procedures conscientiously, is lacking. Louw<sup>97</sup> supports Kollamparambil and submits that public sector procurement practices that are consistently executed in a systematic and transparent manner will lead to efficient goods and service delivery.

The tender process must meet all the legislative requirements as set out in inter alia the Constitution, the PFMA, the PPPFA, the Preferential Procurement Regulations, the Treasury Regulations, etc. Bids must therefore meet the legislative requirements of an acceptable tender as defined in the PPPFA, which defines an acceptable tender as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”.<sup>98</sup>

Kollamparambil’s view referred to above is supported as it is evident that since the advent of the Constitution and in particular in support of Section 217 of the Constitution, government has put measures in place to ensure compliance with the requirements of section 217 of the Constitution ranging from the PFMA, PAJA, the PPPFA, the BBBEE Act, CIDB Act and the SITA Act.

However, the litigation playing out in the courts and the associated publicity in the different media, points out shortcomings in government procurement starting from corruption, to poor contract management and failure to take responsibility of the public

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<sup>96</sup> Kollamparambil (2014)203.

<sup>97</sup> Louw (2010) 84.

<sup>98</sup> Section 1 of the PPPFA.

purse thus coinciding with the assertion of Kollamparabil<sup>99</sup> above, that the ability or will to apply these procedures conscientiously is lacking.

### **3.2 Drafting of contracts**

In the course of many years lawyers have, for better or for worse, developed certain expressions, terminology or formulae that are known to effect the desired result and have survived strict testing by the judiciary. As a result, many legal texts are not spontaneously formulated but are copied from examples of similar documents that were employed in the past so that legal language can be described as a manifestation of the unoriginal authorship.<sup>100</sup>

The essence of legal drafting is the attempt by the drafter to convey a certain message to the eventual recipient or adjudicator of the legal instrument. The drafter's aim should be to convey the message as clearly and accurately as possible.<sup>101</sup> A legal instrument is not merely a piece of writing.<sup>102</sup>

The three contexts of drafting *viz.* systemic, linguistic, functional and six dimensions *viz.* substantive, interpretation, constitutional, structural, semantic and historical, have an impact on the meaning of a legal instrument.<sup>103</sup>

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<sup>99</sup> Kollamparabil (2014) 203.

<sup>100</sup> Cornelius (2007) 35.

<sup>101</sup> Cornelius (2007)1.

<sup>102</sup> Cornelius (2007)1.

<sup>103</sup> Cornelius (2007)2.

Therefore according to Cornelius,<sup>104</sup> it is vital for a drafter to keep this definition in mind whenever he or she drafts a contract to ensure that the instrument which is drafted is at all times valid and compatible with the substantive law of contract.

A contract is a memorial of the agreement between the parties. According to Hutchison<sup>105</sup> a contract is an agreement between two or more parties, but not all agreements are contracts. He further states that a contract is an agreement entered into by two or more persons, with the intention of creating a legal obligation or obligations and one that the law recognises as being binding on the parties.<sup>106</sup> The GCC defines a contract as the written agreement entered into between the purchaser and the supplier as recorded in the contract form signed by the parties, including all attachments and appendices thereto and all documents incorporated by reference thereto.

The Joint Building Construction Committee (JBCC) Principal Building Agreement does not define a contract, it however contains a definition of Agreement as follows:

“Agreement”, means this JBCC Principal Building Agreement and other contract documents that together form the contract between the employer and the contractor.<sup>107</sup>

“Contract Documents” means this document, the contract drawings, the bills of quantities/lump sum documents and such other documents as identified in the schedule.<sup>108</sup>

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<sup>104</sup> Cornelius SJ (2007).

<sup>105</sup> Hutchinson (2016) 4.

<sup>106</sup> Hutchinson (2016) 4.

<sup>107</sup> JBCC Principal Building Agreement (2005) 1.

<sup>108</sup> JBCC Principal Building Agreement (2005) 1.

The first step in drafting according to Cornelius<sup>109</sup> is identifying the legislation, which also talks to the rules of interpretation that requires one to determine the terms of the contract which in turn will require identifying the relevant legislation.

Cornelius<sup>110</sup> further contends that a legal instrument has a systemic context, which relates to the legal system in which the text exists and functions. The systemic context has a substantive dimension which relates to the particular field of substantive law to which the instrument relates.

When a drafter sets out to draft a contract, it is firstly necessary to pause for a moment and reflect on exactly what the nature of the written instrument will be. The writing is only a record of the proof of the contract. It is not the contract itself. The contract is the legal relationship between the parties.<sup>111</sup>

### 3.3 Primary legislation impacting on procurement

The primary pieces of legislation that govern the SAPS procurement system are the following:

Constitution of the Republic of South Africa, 1996	Provides procurement objectives and establishes government's policy for preferencing. It also establishes requirements for the awarding of contracts to be lawful, reasonable and procedurally fair. It dictates that government procurement must
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<sup>109</sup> Cornelius (2007)2.

<sup>110</sup> Cornelius (2007)2.

<sup>111</sup> Kerr(2002)152.

	be cost effective, fair, transparent, competitive and equitable.
Public Finance Management Act (PFMA), 2009 Act 1 of 2009 as amended by Act No 29 of 1999	Establishes a regulatory framework for supply chain management which includes procurement within the national- and provincial departments and state owned enterprises.
Promotion of Administrative Justice Act (PAJA), 2000 (Act No 3 of 2000)	Establishes fair administrative procedures, permits those affected by unfair administrative action to request reasons for such administrative action provides for procedures for the judicial review of administrative actions.
The Preferential Procurement Policy Framework Act, (PPPFA), 2000 (Act No 5 of 2000)	Establishes the manner in which preferential procurement policies are to be implemented.
Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)	Prohibits the state or any person from discriminating unfairly against any person on the grounds of race or gender through the denial of access to contractual opportunities for rendering services or by failing to take steps to reasonably accommodate the needs of such persons.

<p>Construction Industry Development Board Act, 2000 (Act 38 of 2000)</p>	<p>Establishes the means by which the Board can promote and implement policies, programmes and projects, including those aimed at procurement reform, standardisation and uniformity in procurement documentation, practices and procedures within the framework of the procurement policy of government.</p>
<p>The Broad Based Black Economic Empowerment Act (BBBEE), 2008 (Act No 53 of 2008)</p>	<p>Establishes a code of good practice to inform the:</p> <ul style="list-style-type: none"> <li>• developments of qualification criteria for the issuing of licences or concessions, the sale of state owned enterprises and for entering into partnerships with the private sector; and</li> <li>• development and implementation of preferential procurement policy.</li> </ul>
<p>The Prevention and Combating of Corrupt Activities Act, 2004 (Act No 12 of 2004)</p>	<p>Makes corruption and related activities an offence, establishes a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts and places a duty on certain persons holding a position of authority to report certain corrupt transactions.</p>

The State Tender Board Act, 1968 (Act No 86 of 1968) <sup>112</sup>	The regulations to the State Tender Board Act have been amended to allow for accounting officers to procure goods and services either through the State Tender Board Act, or in terms of the PFMA. <sup>113</sup>
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### 3.4 Other legislation impacting on procurement

The Conventional Penalties Act, 1962 (Act No 15 of 1962)	Provides for the enforceability of penalty stipulations, including stipulations based on pre-estimates of damage.
The Arbitration Act, 1965 (Act No 42 of 1965)	Provides for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the reinforcement of the awards of such tribunals.
The Auditor General Act, 1995 (Act No 12 of 1995)	Requires the Auditor General to reasonably satisfy him or herself that satisfactory management measures have been taken to ensure that resources are procured economically and utilised efficiently and effectively. (The Auditor General has wide powers to investigate and enquire into procurement matters and related control. He or she is furthermore obliged to report his or her findings

<sup>112</sup> Act No 86 of 1968 (hereinafter referred to as the State Tender Board Act).

<sup>113</sup> Act 1 of 2000.



	either to parliament or the provincial legislative, as relevant).
The Public Protector Act, 1994 (Act No 23 of 1994)	Permits the public to raise issues and empowers the Public Protector, acting as an ombudsman, to investigate, report on and take the necessary remedial action on any conduct in state affairs or in the public administration that is alleged, or suspected to be improper or to result in any impropriety or prejudice. Information or evidence that suggests criminal activity is referred to the SAPS and the Director of Public prosecutions. Non-compliance with tender procedures that render expenditure irregular or unauthorised is referred to the Auditor General.
The Competitions Act, 1998 (Act No 89 of 1998)	Prohibits the following between parties: <ul style="list-style-type: none"> <li>• restrictive horizontal practices which have the effect of substantially preventing or lessening competition in a market or involves directly or indirectly fixing a purchase price or selling price or any trading condition, dividing markets by allocating customers, suppliers, territories, or specific types of goods or services, or collusive tendering;</li> </ul>

	<ul style="list-style-type: none"> <li>• restrictive vertical practices which have the effect of substantially preventing or lessening competition in a market or establish a minimum resale price.</li> </ul>
<p>The Protected Disclosure Act, 2000 (Act No 26 of 2000)</p>	<p>Makes provision for the protection of employees in both the public and private sector who disclose information in good faith regarding unlawful or irregular conduct to the Public Protector, Auditor General or a person or body established for this purpose in terms of the Act. Protects those employees who “blow the whistle” on corrupt activities.</p>
<p>Promotion of Access to Information Act, 2000 (Act No 2 of 2000)</p>	<p>Gives effect to the rights provided for in the Bill of Rights in section 32 of the Constitution, namely that everyone has the right to access to information held by the state and any information that is held by another person that is required for the exercise or protection of any rights. It also sets out the procedures pertaining to the obtaining of records in both the public and private sector, the grounds for refusal of access to information, mandatory disclosures in the public interest and appeals against decisions of information officers of certain public bodies.</p>

Electronic Communications and Transactions Act, 2002 (Act No 25 of 2002)	Establishes legal requirements for data messages and the communication of data messages.
Public Audit Act, 2004 (Act No. 25 of 2004) and the Public Audit Amendment Act, 2018 (Act No 5 of 2018)	The recent amendment to the Act expands the mandate of the AG to include the taking of remedial steps against the executive authority for failing to implement the AG’s recommendations.

**TABLE 1**

### **3.5 Discussion of Primary Legislation**

#### **3.5.1 The Constitution**

Section 217 of the Constitution is the foundation of all procurement actions in the State and has been described by the Supreme Court of Appeal (SCA)<sup>114</sup> as laying down “minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer.”

Section 217<sup>115</sup> of the Constitution provides as follows:

- (1) When an organ of the state in the national, provincial or local sphere of Government or any other institution defined in national legislation contracts for goods and services it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

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<sup>114</sup> The Constitution.

<sup>115</sup> The Constitution .

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the procurement policy must be implemented.

According to *Kollamparambil*<sup>116</sup> although the multiplicity of the requirements are clear the relationship between them is not, because of the evident trade offs between these tenets.

The principles are explained in the Treasury Standard for a Construction Procurement system<sup>117</sup> as follows:

Fair: the process of offer and acceptance is conducted impartially and without bias, and provide participating parties simultaneous and timely access to the same information. This requirement is supported by *Metro Projects CC & Another v Klerksdorp Local Municipality & Others*<sup>118</sup> where it was held that fairness requires that there must be an equal evaluation of tenders.

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<sup>116</sup> Kollamparambil(2014)203.

<sup>117</sup> CIDB Standard for Construction Procurement System.

<sup>118</sup> 2004 (1) SA 16 (SCA).

Equitable: the only grounds for not awarding a contract to a tenderer who complies with all the requirements are restrictions from doing business with the organization, lack of capability or capacity, legal impediments and conflict of interest.

Transparent: the procurement process and criteria upon which decisions are to be taken shall be publicized and made publicly available with the reasons for those decisions, and with the possibility of verifying that criteria was applied.

Competitive: the system provides for appropriate levels of competition to ensure cost-effective and best value outcomes.

Cost-effective: the process, procedures and methods are standardized with sufficient flexibility to attain best value outcomes in respect of quality, timing and price and the least resources to effectively manage and control procurement processes.

Promotion of other objectives: the system may incorporate measures to promote objectives associated with a secondary procurement policy subject to qualified tenderers not being excluded and deliverables or evaluation criteria being measurable, quantifiable and monitored for compliance.<sup>119</sup>

The principles referred to above was considered in the matter of *The Minister of Transport v Prodiba (Pty) Ltd*<sup>120</sup> which deals inter alia with the award of a single tender in 1997 to one service provider. The court found that it was incumbent on the Accounting Officer for the Department “to have regard to Constitutional principles, the provisions of the sub-section set out above and other statutory prescripts. The high court erred by not having sufficient regard to constitutional norms and statutory

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<sup>119</sup> Standard for a Construction Procurement System (2012).

<sup>120</sup> (20028/2014) [2015] ZASCA 38.

requirements and concluding that the decision to produce the new licences in-house could only have been facilitated by an extension of Prodiba's contract and that a competitive bid would not have been viable where the supply of the services would have been for a very limited duration. The High Court ignored the very extensive period during which Prodiba enjoyed a monopoly and did not properly appreciate that the five year extension period was not of very limited duration. More importantly, the agreement was one in respect of which Prodiba was required to provide a new service dealing with new technology in respect of which potential competitors were not engaged."

In his judgment Justice Froneman held that "It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner".

The Court further held that "..."deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimally in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences".

Section 195 of the Constitution relating to the the basic values and principles that govern public administration, provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- Efficient , economic and effective use of resources must be promoted;

- Services must be provided impartially, fairly, equitably and without bias.

The cornerstones of the the South African law of contract are good faith, freedom of contract, sanctity of contract and privity of contract.<sup>121</sup> The fundamental concepts of the common law are consensus and reliance.<sup>122</sup> Contractual law principles in South Africa are derived from the common law. The common law co-exists with the constitutional democracy and the Constitution requires that all law, including the common law, must conform to it.

In *Barkhuizen vs Napier*,<sup>123</sup> the Constitutional court made the following remarks.

“Under our legal order, all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control.”

It can thus be said that in a constitutional democracy, the common law of contract has to become infused with the values contained in the Constitution.<sup>124</sup>

Although the ratio of government procurement to GDP of South Africa is low compared to that of developed countries, the relevance of government procurement as a policy instrument in South Africa is underlined by the fact that it finds mention in its Constitution. However there is emphasis in the Constitution on the need to correct the inequality of South African Society and for the use of government procurement as a policy tool in this direction.<sup>125</sup>

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<sup>121</sup> Pillay (2015)2.

<sup>122</sup> Hutchinson & Pretorius(eds)2012(2).

<sup>123</sup> 2007(7)BCLR 691(CC).

<sup>124</sup> Pillay (2015) 10.

<sup>125</sup> Bolton (2006) 37.

Apart from Section 217, the procurement clause in the Constitution, there are also other provisions in the Constitution that impact on government procurement processes:

Section 9	Deals with the right to equality
Section 32	Provides for the right of access to information
Section 33	Provides for just administrative action
Section 33(1) and (2)	provides for the right to administrative justice that is lawful, reasonable and procedurally fair
Section 39	that deals with the interpretation of legislation within the spirit, purport and objects of the Bill of Rights. <sup>126</sup>

The principles enunciated in the Constitution being fairness, equity, transparency, cost effectiveness and competitiveness run like a golden thread in the PFMA<sup>127</sup>, the PPPFA<sup>128</sup> and the State Information Technology Agency Regulations.<sup>129</sup>

The common law principles of good faith require that all dealings in a contract must take place in an honest manner. The notion of sanctity of contract goes hand in hand with freedom of contract. These two principles seem to be in conflict with the foundational principle of good faith and fairness<sup>130</sup> which was also the reasoning in the *Sanparks case*.<sup>131</sup>

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<sup>126</sup> The Constitution.

<sup>127</sup> The Constitution.

<sup>128</sup> The Constitution.

<sup>129</sup> The Constitution.

<sup>130</sup> Hutchinson and Pretorius (eds) (2012) 22.

<sup>131</sup> *Sanparks vs MTO supra*.



Sections 216, 218 and 219 of the Constitution directs the National Treasury to introduce uniform norms and standards within the government.<sup>132</sup> The uniform norms and standards imposed by the National Treasury have a direct impact on all spheres of the government procurement process.

### 3.5.2 The PFMA

The purpose of the PFMA can be summarised as follows:

To regulate financial management in national- and provincial level of government and to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively.<sup>133</sup>

In terms of Section 3(a) the PFMA is applicable to government departments.<sup>134</sup>

The object of the Act is to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies.<sup>135</sup>

Section 38(1)(a) provides as follows:

The accounting officer for a department, trading entity or constitutional institution—

- (a) must ensure that that department, trading entity or constitutional institution has and maintains—

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<sup>132</sup> Bolton (2007) 33.

<sup>133</sup> Act 1 of 1995.

<sup>134</sup> Act 1 of 1995.

<sup>135</sup> Act 1 of 1995.

- (i) effective, efficient and transparent systems of financial and risk management and internal control;
- (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- (iv) a system for properly evaluating all major capital projects prior to a final decision on the project.

Section 76(1)(g) provides that the National Treasury must make regulations or issue instructions applicable to departments, concerning the cancellation or variation of contracts to the detriment of the state.<sup>136</sup>

National Treasury issued an Instruction Note in 2011 regarding variation of contracts which became an audit query by the Auditor General. The reason for the qualified audit is the irregular expenditure as a result of payments made by the SAPS in respect of procurement contracts entered into between SITA and service providers on behalf of the SAPS and also the expansion of contracts beyond the permitted variation of 15% in respect of movable assets and 20% in terms of immovable assets.

In terms of the SAPS' delegations any variations on the contract including expansions and unforeseen expenses up to 15% can be approved by the BAC in respect of fixed term contracts. According to the SAPS the amount was approved by the BAC and is therefore not an irregular expenditure. However, according to AGSA such deviation must be approved by National Treasury.<sup>137</sup>

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<sup>136</sup> Act 1 of 1995.

<sup>137</sup> AGSA Findings supra 2018/2019.

An opinion was sought from the Chief State Law Advisers who agreed with the SAPS' interpretation and legal position on the matter as a result of which AGSA retracted the query.<sup>138</sup>

Bolton explains that section 38(1)(a) and section 51(1) of the PFMA give specific duties to an accounting officer of the state to ensure that the state has and maintains a *“transparent system of financial and risk management and internal control”*.<sup>139</sup>

The PFMA is effected through the regulations published in accordance with it and specifically mentions that the PPPFA, as well as the BBBEE Act, must be included in all tender documentation.

The PFMA Regulations furthermore create guidelines and rules to ensure that the advertisement to tender is correct and inclusive of all necessary averments and it must be followed when a state organ wants to publish an invitation to tender.

### **3.5.3 National Treasury Regulations**

In terms of section 76(4)(c) of the PFMA,<sup>140</sup> National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies, concerning, inter alia, the determination of a framework for an appropriate procurement and provisioning system (supply chain management framework) which is in keeping with the dictates of section 217(1) of the Constitution. Such a framework has been established.

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<sup>138</sup> Letter 54 /2019/20 dd 6 June 2018 from Department of Justice and Constitutional Development.

<sup>139</sup> Bolton (2007) 183.

<sup>140</sup> PFMA.

### 3.5.4 PAJA

PAJA regulates the administrative system of South Africa in order to ensure justice and to give all persons affected by administrative actions a right to be heard.

PAJA aims to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution.<sup>141</sup>

Section 33 of the Constitution ensures that the principles of lawfulness, reasonableness and procedural fairness are upheld.<sup>142</sup>

The entire procurement process of government must adhere to the administrative law of South Africa because Government plays a role in the public procurement process.

PAJA is the main source for judicial review as was the case in *Gijima*<sup>143</sup> and *Buffalo City*.<sup>144</sup> PAJA is therefore a very important tool to use in ensuring that the public procurement procedure complies with the Constitutional principles<sup>145</sup>. In the cited case the judge held that section 8 of PAJA empowers a court in judicial review to grant any order that is just and equitable and that the discretion must be exercised judicially.

As the decision to award a tender constitutes administrative action, it follows that the provisions of PAJA apply to the process. This was held in the case of *Millennium*

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<sup>141</sup> The Constitution

<sup>142</sup> The Constitution

<sup>143</sup> *Gijima vs Sita supra*

<sup>144</sup> *Buffalo City vs Asla supra*

<sup>145</sup> *Esarfranki Pipelines (Pty) Ltd and others v Mapani District Municipality and others (2014) 2 all SA 493 (SCA)*.

*Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and others*<sup>146</sup>, the *Allpay*<sup>147</sup> case and the *Steenkamp* case<sup>148</sup>.

In the *Allpay* case, the court held that “Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the State entity’s behalf, but on the public’s behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. In accordance with the approach set out above it is now necessary to consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review under PAJA exist. The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.”

Furthermore, in the *AllPay*-case<sup>149</sup>, the SCA held as follows:

“The internal circular I referred to earlier required a BEC to comprise at least five people including a supply chain management ("SCM") practitioner. The BEC that evaluated the bids in this case comprised only four members, none of whom was an SCM practitioner.

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<sup>146</sup> 2008 (2) All SA 145 (SCA) (the Millennium-case), *Others v Chief Executive Officer of the South Africa*.

<sup>147</sup> (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC) (the *Allpay*-case).

<sup>148</sup> 2007 (3) SA 121 (CC).

<sup>149</sup> *Allpay Consolidated Investment Holdings (Pty) Limited and others v Chief Executive Officer of the South African Social Security Agency and others supra*.

AllPay's complaint is that the BEC was not constituted in accordance with the circular and for that reason its decisions were invalid.

The BEC was not a body constituted with statutory powers. It was merely a group of people brought together by SASSA to perform a task on its behalf – just as its employees do every day...

I do not understand the submission to be that the defect in its composition rendered its decisions unfair. Nor could such a decision have been sustained. The composition of a BEC was a matter within the discretion of SASSA. If the circular had required only four members without an SCM practitioner – which was its composition in this case – AllPay could hardly have said that was unfair.

I understand the objection to be, once again, that because the composition of the BEC was in conflict with the circular it was irregular, and for that reason alone its decisions were invalid. I do not see how that can be. An act is not "irregular" for purposes of the law simply because one chooses to call it that. An irregularity that leads to invalidity is one that is in conflict with the law. It is because it is in conflict with the law that it is not able to produce a legally valid result.

This decision was subsequently confirmed by the Constitutional Court in an application for leave to appeal (the Allpay-case).

The CC has for the most part been reluctant to allow procedural obstacles (such as time bars) to prevent it from reviewing the lawfulness of an exercise of public power. In support of its view, the court has relied on the constitutional imperative to declare unlawful conduct invalid.

In the *Gijima*<sup>150</sup> case the CC assessed the validity of a contract under which SITA agreed to appoint Gijima as the information technology service provider for the Department of Defence and the Kwazulu-Natala Health Department. When Gijima instituted arbitration proceedings over alleged non-payment, Sita claimed that the contract was invalid owing to non-compliance with section 217 of the Constitution. The arbitrator ruled that he lacked jurisdiction to hear the matter. SITA approached the High Court to have the contract set aside, nearly two years after the contract was awarded.

The High Court found that the decision to award and renew the contract qualified as administrative action in terms of PAJA which thus had to be challenged within the statutory 180 day time limit. As SITA failed to launch the proceedings in the stipulated time period and did not seek condonation for its failure to do so, the High Court refused to entertain the review and the application was dismissed.

On appeal, the SCA likewise concluded the PAJA 180 day deadline applies where an organ of state seeks judicial review of its own administrative action.

However, the CC decided that PAJA does not apply to self-review applications. Instead, these must be brought under the broader constitutional principle of legality and “within a reasonable time”, unless there are compelling reasons for overlooking the delay. While acknowledging that SITA had not instituted its self-review application within a reasonable time, the court found itself compelled to overlook the delay, declared the contract invalid and set it aside because it had not been awarded in compliance with section 217(1) of the Constitution.

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<sup>150</sup> *Sita vs Gijima supra*.

In the *Buffalo City*<sup>151</sup> judgment, the CC assessed the lawfulness of a contract concluded in 2014 between the Buffalo City Metropolitan Municipality and Asla Construction. In 2014 the City had awarded Asla a contract to manage the completion of a housing project. The city later extended Asla's scope of work to include a second housing project nearby.

In 2015 the acting city manager claimed that this scope extension was unlawful as it had not followed a proper tender process. In response, the City appointed an independent investigator but allowed Asla to continue performing under the extended scope of work in the meanwhile.

Asla instituted a High Court claim against the City for alleged non-payment for work performed under the scope extension. The City argued that the scope extension was unlawful and instituted a counter application to have it set aside under PAJA.

Despite the counter application being brought later than 180 days after the scope extension was made, the High Court found that the City had made out a proper case for condonation and declared the scope extension invalid. The SCA disagreed, holding that a proper case for condonation had not been made out.

On appeal, the CC took the opportunity to reiterate how courts should approach delays in launching self-review proceedings. The court had the benefit of hearing the matter after the Gijima judgment had been delivered and acknowledged as settled law the fact that organs of state seeking judicial review of their own decisions must do so under the principle of legality.

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<sup>151</sup> *Buffalo City supra*.



The Court applied a two step approach to assess whether a self-review application may be considered despite significant delay. First, the court must determine whether the delay was reasonable and second, if the court finds the delay to be unreasonable, it must determine whether it ought to exercise its discretion to overlook the delay.

The court applied these steps and concluded that the City's delay of 14 months was unreasonable and there were no compelling reasons to overlook it. The court nevertheless elected to declare the scope extension invalid, but not setting it aside as to preserve the rights to which Asla might have been entitled. Such an award preserves rights that have already accrued but does not permit a party to obtain further rights under the invalid agreement.

While the Gijima judgment was criticised for creating uncertainty in the treatment of delay in bringing judicial reviews and for furthering the bifurcation between PAJA review and legality review, the majority judgment in Buffalo City appears to have set an even more unclear precedent which suggests that courts will have to consider a judicial review application under all circumstances regardless of the delay in it being launched. As a consequence, contracts entered into with the state may be declared invalid even where the delay in bringing the application is found to be unreasonable and the court has found no compelling reason to overlook it.

### **3.5.5 The PPPFA**

The preamble of the PPPFA accurately summarised its functions as follows:

“To give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith”.<sup>152</sup>

The PPPFA gives every state organ an obligation to determine its preferential procurement policy and to implement it within the framework of the PPPFA. In terms of the act a point system was introduced to provide support to the historically disadvantaged individuals. (HDI).<sup>153</sup>

The implementation of the PPPFA according to Kollamparambil<sup>154</sup> is not without issues.

In addition to the criteria contained in section 2(1)(d) additional criteria is not defined in the PPPFA nor the Regulations and must be clearly specified in the invitation to tender.<sup>155</sup>

One of the weak links in the system is the Bid Evaluation Committee and the Adjudication Committee. There is nothing in the law to make it illegal for politicians and government officials and their family members to submit tenders provided that they are not part of these committees. According to the AG report the number of beneficiaries of government contract is disproportionality high at every level of government indicating rampant conflict of interest in decision making. This together with loopholes that exist such as the exception to the PPPFA clauses and the clause that allows a contract to be awarded to a tenderer that did not score the highest total

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<sup>152</sup> PPPFA.

<sup>153</sup> Kollamparambil(2014) 211.

<sup>154</sup> Kollamparambil(2014) 211.

<sup>155</sup> Kollamparambil(2014) 211.

number of points if objective criteria in addition to specific goals justify the award to another tenderer. This has led to widespread favouritism and corruption in the decision making system. This has emerged during court cases and investigations. The scale of it is captured by various international organisations such as Transparency International and the world economic forum. According to Transparency International, South Africa ranks 84 on the worlds Corruption Perception Index. The World Economic Forum also scores South Africa dismally in relation to other countries with regard to favouritism in decision making and diversion of public funds.<sup>156</sup>

The Report by the AGSA has highlighted widespread malpractice in the supplychain management of government. The high proportion of contracts awarded to government officials, or their close families and any other form of competitive practices at every level of government raise a red flag. Another issue relating to preferential procurement practices in South Africa are the lack of information and transparency .

There is no study to indicate how well targetted procurement has served society in general.

According to Kollamparambil<sup>157</sup> trends in measures in regard to inequality indicate that the PPPFA has not led to a reduction in inequality. There is evidence to corroborate this.

There are also studies that indicate that SMES fail during their first and second year. According to Luiz<sup>158</sup> Government procurement is too complicated, inflexible and inadequate for SMES and as a result they fail.

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<sup>156</sup>Kollamparambil (2014)211.

<sup>157</sup> Kollambarampil ( 2014 ) 211.

<sup>158</sup> Luiz (2003) 18 .

### 3.5.6 The SITA Act

The State Information Technology Agency (Pty) Ltd, was established in terms of the State Information Technology Agency Act, 1998 (Act No 88 of 1998), as amended, to provide information technology, information systems and related services to, and on behalf of, participating departments and organs of the state and in regard to these services act as an agent of the South African Government.

The objects of the SITA Act, as stipulated in section 6 of the Act, is to improve service delivery to the public through the provision of information technology to departments and public bodies and to promote the efficiency of departments and public bodies through the use of information technology<sup>159</sup>.

There are certain services that SITA must provide when a request is made by a department, which includes a telecommunication network, transversal information systems, data processing systems. There are also certain services that SITA may provide which include training, application software, maintenance services, data processing services, technical services and management services that are all related to information technology or information systems.<sup>160</sup>

The Agency is funded by monies received for services rendered. The departments or public entities are therefore paying for the services rendered.<sup>161</sup> Therefore, there needs to be uncompromising compliance with the applicable provisions of the Constitution, the PFMA and Treasury Regulations.

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<sup>159</sup> Act 88 of 1998.

<sup>160</sup> State Information Technology Agency Act, Act 88 of 1998, section (7).

<sup>161</sup> State Information Technology Agency Act, Act 88 of 1998, section (16).

It is compulsory for departments to procure all information goods or services through the agency and it must be done in accordance with a business and service level agreement.<sup>162</sup>

If the agency indicates that it is not able to provide the services then it may be procured through a subsidiary as provided for in the Act. The Act also provides that every department must conclude a business agreement with the agency to regulate their relationship and the compulsory terms of the business agreement must be prescribed by the minister in regulations. The department, in addition to the business agreement, concludes a service level agreement to support the business agreement.<sup>163</sup>

### **3.5.7 SITA General Regulations<sup>164</sup>**

In terms of the Regulations general procurement requirements are set out to include that the procurement must leverage economies of scale so as to provide cost effective procurement by using the collective purchasing power of departments, ensuring that all procurement results in value for money, including, if economically feasible, paying for usage only, promote the South African Information Technology industry with a particular emphasis on broad based black economic empowerment as defined in the BBBEE Act.

The Regulations provide that when carrying out the procurement function the Agency must comply with Section 217 of the Constitution, the PFMA, the PPPF Act, and any other applicable law.<sup>165</sup>

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<sup>162</sup> State Information Technology Agency Act , Act 88 of 1998 , section (7,20).

<sup>163</sup> State Information Technology Agency Act , Act 88 of 1998 , section (7,20).

<sup>164</sup> Regulations , GNR. 904 OF 23 September 2005, General Regulations.

<sup>165</sup> Regulations , GNR. 904 OF 23 September 2005, General Regulations.

The Regulations also provide for transversal contracts. The Regulations set out the procedure for procurement in respect of tenders and in respect of quotations. An important provision in the Regulations is the requirement that the relevant accounting officer must make the final decision on the award of the bid and matters incidental thereto, like a situation where the accounting officer decides to award a bid to a bidder other than the one recommended.

There is a specific provision that provides that if the National Commissioner of the South African Police Service considers it to be in the interest of safety and security, the National Commissioner may with the concurrence of the Director General of National Treasury procure information technology goods and services directly from the suppliers or through an institution other than the Agency.<sup>166</sup>

### **3.5.8 The Construction Industry Development Board Act**

The Construction Industry Development Board Act, defines the construction industry as the broad conglomeration of industries and sectors which add value in the creation and maintenance of fixed assets within the built environment. The CIDB Regulations issued in terms of this Act define construction procurement as procurement in the construction industry including the invitation, award and management of contracts, but also supply contracts that involve the purchase of construction materials, plant and equipment and service contracts relating to any aspect of construction including professional services. It involves demolitions and the disposal of materials, plants and equipment surplus to requirement or which are redundant.<sup>167</sup>

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<sup>166</sup> Regulations, GNR. 904 OF 23 September 2005, General Regulations.

<sup>167</sup> Statatd for construction procurement system (2012).

In Government the procurement of premises for lease, as well as procurement of immovable assets and construction is done by the department of Public Works (DPW). Certain of these functions were devolved by Cabinet to the SAPS to include building of police stations and leases. Therefore, where the SAPS is performing the devolved functions relating to construction it is required to comply with the Construction Industry Development Board (CIDB) Act and the Regulations which require the SAPS to use the Principal Building Agreement approved by the Joint Building and Construction Committee (JBCC) contract for construction projects.

The Construction Industry Development Board, (CIDB) has the mandate to inter alia promote improved procurement and delivery management, and develop methods for monitoring and regulating the performance and regulating the performance and registration of projects.<sup>168</sup>

The PFMA and SCM Regulations<sup>169</sup> of the SAPS provide that tender documentation must include evaluation and adjudication criteria, including any criteria required by other applicable legislation which includes the CIDB Act requirements, as well as the CIDB Regulations and the JBCC.<sup>170</sup>

The CIDB has developed standards which provide procedures and methods which are required by law to be applied to certain key procurement processes, as well as a series of best practice guidelines, which have now been incorporated into the recently published ISO10845 standards for construction procurement.

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<sup>168</sup> Bolton (2007) 15.

<sup>169</sup> Treasury SCM Framework.

<sup>170</sup> Construction Industry Development Board Regulation 24 issued in terms of section 33 of the CIDB Act.

### 3.5.9 The Public Audit Act<sup>171</sup>

The recent amendments to the Public Audit Act include the following expansion to the mandate of the AG:

In terms of section 5 (1A ) of the Act the AG may refer material irregularities to relevant public bodies for further investigation. The AG may in terms of section 20(4) make recommendations in the audit report regarding any matter, including material irregularities.

Take binding remedial action for failure to implement the AG's recommendations for material findings

The issuing of a certificate of debt for failure to implement the remedial action if financial loss was involved.<sup>172</sup>

The Act defines material irregularity as any non compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act, that resulted in, or is likely to result in a material financial loss, the misuse or loss of a material public resource, or substantial harm to a public sector institution or the general public. Examples of material irregularity include non-compliance with the SCM legislation requiring a competitive bidding process and suspected bribery of an official to approve the payment for services not received. The impact of the first example being a material financial loss due to goods being priced at or above market value and the latter being a material financial loss due to no value being received for the money paid.

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<sup>171</sup> Act No 25 of 2004 (hereinafter referred to as the Public Audit Act).

<sup>172</sup> Public Audit Act amendments of 2019.



The failure to follow procurement process could result in irregular expenditure and material irregularity.

Irregular expenditure is that expenditure which is incurred in contravention of, or that is not in accordance with a requirement of applicable legislation. Material irregularity includes any non-compliance not limited to expenditure as well as fraud, theft, or a breach of a fiduciary duty.

### **3.6 Other Regulatory Prescripts**

#### **3.6.1 Standard for a construction procurement system**

The Standard for Uniformity in Construction Procurement<sup>173</sup> is published in terms of sections 4(c) and 5(4)(b) of the Construction Industry Development Board Act, read with Regulation 24<sup>174</sup> of the Construction Industry Development Board Regulations, issued in terms of section section 33 of the Act. Regulation 24 (b) of the CIDB Regulations issued in terms of the Act states that every client or employer (organ of the state) who is soliciting tenders in the construction industry must do so in accordance with the standard for uniformity in construction procurement published by the board in the Gazette.

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<sup>173</sup> Published in terms of sections 4(c) and 5(4)(b) of the Construction Industry Development Board Act.

<sup>174</sup> Construction Industry Development Board Regulations issued in terms of section section 33 of the Act.

### 3.6.2 Standardised documents

All procurement documents, including calls for expressions of interest shall be based on the standard institution approved templates which comply with the requirements of the CIDB Standard for Uniformity in Construction Procurement.<sup>175</sup>

The Board has issued the following prescripts in terms of the Construction Industry Development Board Act:

- CIDB Code of Conduct for the parties engaged in construction procurement.
- CIDB Standard for Uniformity in Construction Procurement.

Institutions need to take account of these prescripts in the development of their supply chain management systems and procurement documentation. The SCM Regulations read with Regulation 24 of the Construction Industry Development Regulations, issued in terms of section 33 of the Act. Regulation 24(b) of the Regulations state that “Every client or employer (organ of state) who is soliciting tenders in the construction industry must do so in accordance with the Standard of Uniformity in Construction Procurement, published by the Board in the Gazette.”

### 3.7 Conclusion

This Chapter identified the primary and secondary legislation applicable to government procurement. The primary legislation starting with the Constitution was discussed with emphasis on the requirements of Section 217 of the Constitution. The consequence

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<sup>175</sup> Published in terms of Section 4(c) and 5(4)(b) of the Construction Industry Development Board Act 2000 (Act 38 of 2000).

of non compliance with the provision of the Constitution with reference to case law was further explored.

## CHAPTER 4: INTERPRETATION OF CONTRACTS

### 4.1 Introduction

The purpose of interpretation of contracts is to determine the intention of the parties.<sup>176</sup> In this chapter two litigation matters related to copyright and intellectual property encountered by the SAPS are initially referred to. Whereafter the related provisions of the Copyright Act<sup>177</sup> are unpacked. In the third place the theory of interpretation is also explained with reference to concretisation and determining of the meaning of the terms.

Furthermore copyright provisions in the SBD's, GCC, SITA Business Agreement, JBCC Principal Building Agreement, Standard Professional Services Contract, Standard for a Construction Procurement System are identified .

The applicable legislation and prescripts governing procurement of information technology and construction are explained in Chapter 2, wherein the requirement of formalities for a valid contract are discussed. Therefore the regulatory prescripts will not be repeated in this chapter.

In addition certain other problematic clauses are identified and explained to include the requirement that a contract be in writing.

Recommendations are also made on resolving the problematic clauses identified.

Lastly the JBCC Principal Building Agreement is discussed in relation to a specific clause applicable to the State.

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<sup>176</sup> Cornelius 2016 (75).

<sup>177</sup> Act 98 of 1978 (hereinafter referred to as the Copyright Act).

## 4.2 Instructions relating to Standard Form Contracts

The Supply Chain Management Regulations issued in terms of the PFMA, 16A.6 provides for procurement of goods and services. Regulation 16 A.6.3 of the PFMA prescribes that the Accounting Officer must ensure that bid documentation and the general conditions of contract are in accordance with the instructions of National Treasury, the prescripts of the CIDB, bid documents comply with the PPPF Act, BBBEE Act, contracts relating to IT are in accordance with the SITA Act and applicable SITA regulations.<sup>178</sup>

Treasury Practice Note<sup>179</sup> provides that for building, engineering and construction works, accounting officers should use the GCC and Standard Bidding Documents for construction projects issued by the Construction Industry Development Board (CIDB). The practice note also prescribes the standard bidding document that was issued by Treasury with the approval to customize the SBD's. However the SBD's should be used with minimum changes that are necessary to address contract and project specific issues. Where no relevant bidding documents have been issued, institutions should use the internationally recognised documents acceptable to the Accounting Officer in concurrence with the relevant Treasury.

It is therefore evident that the standard form contracts are prescribed by Treasury.

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<sup>178</sup> Public –private partnership regulations and supply chain management regulations, GNR 225 of 15 March 2005;

<sup>179</sup> National Treasury Practice Note 1 of 2003 dd 5 December 2003.

### **4.3 Litigation on intellectual property and copyright**

#### **4.3.1 The Fingerprint Permit System (FPS)**

In April 2018 SITA on behalf of the SAPS, brought an urgent application in the North Gauteng High Court.<sup>180</sup> The application related to the restoration of possession and access to a FPS system that was procured for the SAPS. The service provider had terminated access to the system because of non payment for services rendered for maintenance and support and outstanding licence fees. The respondents brought a counter application for the applicants to be ordered to pay the outstanding licence and maintenance and support fees and in the alternative for the applicants to be interdicted from infringing the respondent's copyright in the system .

SITA restored access to the system and withdrew the urgent application. The respondents continued with the counter application. The matter was heard and the judge postponed the hearing of the application because of a pending review application relating to the Property Control and Exhibit Management System as explained hereunder.

The applicants brought an interlocutory application for the court to decide whether there was indeed a contract between the applicant and the SAPS.

When the matter was heard the parties agreed that the only issue to be determined was whether the service provider was the owner of the copyright in the system.

Both parties claimed ownership to the copyright.

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<sup>180</sup> SAPS v FDA 24570/2018 30 /01/2019, Gauteng Division Pretoria.

It was not disputed that the system is eligible for copyright, that it is an original work and that the service provider was the author thereof. The dispute was who owns the copyright.

The court held that the author of a work is generally also the holder of the copyright therein. The question was whether the system was authored by the service provider under the direction or control of the state, in which case, although the service provider might have been the the author, copyright would vest in the state. <sup>181</sup>

The court having gone into a detailed discussion of under the control and direction of the state, held that in this case there was no evidence that the state exercised any direction or control over the the creation of the programme. The evidence showed that the programme was written by the service provider and provided to the SAPS in completed form. The court found that the service provider holds the copyright in the system.

#### **4.3.2 Litigation on Copyright: Property Control and Exhibit Management**

Upon the award of a tender for IT services, the SAPS entered into a contract with a specific service provider in terms of which the intellectual property in the solution to be provided was to be owned jointly by the parties. Due to many challenges the solution was not completely developed.

In the meantime the service provider provided an interim solution provided by a third party to whom the intellectual property belonged. SITA that procured the services on

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<sup>181</sup> SAPS v FDA *supra*.

behalf of the SAPS brought an application on behalf of SAPS alleging that the intellectual property and copyright in the interim solution belonged to the state.<sup>182</sup>

#### **4.4 The Copyright Act**

The Copyright Act provides as follows:

Section 5(2) - “Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the State or such international organization as maybe prescribed.”

Section 21(2) “The copyright created by section 5 shall initially vest in the State or such international organization concerned and not in the author.”

Section 21(1) “The copyright conferred by section 3 and 4 shall vest in the author or in the case of a work of joint authorship in the co-authors of the work.”

#### **4.5 Concretisation / determining the contents of the contract**

To ascertain what the parties intended it is important to determine the contents of the contract. Here one determines, whether there is a contract and establishes the extent of the contract. It is referred to as pinning the four corners of the contract. The written and unwritten terms are established. <sup>183</sup>

What also needs to be determined is what evidence will be admissable to determine whether a valid contract came into existence.<sup>184</sup>

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<sup>182</sup> *SITA v FDA supra.*

<sup>183</sup> Cornelius SJ (2016)139.

<sup>184</sup> Cornelius SJ (2016)139.



The coming into existence of the *pactum de contrahendo* is explained in Chapter 2 above.

In order to properly determine the extent of the terms the interpretor must know what sources must be considered to ascertain the content of the contract.<sup>185</sup>

There are four types of terms in a contract, namely express terms , consensual tacit terms, imputed tacit terms and implied terms.<sup>186</sup>

#### 4.5.1 Implied terms

In many cases terms are implied *ex lege* in a contract as in the case of the SAPS contracts, despite the fact that the parties did not reach and would not have reached agreement on the matters involved. These terms are derived from the common law, statutes, precedence etc. They are duties which the law imposes on the contracting parties. They are terms which any honest party entering into a contract would want to include in the contract.<sup>187</sup>

Implied terms are premised on the idea of parties negotiating on an equal footing. As such implied terms contain an element of justice that strives to level the playing fields between parties that do not have equal bargaining power.<sup>188</sup> Section 217 of the Constitution strives to achieve this.

The Provisions of the Constitution must be read into the *pactum de contrahendo* whether the parties have explicitly agreed thereto or not. It is therefore an implied term

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<sup>185</sup> Cornelius SJ (2016)139.

<sup>186</sup> Cornelius SJ (2016)139.

<sup>187</sup> Hutchinson 2016(244).

<sup>188</sup> Draft Business Agreement between SITA and SAPS (2019)26.

that the SAPS has evaluated the tender according to a system that is fair, equitable, transparent, competitive and cost-effective.<sup>189</sup>

Further implied terms in the *pactum de contrahendo* would be from the prescripts referred to in Chapter 3 above.

#### 4.5.2 Express terms

Of importance in interpreting the SAPS contract will be the express and implied terms. The express terms of a contract are those promises and matters incidental thereto which the parties have set out in words in the operative part of the contract concerned. The express terms form the basis of the agreement between the parties and for this reason a contract can only be understood with reference to the express terms.<sup>190</sup>

Not all the words that appear in a written contract set out express terms and the operative part of the contract must be distinguished from the other parts that may be included in the contract.<sup>191</sup> The express terms may be contained in more than one document, e.g. software licence and maintenance agreement. One matter may be regulated in more than one document.<sup>192</sup> In such a case the various documents should be read together as if it were a single document.

It may also happen that other documents are incorporated into the contract by reference as in the case of the SAPS where the GCC incorporates terms contained in the SCC and other documents as referred to above. In such an instance the terms must be read as if they had been written out in full in the contract concerned.

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<sup>189</sup> Section 217 Of the Constitution .

<sup>190</sup> Cornelius (2016) 148.

<sup>191</sup> Cornelius (2016) 148.

<sup>192</sup> Cornelius (2016) 148.

In the SAPS context the express terms of the contract will be found in the tender documents to include the advertisement, the offer, the acceptance, the general conditions of contract and the special conditions of contract in the case of procurement of certain goods and services.

In respect of procurement of IT, where SITA is providing the services the terms will be found in the Business Agreement prescribed by SITA and the applicable Service Level Agreement and where SITA is the procuring agent the terms will be found in the the GCC or SCC. In respect of property leases the express terms are to be found in the contracts prescribed by Public Works and in the case of construction of buildings in the JBCC Principal Building Agreement Contract prescripts and finally in respect of professional services in terms of JBCC prescripts.

The GCC stipulates that the terms that do not contain obligations to include the preamble, recital and other non-operative terms. The express terms are set out in the relevant documents referred to above and form the basis of the contract between the parties. When a tender is published, the GCC is also attached to inform the bidders of the terms in advance in accordance with the principles enunciated in Section 217 of the Constitution.

#### **4.5.3 Determining the meaning of the terms**

The second step in the interpretation would be determining the meaning of the terms. The meaning of the words, expressions, sentences and terms which constitute the text of the contract is determined. Since all words or expressions have multiple meanings, since meaning is always dependent on context the correct meaning which

can be ascribed to each word or expression which is contained in a contract must be established.<sup>193</sup>

#### 4.5.3.1 Presumptions

For the purpose of determining the meaning of the terms certain presumptions, rules and maxims are applied. The process of interpretation must be founded on valid premises to ensure that a rational, justifiable interpretation can be reached. These premises are generally contained in various presumptions.<sup>194</sup>

Knowledge of the presumptions and rules that should be applied in the process of interpreting, will enable an interpreter to reduce his or her own interpreting abilities to a more exact level through conscious or subconscious application of those presumptions. On the solid foundation provided by applying the rules and presumptions of interpretation, it becomes possible to determine the practical implications and significance of a contract.<sup>195</sup>

In determining the meaning of the terms the presumption that the parties intended that the words used in the contract were used in their ordinary sense will be the starting point and the substantive law presumption that the parties intend to conclude a legally valid contract will be also applicable in determining the meaning of terms in a contract.<sup>196</sup>

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<sup>193</sup> Cornelius (2016) 96.

<sup>194</sup> Cornelius (2016)96.

<sup>195</sup> Cornelius (2016)95.

<sup>196</sup> Cornelius (2016) 96.

So in the case of the allegation that the service provider was infringing the Copy Right Act in interpreting it can be presumed that it was the intention of the parties to enter into a legally valid contract.

The presumption that no person writes what he or she does not intend, lies at the base of the interpretation of any document and gives effect to the general rule that no person ought to go counter to his or her own act. As a result it is presumed that the intention of the parties coincides with the words contained in the contract. It is therefore presumed that the document is what it purports to be.

Although the parties may in certain instances include terms in their contract that are to some degree in conflict with the principles of the common law and certain statutory provisions it is presumed that the parties do not do not intend to deviate from the existing law. This will be applicable to the Property Control and Exhibit Management System contract.

The caveat subscriptor rule applies which means that by appending their signatures the parties indicate actual acceptance or create a reasonable impression they are accepting. In the case of *Cecil Nurse v Nkola*<sup>197</sup>, a dispute arose from a suretyship agreement which was duly executed and mistakenly sent to the other party by the CEO's secretary. In deciding the outcome the court referred to the case of *Smith v Hughes*<sup>198</sup> where the Judge made the following remarks:

"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party,

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<sup>197</sup> 2008(2)SA 441(SCA).

<sup>198</sup> *Smith v Hughes* (1871 )LR 6 QB 597.

and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's term."<sup>199</sup>

In respect of the interpretation dimension, express terms include promises and incidental matters like intellectual property. The contract is to be understood with reference to the express terms. Creating the express terms of the contract constitutes the essence of legal drafting and gives expression to the common intention of the parties.

In the contract in question the operative parts are not contained in a single document. The Request for Bid, GCC, Special Conditions of Contract and tender documents are not read together as a single document. There may be difficulties in drafting as the drafter must take into account each of the different documents to ensure that they are compatible and do not contradict each other. The terms in the documents had to be read as if they have been written out in full in the contract concerned. There is reference to incorporated terms .

The second step for drafting would be to start with determining the documents relevant to the contract and putting it together. Once the documents are identified the documents must be interpreted, by classifying them, which is the first step in interpretation.<sup>200</sup>

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<sup>199</sup> *Smith v Hughes supra*.

<sup>200</sup> Cornelius (2016)

## **4.6 Interpreting the Standard Form Contracts**

### **4.6.1 General Conditions of Contract (GCC)**

The General Conditions of Contract (GCC) were issued by Treasury in accordance with Treasury Regulation 16 A, published in terms of the PFMA . The GCC also makes provisions for Special Conditions of Contract (SCC), if necessary, and is intended to supplement the GCC. It is also stipulated in the GCC that if there is conflict in the provisions the SCC will prevail.

The Framework for Supply Chain Management<sup>201</sup> in terms of which National Treasury issued the GCC Bid Documents for Supply Chain Management was issued in 2003. The GCC and SBD came into effect in terms of Treasury Practice Note 1 of 2003<sup>202</sup> issued on the 5<sup>th</sup> of December 2003 and was amended in 2010. This requires all Accounting Officers to base their bid invitations on the GCC.

#### **4.6.1.1 Morphosis**

This means that the standard documents are classified as a statutory or legislative instrument because they are gazetted. However the moment the SAPS uses the form and enters into an agreement, the forms morph into a contract between the parties. The parties may intend to enter into a particular kind of transaction or perform a particular juristic act, which they duly do, only for the transaction to be morphed into

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<sup>201</sup> PFMA ( Section 76(4) (c) promulgated in GG 25767 on the 5<sup>th</sup> of December as a Treasury Regulation.

<sup>202</sup> Treasury Practice Note 1 of 2003 dated 5<sup>th</sup> December 2003.

some other form or become a different kind of instrument because of some intervening factor.<sup>203</sup>

There is also a provision in the practice note that the standard wording of the document should not be amended. If any aspect is not covered by the GCC, Special Conditions of Contract (SCC) relevant to a specific bid may be compiled separately. The SCC is intended to supplement the GCC. If there is a conflict the SCC will prevail. .

The SBD's are the following:<sup>204</sup>

SBD 1	Invitation to Bid
SBD 2	Application for Tax Clearance
SBD 3.1 to 3.3	Pricing Schedule
SBD 4	Declaration of interest
SBD 5	National Industrial Participation Programme (NIPP)
SBD 6.1 to 6. 12	Preferential Claim forms in terms of the PPPFA
SBD 7	Formal Contract
SBD 8	Declaration of Past SCM Practices.
SBD 9	Certificate of Independent Bid Determination

The practice note further provides that the standard SBD 2 and SBD 5 should not be amended and SBD 7.1 to 7.3 should not form part of the bidding documents issued to every prospective bidder, but should be made available only to the successful bidder, after adjudication and awarding of the bid. The SBD 7 is the formal contract.

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<sup>203</sup> Cornelius (2016)125.

<sup>204</sup> Treasury Practice Note 1of 2003 dd 5 December 2003.



The GCC is published with the tender documents. A bidder is required to take note of the GCC and in the event of the bidder being awarded the tender the successful bidder is required to sign the GCC.

#### **4.6.2 Provisions in the GCC relating to copyright**

In interpreting the GCC it is noted that there is only a provision relating to patent rights. The provision reads as follows.

“Patent rights” “The Supplier shall indemnify the purchaser against all third- party claims of infringement of patent, trademark, or industrial design rights arising from use of the goods or any part thereof by the purchaser.”<sup>205</sup>

There is no provision relating to copyright protection for the State.

An implied term in the GCC would mean that copyright in any intellectual property in terms of the Copyright Act will vest in the State in accordance with the Copyright Act.

#### **4.6.3 Copyright provisions in other Standard Form Contracts**

The Standard for a Construction Procurement System provides in clause 4.8.12 as follows in respect of Intellectual Property rights;

“ The institution shall as a general rule own the rights over the materials prepared by a contractor in relation to a contract. Approval of the designated person shall be

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<sup>205</sup> GCC published in terms of Treasury Practice Note.

obtained to allow the contractor to own such rights.”<sup>206</sup> There is also provision in the delegation attached for intellectual property right to be waived.<sup>207</sup>

This is an indication that intellectual property right may be waived by the state to a third party which is in accordance with the Act that provides that copyright initially vests in the State.

#### **4.6.4 The Standard Professional Services Contract**

The Standard Professional Services Contract<sup>208</sup> prescribed by the the CIDB provides as follows regarding ownership of documents and copyright:

“ 9. Copyright of all documents prepared by the Service Provider in accordance with the relevant provisions of the Copyright Act shall be vested in the party named in the contract data. Where copyright is vested in the Service Provider the Employer shall be entitled to use the documents or copy them only for the purpose for which they are intended in regard to the Project and need not obtain the Service providers permission to copy for such use. Where copyright is vested in the Employer the Service Provider shall not be liable in any way for the use of any of the information other than as originally intended for the Project and the Employer hereby indemnifies the Service Provider against any claim which may be made against him by any party arising from the use of such documentation for other purposes.

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<sup>206</sup> Standard for a construction procurement system( 2012).

<sup>207</sup> Standard for a construction procurement system( 2012).

<sup>208</sup> Standard Professional Services Contract (2005).

9.2 The ownership of data and factual information collected by the Service Provider and paid for by the employer shall after payment by the employer, lie with the employer.

9.3 The employer shall have no right to use any documents prepared by the Service Provider whilst the payment of any fee and expense due to the Service Provider in terms of the contract is due.”

The current Business Agreement that the SAPS has with SITA does not make provisions for intellectual property and copyright. However, when SITA became an agent for the SAPS IT procurement, an incorporation agreement was signed as an annexure to the Business Agreement between the SAPS and SITA and the Incorporation Agreement<sup>209</sup> provides as follows:

“Clause 5.5 Transfer of Intellectual Property

5.5.1 Copying in the items as listed in appendix A: 006/199-04-01, to be appended from time to time as required, are hereby ceded to SITA by the DoSS (Department of Safety and Security), who warrants that it is the lawful and sole owner of such copyright and is duly authorised to so cede such rights”.

#### **4.6.5 The Business Agreement between the SAPS and SITA**

The current Business Agreement has a further clause to the effect that SITA agrees that the security considerations in terms of the possible breach of applicable legislation

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<sup>209</sup> SITA Business Agreement with Department of Safety and Security (DOSS) dd 2009/03/27.

were not duly considered and therefore the ownership of any intellectual property of SAPS shall remain with SAPS.

Although the SITA regulations require a new Business agreement to be signed on a yearly basis the current agreement is in existence from 2009.

The Current Draft Business Agreement , has the very same provision mentioned above and an additional provision as indicated hereunder without any review.

“19. Ownership of intellectual property rights

19.1 Any Intellectual Property rights owned by SITA prior to the commencement date of this BA shall remain vested with the SITA exclusively.

19.2 Any Intellectual Property rights owned by the SAPS prior to the commencement date of this BA shall remain vested with the SAPS exclusively.

19.3 Ownership of any Intellectual Property derived, produced or developed by any Service Provider expressly and exclusively for SITA acting on behalf of the SAPS will be dealt with in accordance with the terms and conditions of the agreement to be concluded between SITA, the SAPS and such Service Provider”<sup>210</sup>

The above provision 19.3 once again does not contain the legal provision as provided for in the Copyright Act, the principle being that copyright vests in the state yet it was being submitted in the review application of the Property Control and Exhibit Management contract that copyright belongs to the State.

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<sup>210</sup> Draft Business Agreement between SITA and SAPS (2019)26.

#### **4.7 Analysis of the bid documents: ongoing litigation**

The RFB for for the services reads as follows:

“DESCRIPTION OF SERVICES: Provision of IS/ICT Goods to the SAPS for the establishment, maintenance, support and continuous improvement of an automated solution within the SAPS domain for a period of 3 years with an option to renew”.

“ESCROW AND OWNERSHIP OF SOURCE CODE: indicates that SAPS will allow the successful bidder to retain the intellectual property rights of its source code and designs of the systems offered where the source code and designs offered exist prior to the commencement of this RFB for which the successful bidder owns the intellectual property rights. All the new designs or functions will be the intellectual property of SAPS and may not be utilised or sold in whatever way without the written approval of the CIO of SAPS.”

In determining the meaning of the terms the presumption that the parties intended that the words used in the contract were used in their ordinary sense will be the starting point.

The tender was awarded in 2008 and contract signed off in 2010.

The provisions of the contract provided as follows:

“Copyright in the interim solution belongs to company X and SAPS is granted a perpetual licence to use that product. SAPS is required to pay a once off fee and an annual licence renewal fee.”

Terms and conditions of the Enterprise Software Licence Agreement stipulated that no party is entitled to use any enterprise software, unless such party has a valid written licence to use the software and applicable charges to use the software are paid.

The terms of the Contract include the following:

- the interim enterprise software shall constitute “X’s pre-existing IP” for purposes of clause 26.”
- the interim enterprise software shall constitute X’s pre-existing IP for the purpose of this agreement;
- There will be no transfer of title except as provided for in clause 26.6;
- Agreement does not transfer to SAPS title to any intellectual property in any third party software, User Manual or Confidential Information;

For the avoidance of doubt title to any intellectual property in the interim enterprise software shall remain with the service provider or its licensors, and shall not transfer to the SAPS:

- Any modifications made to the software to be developed shall be owned jointly;
- X, with written pre-authorisation of SAPS CIO (Chief Information Officer) may resale/market that software.
- SAPS may not unreasonably withhold permission for the resale;
- Project software provides that any pre-existing IP means X or third party intellectual property rights of software provided by X to SAPS in existence at the date of the agreement comes into existence after the date of the agreement otherwise than in connection with the agreement.
- The title to any IP contained in Version 1X will be owned by the SAPS.

- The SAPS may upon receiving a request in writing consider granting the Service Provider permission to resell PCEM Version 1X.
- the developed software user manual is vested in SAPS/SAPS property;
- X agrees to assign all rights and interests in project software to SAPS;
- Notwithstanding any other provision in this agreement or otherwise the Property Control and Exhibit Management System v1.1 shall not be considered to be project software.

The presumption that no person writes what he or she does not intend lies at the base of the interpretation of any document and gives effect to the general rule that no person ought to go counter to his or her own act. As a result it is presumed that the intention of the parties coincides with the words contained in the contract. It is therefore presumed that the document is what it purports to be.

The Property Control and Exhibit Management Contract clauses relating to intellectual property and copyright are confusing and too verbose. There is repetition. The granting of a perpetual licence for the enterprise software is confused with the annual licence fees payable. The clauses in the contract are mixing up licence fees, project software, and source codes. The clauses should be guided by the RFB. The RFB was clear on the ownership of intellectual property.

The term is an express term in the contract, which is contrary to the Copyright Act.

The GCC is applicable to government procurement. With IT procurement for Government it is vital for a provision to be included in the GCC to provide for copyright protection of the State. The GCC makes provisions for Special Conditions of Contract (SCC). This should be included in the GCC from the outset.

Submissions to be made to Treasury to consider including a definition of intellectual property rights in the GCC e.g:

- **“Intellectual Property Rights** includes any copyright, design rights, patents, inventions, logos, business names, service marks and trademarks, Internet domain names, rights in databases, data, source codes, reports, drawings, specifications, know how, business methods and trade secrets.”
- A clause be included in the GCC to indicate ownership of intellectual property and copyright to read as follows:

**“Copyright** ensuing from this contract vests in the State unless the parties agree otherwise.”

- This could be elaborated on in the SCC.

#### **4.8 Clauses requiring a written contract**

The GCC provides as follows:<sup>211</sup>

“The GCC defines a contract as the written agreement entered into between the purchaser and the supplier as recorded in the contract form signed by the parties, including all attachments and appendices thereto and all documents incorporated by reference thereto.”

The GCC also stipulates that all procurement must take place by way of a quotation or bidding process which implies that a contract must be in writing. The Acquisition

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<sup>211</sup> GCC.



Delegation of Treasury also refer to a contract as a written agreement as stated in the GCC. The GCC forms part of all bid documents, and may not be amended.

#### **4.9 The Parol Evidence Rule**

According to Cornelius,<sup>212</sup> a distinction is made between two apparently related rules that limit the admissibility of extrinsic evidence in the interpretation of contracts. Firstly, there is the so called parol evidence rule, or integration rule, which provides that once a contract has been reduced in writing, the writing is in general viewed as the exclusive memorial of the transaction and no evidence is admissible to prove the terms of the contract.

The other rule, which is often referred to as the “golden rule of interpretation” provides that the ordinary meaning of the words in a written contract must be followed and that no evidence is admissible to prove the meaning of the terms contained in a written agreement. The golden rule of interpretation has over the past six decades undergone substantial development in South Africa.<sup>213</sup>

This entails attaching to each word that ordinary meaning which the context seems to require and applying the common law rules of grammar.<sup>214</sup>

In applying this principle to the SAPS the parol evidence rule will find application as it is requirement that the contract must be reduced in writing and the Delmas rule will also find application in that the ordinary meaning of the words will be followed, and no evidence may be led to prove the terms of the contract.

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<sup>212</sup> SJ Cornelius (2016) 71.

<sup>213</sup> SJ Cornelius (2016) 71.

<sup>214</sup> 1980 (1) SA 796(A)at 803G-H.

Where the tender deals with a technical matter the words will have technical matter words should have their technical meaning.

The court have applied the golden rule of interpretation as set out in the *Delmas Milling Co Ltd v du Plessis*<sup>215</sup> case and held that except in the case of ambiguity and absurdity, evidence is inadmissible to guide the court in determining the meaning of the words or expressions contained in a contract.<sup>216</sup>

Extrinsic evidence will be admissible if there is absurdity or ambiguity that a court will allow an exception. Where there is a requirement that a contract must be in writing extrinsic evidence will not be admissable.

In *Tsantsabane Municipality v Thabula Trade and Investment (Pty) Ltd and another*,<sup>217</sup> the municipality awarded a tender to Ms M Mokgoro and Ms S de Bruin for the purchase of a piece of land. After the awarding of the tender, the contract for the purchase of the relevant immovable property was drafted and the name of the tenderers was substituted with the name of their company, being Thabula Trade and Investment (Pty) Ltd. Kgomo JP held that “*if there is no ambiguity in the terms of the agreement and no fraud or other impropriety is alleged then the interpretation has to be confined to the written instrument*”.

It can be seen from the judgment of Kgomo JP that the parol evidence rule must be upheld as far as possible and that the parties will not be allowed to go beyond the written documents. Due to the *pactum de contrahendo* between the municipality and

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<sup>215</sup> 1955 (3)SA447(A).

<sup>216</sup> SJ Cornelius (2016) 79.

<sup>217</sup> *Tsantsabane Municipality vs Thabula Trade & Investment (Pty)Ltd and Another* (2012)4 All SA 219.

Mokgoro and de Bruin, the agreement must be upheld when the contract to purchase the immovable property is drafted and signed. The case law shows that the courts tend to take the parol evidence rule into serious consideration when faced with a “tender” challenge.

Although an interpretor may not alter or amend the terms of a contract a court may refuse to enforce contractual terms that are immoral or against public policy.

In principle a court may not refuse to enforce a contract unless it is contrary to public policy.

In the instance of SAPS , it is public money that is used for securing services of what ever nature , therefore if the court finds that the contract s contrary to public policy for instance the finances of the state is not properly being utilised the court may refuse to enforce a contract.

#### **4.10 JBCC - Principal Building Agreement**

In Government the procurement of premises for lease, as well as procurement of immovable assets and construction is done by the Department of Public Works (DPW). Certain of these functions were devolved by Cabinet to the SAPS to include building of police stations and leases which is currently implemented through a Memorandum of Understanding.<sup>218</sup> Therefore, where the SAPS is performing the devolved functions relating to construction it is required to comply with the CIDB Act and the Regulations<sup>219</sup> as discussed in chapter 3 . This requires the SAPS to use the Joint the

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<sup>218</sup> Memorandum of Understanding between SAPS and Department of Public Works dd 26 November 2013.

<sup>219</sup> Issued i.t.o. the Construction Industry Development Board Act.

JBCC Principal Building Agreement<sup>220</sup> for construction projects and the Standard Professional Services Contract for professional services as prescribed by the CIDB.<sup>221</sup>

The Principal building agreement is prepared by the JBCC.

The CIDB has the mandate to inter alia promote improved procurement and delivery management, and develop methods for monitoring and regulating the performance and registration of projects.<sup>222</sup>

The JBCC has revised the 3<sup>rd</sup> edition to include a comprehensive set of state provisions. Where an employer is an organ of the state, specific requirements that differ from those required by the private sector are set out in a single clause.<sup>223</sup> Clause 41.0 applies to all the substitutions that are required to the standard clauses.<sup>224</sup>

There is also a pre tender and post tender schedule attached. Both the pre tender and post tender categories form part of the agreement.

The PFMA<sup>225</sup> and SCM Regulations<sup>226</sup> of the SAPS provide that tender documentation must include evaluation and adjudication criteria, including any criteria required by other applicable legislation which includes the CIDB Act requirements, as well as the CIDB Regulations and the JBCC requirements.

It is stated in the preamble that the agreement is compiled in the interest of standardisation and sets out a clear, balanced and enforceable set of procedures, rights and obligations, which when competently managed and administered protect

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<sup>220</sup> JBCC, Series 2000, Principal Building Agreement.

<sup>221</sup> The CIDB Act.

<sup>222</sup> Bolton (2007) 15.

<sup>223</sup> JBCC, Series 2000, Principal Building Agreement.

<sup>224</sup> JBCC, Series 2000, Principal Building Agreement (2005).

<sup>225</sup> PFMA.

<sup>226</sup> Treasury SCM Framework .

the employer, contractor and subcontractor alike. It is also indicated that each of the documents has been formulated for use specifically as part of a series and is most unlikely to be suitable for use with other forms of contract. There is also a warning that the latest edition being 4.1 updates the document with a comprehensive set of state provisions. The agreement has been specifically structured for usage by both the private and state sector.

Although the amendments are allowed amending the document in the current form will add to the confusion.

Although the document is very helpful , it is not without its shortcomings. The entire structure of the document is an issue. There is a lot of accountability. It is an unmanageable document for the user. It is extremely confusing and as mentioned above it has a plethora of state provisions which amends certain clauses in the JBCC Principal Building Contract, repeal certain clauses, cross references to other clauses, etc. which compounds the confusion with contract managers. Contractors also misinterpret such contracts and they are unaware of specific clauses which have been amended by the specific state provisions. The specific provisions applicable to government even when incorporated into the document fail to produce a document that is clear, coherent and not contradictory. It is noted that the provisions of applicable legislation for government procurement is not taken into consideration or there are contradictory provisions .

The Principal Building Agreement contains a definition of Agreement as follows:

“Agreement” means this JBCC Principal Building Agreement and other contract documents that together form the contract between the employer and the contractor.

“Contract Documents” means this document, the contract drawings, the bills of quantities/lump sum documents and such other documents as identified in the schedule.

This immediately creates uncertainty about what constitutes the agreement and once again there are too many documents that constitute the Agreement including the pre tender and post tender documents referred to above that is not referred to in the definition.

In the process of interpreting the JBCC Principal Agreement it has been found that the Principal Agreement is far from being clear and balanced and neither are the state provisions comprehensive. The provisions are actually found to be confusing .

The Table below sets out the main problematic clauses:

<p>Clauses 1.8, 3.5, 3.6</p>	<p>Clause 3.5 provides that arrangements must be made for a formal signing of the agreement however formal signing is not a requirement to render the contract valid.<sup>227</sup> This is contrary to the GCC requirements which require that the contract must be in writing where the state is the contracting party. This is not covered in clause 41.0 the all encompassing state provision clause to the effect that where the State is involved the contract must be signed by the parties which in turn means that the contract must be signed. The variation clause 1.8 referred to below requires that the variation must be in writing and signed off yet signature is not</p>
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<sup>227</sup> JBCC, Principal Building Agreement, (2005:28 ).

	<p>a requirement for validity of the principal agreement. Also clause 3.6 stipulates that the parties shall sign the agreement.</p>
<p>Clause 40.2.2</p>	<p>Provides that the employer may resort to litigation. Institution of the action shall be commenced and process served within 1 year from the date of existence of the dispute, failing which the dispute shall lapse.<sup>228</sup> The prescription for state departments is three years in terms of the Prescription Act.<sup>229</sup> This is not catered for in clause 41.0. Further more 40.7 refers to a dispute being submitted to mediation which would not be applicable to the state but it is not indicated as such by means of the asterix as indicated with the others.</p>
<p>Clause 1.8</p>	<p>Provisions relating to amendments and variation is not in accordance with contract law principles that requires such a variation clause to include that any amendment or variation including the variation clause must be in writing, the Shifren Principle.<sup>230</sup></p> <p>In terms of the Shrifren Principle a non variation clause is not against public policy and no oral variation of the contract was effective if the clause entrenched both itself and and all other terms of the contract against oral variation.</p>

<sup>228</sup> JBCC , Principal Building Agreement, (2005 :31).

<sup>229</sup> Act 68 of 1969.

<sup>230</sup> SA Sentrale Ko –operatiewe Graanmaatskappy Bpk v Shifren 1964(4)SA 760 (A).

	<p>Therefore it should be considered to rephrase the clause to indicate as follows;</p> <p>“No variation of the terms of this agreement including this clause shall be of any effect unless reduced in writing and signed by the parties.”</p>
Clause 15.14.1	The words accept ,appoint etc indicate an act carried out in writing and should therefore include a requirement that it must be in writing.
Clause 15.4.2	There is inconsistent use of terminology, deemed and presumed.
Clause 3.4	Makes provisions for additional clauses to be added, it is regarded as standard and prescribed yet additional clauses may be added.
Clause 3.6	Indicates that the parties shall sign. There is no link to client to client and contractor, make link to client and contractor.
Clause 1.5	Should consider the Electric Communications Act , link 3.5 to 1.8
Clause 8.0	Work risk limits contract liability.
Clause 8.2	Makes the contractor liable and 8.2 grants an exemption.



Clause 14	Marry security and payment.
Clause 19	Assignment should include cede or delegation.
Clause 29	Refers to revision of date for practical completion due to interalia <i>vis major</i> . Clause 8.5 relating to work risks provides for indemnity in favour of the contractor for liability in respect of costs arising as a result of <i>force majeure</i> . It would make proper drafting sense for clause 8.5 and 29 joined.
Clauses 36, 37, 38, 39	<p>There are 4 cancellation clauses:</p> <ul style="list-style-type: none"> <li>• cancellation by the employer:for contractors default;</li> <li>• cancellation by the employer : loss and damage;</li> <li>• cancellation by contractor for employers default ;</li> <li>• cancellation - cessation of the works.</li> </ul> <p>The first relates to failure to comply with preparation of works provisions, the second to construction being destroyed for whatever cause, the third for the employer interalia failing to give possession of the site and lastly if by other parties if work ceases for a continuous period of ninety days.</p> <p>The cancellation clauses are all differently worded. Only clause 38.2 has a complete <i>lex commissario</i> clause. It may be prudent to separate the clauses. Although the provisions it could considered to collapse into one clause.</p>

#### **4.11 Recommendations**

National Treasury should consider establishing a standard contract for government aligned with the conditions of the JBCC contract applicable to all construction related procurements.

#### **4.12 Conclusion**

This chapter highlighted the litigation challenges faced by the SAPS in respect of contracts entered into in relation to intellectual property and copyright provisions that are contrary to the provisions of the Copyright Act in so far as ownership of copyright by the state is concerned.

The copyright provisions in standard form contracts used by the SAPS were interpreted to conclude that none of the provisions in the various standard form contracts comply with the Copyright Act. An interpretation of the JBCC Principal Building Agreement was found to have serious shortcomings . The provision of a specific clause for state departments creates serious confusion contrary to the assertion in the preamble of the agreement that the agreement sets out a clear , balanced and comprehensive set of state provisions.

## **CHAPTER 5: CONCLUSION**

### **5.1 Introduction**

This Research dissertation focussed on assessing the prescribed standard form contracts used by the SAPS in its procurement processes. The reason for such assessment was to identify the reasons for the challenges faced by SAPS with contracts awarded to service providers. In the process the requirements of consensus and formalities for the validity of a contract was discussed in detail . On the requirement of consensus which is determined by offer and acceptance the tender process up to the awarding of the contract was explained and it was determined that such a process is a pactum de contrahendo.

In respect of the requirement of formalities the numerous pieces of legislation and other regulatory prescripts starting from the Constitution to the CIDB Act was elaborated on in detail with particular emphasis on the requirements of the Constitution.

Furthermore and very importantly the GCC, the SITA Business Agreement ,the JBCC Principal Building Agreement were interpreted with specific emphasis and discussion on provisions relating to intellectual property and copyright. This was motivated by the litigation that SAPS was involved in relating to intellectual property and copyright. These specific cases were explained.

Lastly the JBCC Principal Business Agreement was interpreted and serious shortcomings identified in respect of correlating the state provisions to the rest of the clauses.

## 5.2 Recommendations

The shortcomings identified are not insurmountable.

National Treasury is requested to consider augmenting paragraph 6 of the GCC. It is proposed that a provision be included to refer to the provisions of sections 5(2) and 21(2) of the Copyright Act, which provides that ownership of copyright in every work which is eligible for copyright and which is made by or under the direction or control of the state shall vest in the State and not the author. It is vital for a provision to be included in the GCC to provide for copyright protection of the state. The GCC makes provisions for SCC. This should be included in the GCC from the outset.

Recommendations made to include the clauses in the GCC are as follows; **“Intellectual Property Rights** includes any copyright, design rights, patents, inventions, logos, business names, service marks and trademarks, Internet domain names, rights in databases, data, source codes, reports, drawings, specifications, know how, business methods and trade secrets.”

A clause be included in the GCC to indicate ownership of intellectual property and copyright to read as follows:

**“Copyright** ensuing from this contract vests in the State unless the parties agree otherwise.”

Since there is a new draft Business Agreement with SITA there should be consideration given to include a similar provision on intellectual property and copyright as recommended for the GCC.

National Treasury should consider streamlining the SBD forms.

Since the JBCC documents belong to a private institution there should be engagement amongst National Treasury ,the JBCC and the CIDB for the issuing of an updated standard JBCC Principal Business Agreement to be used by government departments only without the reference to state provisions, but which would have already been amended specifically for use by departments. This will minimise confusion by contract managers in government and will contribute towards legal certainty. Whilst the changing of the document or amendment thereof is beyond the control of government and whilst such submissions are being made in future drafting of such contracts and since there are provisions made to replace such provisions they could be incorporated into an SCC. The SAPS has made recommendations in this regard to National Treasury.

### **5.3 Conclusion**

On 23 October 2019, the Auditor General of South Africa, Mr Kimi Makwetu reported to Parliament's Standing Committee on Public Accounts (SCOPA) on the audit outcomes of national and provincial government for the 2018/2019 financial year. The report showed that irregular expenditure by government departments amounted to billions of rands. Mr Makwetu said that irregular expenditure is incurred through non-compliance with supply Chain processes, as well as payments made without following due process.

Although the regulation of government procurement documents is necessary this research attributes the challenges faced with government procurement to the inconsistent provisions in standard form contracts prescribed for use by government departments that makes drafting and interpreting contracts a difficult task.

## BIBLIOGRAPHY

### 1. Books

Bolton P *The Law of Government Procurement in South Africa* Durban (2007) Lexis Nexis Butterworths;

Christie RH and Bradfield GB *The law of Contract* (1991) Durban: Lexis Nexis;

Cornelius SJ *Principles of Interpretation of Contracts in South Africa* (2016) 3<sup>rd</sup> Edition Durban: Lexis Nexis;

Cornelius SJ *Principles of Interpretation of Contracts in South Africa* (2007) 3<sup>rd</sup> Edition Durban: Lexis Nexis;

Currie I and Klaaren J *The Promotion of Access to Information Act Commentary* (2002) Cape Town: Siber Ink;

Hutchinson and Pretorius *The Law of Contract in South Africa* (2012) Cape Town: Oxford University Press Southern Africa;

Kerr AJ *The Principles of the Law of Contract* (2002) 6<sup>th</sup> Edition Butterworths: Durban;

Lawson R *Exclusionary Clauses and Unfair Contract Terms* (1998) 5<sup>th</sup> Edition: London: Sweet and Maxwell Ltd;

Nagel et al (2006) *Commercial Law* Durban :Lexis Nexis;

Schulze H et al (2018) *General Principles of Commercial Law* 8<sup>th</sup> Edition Juta: Cape Town;

Van Der Merwe et al (2012) *Contract General Principles* 4<sup>th</sup> Edition Juta:Cape Town.

## **2. Journal articles**

Bolton P “*Government Procurement as a Policy Tool in South Africa*” (2006) Journal of Public Procurement;

Hawthorne L “*The Principle of Equality in the Law of Contracts*” (1995) 58 *THRHR*;

Kollamparambil U *The amended government procurement agreement: Challenges and opportunities for South Africa, Law, Democracy and development* (2014) Volume 18;

Louw NH *Public Sector Procurement* (2010) IMIESA;

Luiz J *Small business development, entrepreneurship and expanding the business sector in a developing economy: The case of South Africa* (2003), Journal of Applied Business Research 53;

Pillay M *The impact of pacta sunt servanda in the law of contract* (2015), Masters Dissertation.

## **3. Legislation**

Broad Based Black Economic Empowerment, 2008 (Act No 53 of 2008);

Constitution of the Republic of South Africa, 1996;

Construction Industry Development Board Act, 2000 (Act No 38 of 2000);

Construction Industry Development Board Regulations issued in terms of section 33 of the Construction Industry Development Board Act, 2000 (Act No 38 of 2000);

Copyright Act, 1978 (Act No 98 of 1978);

National Treasury Regulations: Regulation 16.A.6(3)(a) issued in terms of the Public Finance Management Act 1 of 1999,16.A.6;

Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000);

Preferential Procurement Regulations;

Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000);

Public Audit Act, 2004 (Act No. 25 of 2004);

Public Audit Amendment Act, 2018 (Act No 5 of 2018);

Public Finance Management Act, 1999 (Act No 1 of 1999) as amended by Act No 29 of 1999);

State Tender Board Act, 1968 (Act No 86 of 1968);

State Information Technology Agency Act, 1998 (Act No 88 of 1998) as amended by Act No 38 of 2002;

State Information Technology Agency General Regulations; GNR 904 of 23 September 2005,General Regulations.

#### **4. Case law**

*AllPay Consolidated Investment Holdings (Pty) Ltd and an Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC);*

*Baker Tilly v Makar (2010)EWCA Civ (41);*

*Barkhuizen v Napier 2007(7)BCLR 691(CC);*

*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (5668/2018)(5246/2015)[2016]ZAECGHC 55, [2016]4 All SA 9ECG)(29 July 2016);*



*Carlill vs Carbolic Smoke Ball Company* (1893 )1 QB 256;

*Cecil Nurse (Pty) Ltd v Nkola* 2008 (2) SA 441(SCA);

*Cinema City (Pty) Ltd vs Morgenstern Family Estate and others*, 1980 (1) SA 796(A);

*Croxley vs Rex* 1909 TS 1105;

*Delmas Milling Co Ltd vs du Plessis*1955 (3)SA447(A);

*Esarfranki Pipelines (Pty) Ltd and others v Mapani District Municipality and others* (2014) 2 all SA 493 (SCA);

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers(Pty)Ltd* 2012(1)SA256 (CC);

*Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional:*

*Johnson vs Leaf* 1980 (3) SA 927(A);

*Kempston Hire (Pty)Ltd vs Snyman* 1998 (4) SA 465(T);

*KPMG Chartered Accountants v Securefin Ltd and another* 2009(2) All SA 523(SCA);

*Metropolitan Council and others*, (1998) BCLR 1458(CC);

*Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and others* 2008 (2) All SA 145 (SCA) (the Millennium-case), *Others v Chief Executive Officer of the South Africa*;

*Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George and Others;*

*Minister of Transport v Prodiba (Pty) Ltd*<sup>231</sup> (20028/2014) [2015] ZASCA 38 (25 March 2015);

*SA Sentrale Ko –operatiewe Graanmaatskappy Bpk v Shifren* 1964(4)SA 760 (A);

*South African National Parks (Sanparks) v MTO Forestry (Pty) Ltd and another* (446/2017);

*SAPS v SITA* 24570/2018 30 /01/2019, *Gauteng Division Pretoria*;

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<sup>231</sup> *Minister of Transport v Prodiba (Pty) Ltd*<sup>231</sup> (20028/2014) [2015] ZASCA 38

*Smith v Hughes* (1871 )LR 6 QB 597;

*S v Stone* 1945 CPD 298 301;

*State Information Technology Agency SOC Ltd v Gjima Holdings (Pty) Ltd* (641/2015) [2016] ZASCA 143; [2016]4 All SA842(SCA);2017(2)SA 63 (SCA)(30 September 2016);

*Steenkamp NO v Provincial tender board Eastern Cape* 2006 (3) SA151 SCA;

*Tsantsabane Municipality vs Thabula Trade & Investment (Pty) Ltd and Another* (2012) 4 All SA 219;

*Tucker (2013) Chief Executive Officer, South African Social Security Agency and others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216(SCA).

## **5. Websites**

Government Procurement Procedure by the Department of Government Communication and information System < [http://www.gcis.gov/content/about-us/procurement /procurement](http://www.gcis.gov/content/about-us/procurement/procurement)> (accessed on 2018/09/30).

## **6. Other**

### **6.1 Newspapers:**

Sunday Times (2018/ 10/ 28) 10;

Peter L *Business Day* 19 June 2019 7: Uncertainties: Judgement puts a question mark over validity of public sector contracts.

### **6.2 Government publications**

Auditor General South Africa Report (AGSA ) (2018/2019);

CIDB Standard for Construction Procurement System;

Draft Business Agreement between SITA and SAPS (2019);

General Conditions of Contract;

JBCC Principal Building Agreement (2005);

Letter 54 /2019/20 dd 6 June 2018 from Department of Justice and Constitutional Development;

Memorandum of Understanding between SAPS and Department of Public Works;

National Treasury Instruction Note 32 of 2011 on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management dd 31 May 2011;

National Treasury Practice Note No. 8 of 2007/2008;

National Treasury Practice Note 1 of 2003;

National Treasury SCM Framework;

SAPS Letter 3/134/2 dd 2019/09/05 to Treasury;

SITA Business Agreement with Department of Safety and Security (DOSS) dated 2009/03/27;

CIDB Standard Professional Services Contract;

Treasury Standard for a Construction Procurement System (2012).