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**MEMORANDUM OF OPINION**

**(CONFIDENTIAL AND LEGALLY PRIVILEGED)**

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**IN RE: DEPARTMENT OF NATIONAL TREASURY**

**RPA Ramawele SC**

**KF Magano**

**Instructing Attorney  
Office of the State Attorney  
PRETORIA**

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**MEMORANDUM OF OPINION**

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**A. INTRODUCTION:**

1. We are instructed to traverse the concepts of cession and/or assignment as applied in the public procurement of goods and services. We are advised that the applicability of these juristic phenomena has created considerable difficulties in the public service and that they are more than often used, applied and/or concluded interchangeably leading to confusion and uncertainty. To compound to the uncertainty, so we are instructed, there has been no policy formulation regulating the permissibility of the use of both the juristic phenomena within the South African Public Procurement Regulatory Framework.
2. This memorandum seeks to address this uncertainty and other interrelated matters.
3. The applicability of these two juristic phenomena should be understood against the backdrop of the overarching requirement of s 217 of the Constitution which provides that any procurement of goods and services in the public sector must be done in compliance with a bidding process which is fair, transparent, equitable, competitive and cost effective.
4. The concerns and views of the National Treasury (“our Consultant”) can aptly be summarized as follows:
  - 4.1. That the use or application of the two juristic phenomena may well be in conflict with the peremptory provision of s 217 of the Constitution;
  - 4.2. That the effect of the conclusion of the two juristic phenomena may well be that the cessionary, as a third party, steps into the shoes of the successful bidder who has been awarded a tender following a bidding process. The acquisition of rights arising from a public tender under these

circumstances could result in the cessionary circumventing the requirements of s 217 of the Constitution without being subjected to a bidding process;

4.3. That although public procurement prescripts primarily favour the upliftment of Small and Medium Enterprises (the “SMMEs”), most of these SMMEs do not have the necessary funds to execute their obligations in terms of the tender and conclude agreements with financial institutions to fund their operations. Financial institutions then conclude cessions with the service providers (successful tenderers) in terms whereof service provider’s rights are transferred to the cessionary *alternatively*, agreements are concluded in terms whereof any payment made by an organ of state in lieu of services rendered by a service provider is paid into a designated account controlled by the third party<sup>1</sup>.

4.4. That the payment of amounts due to a service provider made into a third party’s banking account may be in conflict with the requirement of Central Supplier Database (CSD) which makes it obligatory that payment for services rendered be deposited into the bank account of the service provider contained in the CSD;

4.5. That during a tender process, points are awarded in evaluation for purposes of effecting preferential procurement based on the ownership of the bidder, labour force and management compositions. In these circumstances, assignment allows a person who may have been awarded

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<sup>1</sup> This is the so-called “escrow agreement”

lower points, to effectively become appointed as a service provider without being subjected to a bidding process; and

- 4.6. That a further issue that merits consideration is instances where a cession and assignment take place between related companies or more specifically, companies that are both subsidiaries of the same holding company.

**B: OPINION SOUGHT**

5. Having regard to the aforesaid, we are instructed to render an opinion on:

- 5.1. whether there is any difference between cessions and assignments;
- 5.2. the legality of the use and/or application of cession and assignation in the public procurement of goods and services *differently put*, whether the application of cession and/or assignation in the public procurement of goods and services passes constitutional muster; and
- 5.3. whether it is permissible for payment to be made into an escrow account designated and controlled by a financial institution that has concluded a financial agreement with a successful bidder for the provision of funding *alternatively*, whether payment can lawfully be made into an account other than a banking account contained in the CSD.

**C: BRIEF OVERVIEW OF THE CONCEPTS OF ASSIGNMENT AND  
CESSION**

6. Within the context of public procurement of goods and services as contemplated in s 217 of the Constitution, it is important to discuss and contrast the two concepts that deal with the transfer of rights from one person and/or company to another. Any failure to properly distinguish between the concepts would seriously hamper the taking of proper decisions by public officials who are entrusted with the responsibility of managing and monitoring agreements arising from the awarding of tenders.
  
7. We now proceed to consider the aforesaid concepts after which we draw a distinction, if any, between them. Finally, we address the applicability of these concepts within the ambit of s 217 of the Constitution.

### *CESSION*

8. Cession is another method by which a claim is transferred from one person to another resulting in the substitution of a new creditor (cedent), the debtor remaining the same<sup>2</sup>. Where the right to be transferred is corporeal, it is incapable of physical delivery and transfer can only take place by way of cession. The party ceding the right completely divests himself of the right or benefit arising from the right after it has been transferred. An act that does not completely surrender or exclusively vest the right in the cessionary will not be a cession.

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<sup>2</sup> Christie 's Law of Contract Seventh Edition GB Bradfield @ page 537

9. Unlike novation<sup>3</sup>, cession does not create a new claim to substitute the old one. A cession replaces or substitutes the creditor in the original contract. It has the effect of removing the claim being ceded from the estate of the cedent and vesting it in the estate of the cessionary. No separate act of delivery is required to vest the right completely in the cessionary.
10. In the absence of legislation, public policy does not prevent the cession of pension rights<sup>4</sup> nor or salary already due, no future salary up to a fixed amount<sup>5</sup>. The corollary to this is that if legislation prohibits<sup>6</sup> the cession of salary due, such cession would be invalid.
11. Although cession does not require the notice, co-operation, or consent of the debtor, it would be invalid if it is concluded with the intention to disadvantage the debtor.

*Formalities of a valid cession*

12. The agreement to cede a right or claim does not have to be in writing. The act of cession merely concerns two separate processes. The first entails the parties entering into an obligatory agreement, where the cedent transfers his claim to the cessionary. The second step entails the parties entering into a transfer agreement where the actual cession of the right to the cessionary takes place. Where the parties have elected to reduce the agreement into writing, these agreements are often contained in one

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<sup>3</sup> Novation occurs when an existing obligation is replaced with a new obligation having the effect of extinguishing the former obligation. The fresh obligation is formed between the same parties.

<sup>4</sup> Hedges v Bainbridge (1899) 20 NLR 205

<sup>5</sup> Consolidated Finance Co Ltd v Reuvid 1912 TPD 1019 1023-4

<sup>6</sup> See: One of the requirements of a valid cession is that it should not be prohibited by statute

document. Like any other agreement, a cession agreement is required to comply with the formalities of a valid agreement.

13. A cession agreement must comply with the following requirements:
  - 13.1. there must be a meeting of the minds between the cedent, the party intending to part or transfer his right (*animus transferendi*) and the cessionary, the party intending to receive or be the holder of the right (*animus acquirendi*);
  - 13.2. there must be a *justa causa*, which is the cause or purpose of the cession. The cause or purpose is usually formulated in the obligatory agreement which can be in the form of a contract of sale, or a contract of donation, an agreement of settlement or will or statutory provision;
  - 13.3. *the agreement must be legal, it must therefore not be unlawful*<sup>7</sup>, immoral, *contra bonos mores*, offend against public policy or be tainted by undue influence, duress or fraud;
  - 13.4. both parties to the cession must possess contractual capacity to enter into the agreement, the agreement cannot be fictitious or simulated or be a maneuver by the cedent to deprive the debtor of his rights, which he would have enjoyed if it were not for the cession; and

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<sup>7</sup> We deal with this requirement later in detail in considering whether a cession of a right is permissible in terms of s 217 of the Constitution

13.5. *the cession cannot be prohibited by statute*<sup>8</sup>, the cession cannot be prohibited by common law and the cession cannot be prohibited by subsequent agreement whether expressly or tacitly.

### **ASSIGNATION**

14. In *Simon v Air Operations of Europe*<sup>9</sup> the court held that “the word ‘assignment’ in our law is generally used to denote a transfer of both rights and obligations, but its precise meaning in any given case may depend upon the context in which it is used”.
15. In *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*<sup>10</sup> the court held that “the word ‘assignment’ is often used to denote transmission of both rights and obligations, in contradistinction to cession which signifies a transfer of rights only”.
16. In *Telkom SA Ltd and others v Blom and others*<sup>11</sup> the court held<sup>12</sup> that the natural result of assignment is that the original employer falls out of the picture, and as between him and the employees, the contract is extinguished.
17. In some instances, the courts have found that a cession and assignment does occur simultaneously. In *Noormohamed v. Visser and another*<sup>13</sup>, the court found that an appellant had purchased the property at the auction, ceded his rights and then delegated his obligations as purchaser to another.

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<sup>8</sup> We deal with this requirement later in detail in considering whether a cession of a right contravenes any statute

<sup>9</sup> 1999 (1) SA 217 (A) @ 2281

<sup>10</sup> 1991 (1) SA 100 AD page 115 para G-I

<sup>11</sup> 2005 (5) SA 532 SCA page 537 para A-D

<sup>12</sup> Whilst considering the effect of s 197 of the Labour Relations Act

<sup>13</sup> 2006 (1) SA 290 SCA 295 @ page 295 para [11]



**D: DISTINCTION BETWEEN CESSION AND ASSIGNATION**

18. The distinction between cession and assignation lies primarily in the fact that only in the event of the conclusion of a cession does a claim become transferred from one person/company (cedent) to another person or company (cessionary). In such an event, the cessionary becomes the holder of the right even though the original contract may have been concluded between the cedent and an organ of state.
19. Within the context of public procurement sphere, assignation signifies an act by a third party who was not a party to the bidding process, taking over both the obligations to render services or provide goods and receive payment in regard thereto. The assignor (successful bidder) falls completely out of the picture as he is substituted by the assignee who is a third party.
20. The distinction between assignation and cession is therefore that assignation denotes the transfer of both rights and obligations whereas a cession, is the transfer of a personal rights in such a way that the cedent is divested of his rights but still remains obliged to execute his obligations towards the debtor<sup>14</sup>.
21. As is apparent from the above, sometimes parties may cede and assign rights in one jural act. The effect of this agreement is that the assignee acquires both rights and obligations from the cedent or assignor. If parties want to transfer both rights and obligations, a simple assignation agreement would be sufficient without the necessity for the conclusion of a cession.

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<sup>14</sup> In our case the organ of state

**E: THE APPLICABILITY OF THE CESSION AND ASSIGNATION WITHIN  
THE FRAMEWORK OF SECTION 217 OF THE CONSTITUTION**

*Is the conclusion of cession and/or assignation between a party who has been awarded a tender to provide goods and services and a third party permissible?*

22. S 217 of the Constitution provides that “*when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective*”.
23. Accordingly, the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is s 217 of the Constitution.
24. To achieve the constitutional imperative in relation to procurement of goods and services, various pieces of national legislation have been enacted, including, *inter alia*, Preferential Procurement Policy Framework Act 5 of 2000 and the Public Finance Management Act, 1999. The object of these statutes is to give effect to the constitutional provisions of securing transparency, accountability and sound management of the revenue, assets and liabilities of the applicable institutions.
25. S 217 of the Constitution is the source of the powers and functions of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorized by law, may contract for goods and services on behalf of government. *However, the tendering system it devises must be fair, equitable,*

*transparent, competitive and cost-effective.* This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in s 195 (1)<sup>15</sup>.

26. It has also been said that the Constitution lays down the minimum requirements for a valid tender process ***and the contracts concluded following an award of a tender to a successful tenderer.*** The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be fair, equitable, transparent, competitive and cost effective<sup>16</sup>.
27. Accordingly, the conclusion of a contract pursuant to a bidding process, must be preceded by a process which is fair, transparent, equitable, competitive and cost effective.
28. S 2 of Preferential Procurement Policy Framework Act 5 of 2000 (“the PPPF Act”) provides that an organ of state must determine its preferential procurement policy and implement it within a specified framework. This Act was promulgated to give effect to s 217 of the Constitution.
29. S 38 (1) (a) (iii) of the Public Finance Management Act, 1999 (the “PFMA”) provides that *“the Accounting Officer for a department, trading entity or constitutional entity must ensure that the department, trading entity or constitutional entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective”*.

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<sup>15</sup> Steenkamp NO. Provincial Tender Board, Eastern Cape 2007 (3) SA 121 CC @ para [33]

<sup>16</sup> Millennium Waste Management v. Chairperson, Tender Board 2008 (2) SA 481 (SCA) @ para [4]

30. It has repeatedly been said that cessions have widely been used as tools of commercial transactions. Cessions remain a means by which businesspeople and private individuals transfer their personal rights as part of business or commercial transactions<sup>17</sup>.
31. It is important to note that business transactions arising from the conclusion of cessions are not preceded by the participation of the cessionary in a bidding process as envisaged in s 217 of the Constitution. The cessionary merely concludes an agreement with the cedent after the cedent has already participated in a bid process and then steps into the shoes of the cedent in respect of the rights arising from the tender. Although it could skillfully be dressed up as an ordinary business transaction, the cessionary, by acquiring rights from the cedent under these circumstances, does conduct business with the state without being subjected to a bidding process.
32. The conclusion of a cession or assignment under these circumstances raises two legal issues affecting its validity.
33. Firstly, for a cession to be valid, it must not contravene a statute. The conclusion of a cession between the cedent and cessionary contravenes both the PPPF and the PFMA in that the cessionary acquires rights or claims from the tender without having participated in a bidding process.
34. The conclusion of a cession violates the provisions of the PFMA because the PFMA obliges an Accounting Officer to ensure that the department, trading entity or constitutional entity has and maintains an appropriate procurement and provisioning

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<sup>17</sup> Goodwin Stable Trust v Douher (Pty) Ltd 1998 (4) SA 606 (C) para 617E

system which is fair, equitable, transparent, competitive and cost effective. Any conclusion of a cession giving rise to the acquisition of rights by the cessionary is in conflict with these peremptory provisions of the PFMA.

35. Secondly, as the cessionary or assignee acquires rights without having participated in the bidding process, any rights obtained arising from the tender is unfairly obtained in respect of other unsuccessful tenderers who were not granted an opportunity to compete with the cessionary.
36. Although a cession involves the transfer of rights only<sup>18</sup>, such transfer is still non-compliant with s 217 because the cessionary acquires the rights arising from a public procurement without being subjected to a bidding process.
37. Where parties are required to compete for the awarding of a tender, it is unfair that the successful party cedes his rights to a third party. This is even more so because a cession can be concluded without the consent of an organ of state and thus rendering any agreement concluded between the cedent and cessionary out of the scrutiny of an organ of state that has awarded a tender.
38. Assignment on the other hand, renders the entire bidding process unfair because the successful bidder transfers both his rights and obligations to the assignee who was never a party to the bidding process. In this instance, a bidder who may not be able to execute his works for some other reason, transfers his entire rights and obligations to another party.

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<sup>18</sup> The organ of state still requires performance from the successful bidder

39. Where a party is unable to carry out its obligations in terms of the agreement, it is legally preferable and imperative for an organ of state to invoke the breach of contract provisions than allow for assignation. Parties should be held to the agreement concluded with an organ of state instead of allowing parties to escape or avoid their contractual obligations through an assignation.

*Cession and/or assignation between companies under the same ownership and/or shareholdership*

40. Before dealing with cession between companies under the same ownership, we draw a distinction between a holding company and a consortium.
41. A consortium or an association is a group made up of two or more individuals, companies or governments that work together to achieve a common purpose. Entities that participate in a consortium pool resources but are otherwise only responsible for the obligations set out in the consortium agreement. Every entity that is under the consortium, therefore, remains independent with regard to their normal business operations that are not related to the consortium.
42. In the case of a consortium, no new legal entity is created. It is just a contractual agreement for two or more existing entities to work together on that project.
43. A consortium is formed by contract, which delineates the rights and obligations of each member whereas a joint venture (JV) is an entity between two or more parties to undertake economic activities, generally characterized by shared ownership, shared returns, risks and shared governance.

44. A holding company is a company that owns the outstanding stock of other companies<sup>19</sup> but does not usually produce goods or services itself. Its purpose is to own shares of other companies.
45. From the above discussion, it appears that it would generally be a subsidiary of a holding company that would submit a bid and not a holding company itself. A joint venture and a consortium usually also submit bids.
46. A cession or assignation where the bidder was a joint venture or consortium to another company would fall under the same category as where an individual or company has been awarded a tender and seeks to cede his rights to a third party. The legality of the cession or assignation under these circumstances remains the same as discussed above.
47. Where there are two or more companies falling under the same holding company, and one subsidiary has been awarded a tender but seeks to cede or assign its rights to its sister subsidiary, different considerations apply but the conclusion remains the same. In this instance, subsidiary B which falls under the holding company A has been awarded a tender but seeks to cede its rights to subsidiary C which is also a subsidiary of holding company A.
48. It should be noted that when the tender was awarded to B the adjudication committee would have considered, *amongst others*, the need to achieve specific goals such as contracting with persons or categories of persons historically disadvantaged by unfair discrimination or some other programme of the Reconstruction and Development Programme as contemplated in the PPPF.

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<sup>19</sup> Its subsidiaries

49. Even though the other subsidiaries to whom the rights are being ceded or assigned may well qualify in terms of the requirements set out in paragraph 48 above, the stage at which it should have been determined<sup>20</sup> by the bid committee would have passed because the tender would already have been awarded. If an unsuccessful tenderer were to challenge the cession and/or assignation under these circumstances, an organ of state involved would not be able to contend that assignation was proper because the new subsidiary did qualify. The organ of state would be unable to justify the fairness of the process that was followed to determine the qualification of the new subsidiary. Such a process would be non-existent because the new subsidiary would not have participated in any bidding process justifying its acquisition of the rights arising from the tender.
50. In the *Telkom SA Limited v Merid Trading (Pty) Ltd*<sup>21</sup> (the “Telkom matter”) the issue raised was the legal consequences of a failure by a public body to accept, within the stipulated validity period for the tender proposals, any of the proposals received.
51. In dealing with the issue of whether the procedure that was followed after the validity period had expired, the court in *Telkom* found that such procedure was not in compliance with Section 217 of the Constitution because “as soon as the validity period of the proposals had expired without the Applicant awarding the tender a tender process was complete-albeit unsuccessfully - and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the Applicant to apply its own procedure and either

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<sup>20</sup> The bid evaluation and adjudication of the tender

<sup>21</sup> Telkom SA limited v Merid Trading (Pty) Ltd Case Number: 27974/2010



award a tender or not award a tender within the validity periods of the proposals. If it failed to award a tender within the validity period of the proposals it received, it had to offer all interested parties a further opportunity to tender. *Negotiations with some tenderers to extend the period of the validity lacked transparency and was not equitable or competitive ...*”

52. The essence of the **Telkom** decision is, therefore, the following:

52.1. That the process for the awarding of a tender reaches completion as soon as the validity period has expired, irrespective of whether an organ of state has awarded a tender or not;

52.2. That an organ of state cannot continue to negotiate with a bidder or any other third party after the expiry of the validity period. Any such further negotiation process renders the bidding process neither transparent, equitable nor competitive;

52.3. All tenderers are entitled to expect that an organ of state would apply its own procedure by either awarding the tender or not awarding the tender within the validity period; and

52.4. If an organ of state has failed to award a tender within the validity period of the proposals, it must offer all interested parties a further opportunity to tender.

53. The court in **Telkom** found it to be an affront to the fundamental principles of fairness when **Telkom** purportedly awarded a tender but still continued to negotiate further with the so-called successful tenderer. In effect, the court held that an organ of state

either makes a decision to award or not to award a tender within the validity period or the extended validity period but that such an organ of state cannot after having awarded the tender then commence further negotiations with the “successful” tenderer on the conclusion of the contract.

54. Accordingly, any subsequent consideration by an organ of state to determine whether another subsidiary of the same holding company is compliant with the requirement of the tender will render the consideration process unfair and uncompetitive.
55. If an organ of state continues to negotiate with the successful bidder after the award has been made, so it was held in the **Telkom** matter, then it means that the tender process has actually been completed without a tender being awarded and the bid must be re-advertised. In this event the organ of state must re-advertise the tender and give everyone an equal opportunity to submit bids.

*Payment into a third-party banking account*

56. The Central Supplier Database maintains a database of organizations, institutions and individuals who can provide goods and services to the government. The CSD serves as the single source of key supplier information for organs of state and provides a consolidated, accurate, up to date, complete and verified supplier information to procuring organs of state.
57. The issue raised by our Consultant is whether it is legally permissible to make payment into a banking account of a service provider other than the one contained in the CSD. As is apparent from above, there is no requirement in terms of any statute

governing public procurement for the maintenance of the CSD. The CSD is maintained merely for purposes of keeping complete and up to date details of suppliers in a consolidated manner.

58. If the payment for services rendered in terms of the contract is made into a banking account different to the one contained in the CSD (by agreement between the parties) the organ of state would have lawfully made the payment to the creditor because the payment (although not made into an account contained in the CSD), would have been made *by agreement between the parties*. This does not cause any controversy because payment is made into an account agreed upon by the parties.
59. If the original contract concluded between the service provider and the organ of state directed the organ of state to make payment into an account contained in the CSD, an amendment of the banking details will have to be agreed upon after which the organ of state would make payment into that new account even if such a banking account is not contained in the CSD. Such an amendment may take different forms<sup>22</sup> but the essential requirement is that payment must be made by agreement between the parties. *Preferably, such agreements must be in writing.*
60. It is, however, payment into an account held by a third party that deserves closer scrutiny. We address this issue below.
61. It is trite that a debtor's obligation is not discharged unless it can show that it has made payment to a person recognized by law as competent to receive payment in the

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<sup>22</sup> Not necessary to be prescriptive

discharge of the obligation. This will usually be the creditor in person who again will usually be the other party to the contract<sup>23</sup>.

62. Payment to a third party who is a stranger to the contract will not normally discharge the debtor. But the creditor may be estopped from denying the third party's authority to receive payment<sup>24</sup>. However, payment to the creditor's agent will be valid if the agent is authorized to receive payment and not merely that he was acting as the creditor's agent<sup>25</sup>.
63. In determining whether payment to a third party discharges the debtor's obligation, *the question is always what the agreement between the parties was as to how payment was to be made*<sup>26</sup>. This is trite in ordinary contractual transactions not involving public procurement contracts.
64. However, it should be noted that once a tender has been awarded and a contract concluded between the successful tenderer and the organ of state, no further engagement is required between the two parties save for the consequential and reciprocal obligations of the parties in terms of the contract. This reciprocal obligation does not require an organ of state to *further agreeing* with the service provider to make payment in terms of the contract into a third party's banking account even though the organ of state may desire to do so for benevolent reasons.
65. Such further agreements may skillfully be dressed up as ordinary payments into a third party's accounts for some legitimate reasons whereas they may well in fact be

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<sup>23</sup> Christie 's Law of Contract Seventh Edition GB Bradfield @ page 472 para 11.4

<sup>24</sup> Christie 's Law of Contract Seventh Edition GB Bradfield @ page 475

<sup>25</sup> Minister of Agriculture and Land Affairs v De Klerk 2014 (1) SA 212 SCA @ [14]

<sup>26</sup> Verbeek v Maher 1978 (1) SA 61 (N) 68D

cessions or assignments. An enquiry into the real purpose of such agreements would not only be cumbersome but create an unnecessary burden on the responsibilities of public officials.

66. Further, the conclusion of such agreements would require that public officials conclude proper and binding written agreements for payments into third party's account and further ensure that officials of service providers with whom they conclude such contracts are duly authorized. This again places an onerous obligation on public officials which obligation is not envisaged in terms of the tender awarded to the service provider.

67. Most importantly, the conclusion of such agreements has the potential to expose an organ of state in unnecessary litigation against third parties who were not even parties to the tender that was awarded. Such potential and unnecessary litigation may well lead to fruitless and wasteful expenditure as contemplated in the PFMA.

**F: CONCLUSION**

68. Having regard to the aforesaid, we conclude as follows:

68.1. the distinction between assignment and cession is therefore that assignment denotes the transfer of both rights and obligations whereas a cession is the transfer of a personal rights in such a way that the cedent is divested of his rights but still remains obliged to execute his obligations towards the debtor;

- 68.2. as cessionary and/or assignee acquires rights without having participated in the bidding process, any rights obtained arising from the tender is unfairly obtained in respect of the unsuccessful tenderers who were not granted an opportunity to compete with the cessionary and/or assignee;
- 68.3. although a cession involves the transfer of rights only, such transfer is still inconsistent with s 217 because the cessionary acquires rights arising from a public procurement process without being subjected to a bidding process;
- 68.4. where parties are required to compete for the awarding of a tender, it is patently unfair (towards the unsuccessful tenderers) that the successful party cedes his rights to a third party. This is even more so because cessions can be concluded without the consent of an organ of state and thus rendering any agreement (whether cession or assignation) concluded between the cedent and cessionary out of the scrutiny of an organ of state that has awarded a tender;
- 68.5. assignation renders the entire bidding process contemplated in s 217 of the Constitution unfair because the successful bidder transfers both his rights and obligations to the assignee who was never a party to the bidding process;
- 68.6. a cession and/or assignation where the bidder is a joint venture or consortium to another company would fall under the same category as where an individual or company has been awarded a tender and seeks to

cede his rights to a third party. The legality of this cession and/or assignment is as discussed in sub-paragraphs 61.2 - 61.4 above;

68.7. where there are two or more companies falling under the same holding company, and one subsidiary has been awarded a tender but seeks to cede or assign its rights to its sister subsidiary, an organ of state involved would have no good cause to contend<sup>27</sup> that the new subsidiary qualifies because an organ of state would be unable to justify the fairness of the bidding process that was followed to determine the qualification of the new subsidiary;

68.8. the conclusion of agreements whereby organs of state pay third parties and/or pay into third parties' bank accounts for services rendered by successful tenderers places an unnecessary and heavy burden on public officials who would be required to ensure that such agreements are properly executed whereas no such obligation is envisaged in terms of the tender that has been awarded. Any laxity by public officials in the execution of such agreements may expose the state to unnecessary litigation by third parties; and

68.9. If payment for services rendered in terms of the contract is made by an organ of state to a service provider into an account different to the one in the CSD by agreement between the parties, the organ of state would have lawfully made the payment to the creditor because the payment (although

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<sup>27</sup> Upon being challenged by an unsuccessful tenderer

not made into an account contained in the CSD), would have been made by agreement.

**G: RECOMMENDATIONS**

69. In the light of our aforesaid conclusions, we recommend the following:

69.1. That the conclusion of cessions and/or assignments between successful tenderers and third parties ***be not permitted***;

69.2. That no subsidiary of a holding company be permitted to cede its rights or assigns its rights and obligations to another subsidiary of the same holding company irrespective of the similarity in their ownership and/or BBBEE status and/or component;

69.3. That where a party is unable to carry out its obligations (for any reason whatsoever) in terms of an agreement concluded pursuant to a tender process, that organs of state invoke provisions of the breach of contract contained in the said agreements instead of permitting such parties to conclude cessions or assignments with third parties;

69.4. That payment by an organ of state to a service provider into an account not contained in the CSD be permitted provided that the parties ***have amended the banking details of the service provider in writing***; and

69.5. That payment by an organ of state to a third party for services rendered by the service provider and/or payment by an organ of state into a third



party's account for services rendered by a successful tenderer **be not permitted.**

70. We remain avail for any issue that may require further clarification.

**DATED AT PRETORIA ON THIS THE 17<sup>TH</sup> DAY OF AUGUST 2020**

**RPA Ramawele SC**

**KF Magano**

**PRETORIA**

17 AUGUST 2020