REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

23 March 2018
DATE

SIGNATURE

CASE NUMBER: 21904/2015

In the matter between:

CORRUPTION WATCH (NPC) (RF) **APPLICANT**

And

THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SERVICES **1ST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **2ND RESPONDENT**

CASH PAYMASTER SERVICES (PTY) LTD **3RD RESPONDENT**

JUDGMENT

TSOKA, J

[1] The applicant, Corruption Watch (NPC) (RF) (Corruption Watch) applied to this court to review two decisions by the first respondent, the Chief Executive Officer of the South African Social Security Agency and the second respondent, the South African Social Security Agency, conveniently and collectively called (SASSA). The first decision relates to an alleged Variation Agreement concluded by SASSA and the third respondent, Cash Paymaster Services (Pty) Ltd (Cash Paymaster) at a meeting held on 15 June 2012 at Kyalami, Johannesburg while the second decision relates to the payment of the amount of R316 447 361.41, which payment was the result of the Variation Agreement.

[2] Corruption Watch contends that the two decisions fall foul of the provisions of section 6(a)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that, in concluding the agreement and effecting the payment, SASSA contravened the provisions of its then existing Supply Chain Management Policy of 2008 (SCM Policy) thus rendering the decisions unlawful.

[3] The application is opposed by both SASSA and Cash Paymaster who filed affidavits resisting the order sought by Corruption Watch. At the hearing of the

application, only Cash Paymaster persisted in its opposition while SASSA did not and, in fact, indicated that they abide the decision of this court.

[4] The facts giving rise to this national saga are the following. On 17 January 2012 SASSA enlisted CPS to distribute social welfare grants on its behalf. For reasons that are not relevant to this application, on 29 November 2013, the Constitutional Court declared the agreement between SASSA and CPS unlawful[1]. The declaration of unlawfulness was suspended pending confirmation of a just and equitable remedy. On 17 April 2014, the Constitutional Court ordered SASSA to initiate a new tender process for the payment of social grants within 30 days. Again, the court suspended the declaration of invalidity of the tender pending compliance with the new tender process to be initiated. To date, no new tender has been awarded with the result that the declaration of invalidity still remains.

[5] Before the tender was set aside, SASSA and CPS concluded a Service Level Agreement (SLA) and an agreement in terms of which the latter was to pay social grants on behalf of the former on 3 February 2012 (the Contract). In terms of the SLA, CPS was responsible for two distinct phases of enrolment, namely bulk enrolment and on-going enrolment of new recipients. The enrolment process entails the capturing and registration of the data relating to the name, surname, digital photograph (excluding children) and identification number of the recipient.

[1]AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) (AllPay1), and AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive of the South African Social Security Agency and Others (No. 2) 2014 (4) SA 179 (CC) (AllPay2).

In addition, SASSA requested CPS to capture and register the current address (physical and postal), cell phone numbers, alternate contact numbers, employment, name and address of school attended by the child. This request was considered to be an additional function to be performed by CPS at a fee to be agreed to between the parties. In the event the parties did not reach any agreement on the fee payable, the time and the deliverables, CPS was not obliged to render such additional services.

[6] In terms of the Contract, the parties agreed on a firm price of R16.44, inclusive of VAT, to be paid by SASSA to CPS per recipient of a social grant. In terms of clause 6.3 of the contract the parties agreed that –

> 'In the event that SASSA may require the contractor (CPS) to render social grant payment related services additional to the services, this shall be subject to a written agreement between the parties inter alia as to a negotiated service fee for such services...'

[7] During June 2014, Corruption Watch learnt through an exchange announcement made by Net 1 UEPS Technologies Incorporated (Net 1), a United States company listed on the Johannesburg Stock Exchange - the parent company of CPS - that SASSA engaged CPS to perform approximately 11 million additional registrations that did not form part of its monthly service fee. And that after the additional registrations which were independently verified, SASSA agreed to pay CPS ZAR 275 million as full settlement of the additional costs incurred.

[8] The announcement of payment of such a substantial amount, aroused the interest of Corruption Watch, whose interest, amongst others, is to act as a watchdog in ensuring that procurement systems are tightened so as to reduce their vulnerability to corruption in order to foster transparency and accountability, not only in respect of public entities but private entities as well. Sensing that public resources intended for use by millions of disadvantaged South Africans may have been directed for the benefit of the few, by non-compliance with the procurement requirements and the expenditure of public funds, it approached SASSA to confirm that its suspicions were unfounded. The latter invited Corruption Watch to its offices to inspect the documentation pertaining to the payment. Corruption Watch was however given restricted access to the limited documentation regarding the said payment. From its assessment, it was unable to locate any documentation evidencing that the said payment was made pursuant to the SLA or in terms of a further agreement as envisaged in clause 6.3 of the contract. It was, however, informed that the said payment was made as a result of the discussion between SASSA and CPS.

[9] Corruption Watch then wrote several letters to SASSA requesting the minutes of the meeting at which the payment was discussed but the letters remained unanswered. It was a result of lack of information or clarification regarding the payment that Corruption Watch in 2015 instituted the present application seeking access in terms of Rule 53 to the full information regarding the payment. Instead of SASSA filing the complete record, it filed an incomplete one. Later SASSA

supplemented the record with the necessary information that should have been furnished earlier on.

[10] From the records furnished, Corruption Watch noticed that on 10 March 2014, CPS rendered an invoice to SASSA in the amount of R316 447 361.41 (including VAT). The said invoice was headed "Financial Consideration for Bulk Re-registration" but instead of reflecting the agreed firm price in the amount of R16.44 (including VAT) per registration, it reflected a higher amount of R23.20 (excluding VAT) per registration. It further transpired that three days later, on 13 March 2014, one Mr Frank Earl, who has since resigned from SASSA, the Executive Manager of Benefits Transfer, submitted a document to SASSA's Bid Adjudication Committee (BAC) headed "Variation Order reimbursement of costs incurred by Cash Paymaster Services (Pty) Ltd (CPS) in respect of additional resources procured for re-registration project for the period of 01 January 2013." The purpose of the document was to seek BAC's recommendation for variation of the 3 February 2012 contract. BAC was further requested to recommend to the CEO of SASSA to grant approval to process part payment of the said amount of R316 447 361.41. The remainder of the payment was to be paid after verification by an independent auditor in the ensuing financial year. The motivation for the payment was the elimination of ghost dependants, duplicate children and non-qualifying dependants. The document further reflected that SASSA and CPS had agreed to re-register 9.2 million social grant beneficiaries and recipients for a period of six months at CPS's costs. The document further revealed that at the

discussions held between SASSA and CPS, the total number of social grant recipients as well as dependants was unknown resulting in the re-registration of additional grant recipients of 11.9 million by CPS. In justifying the payment, Mr Earl pointed out that the said figure of R316 447 361.41 was audited by KPMG. This information was to Mr Earl's knowledge incorrect as the figure of R316 447 361.41 was not audited by KPMG. This is common cause. The figure was not audited. SASSA, in its answering affidavit, justified the payment as representing re-registration of children which re-registration was not catered for in the SLA and the Contract which only speak of grant recipients, excluding children.

[11] Pursuant to the said BAC's recommendation, SASSA CEO, Ms Virginia Petersen approved part payment of the invoice as recommended. CPS, on the advice of their auditors, rejected the part payment. Surprisingly, on 25 April 2014 SASSA's Supply Chain Management submitted a document to Ms Peterson to consider the BAC's recommendation and pay CPS the full amount of R316 447 361.41 being in respect of "costs incurred by Cash Paymaster Services (Pty) Ltd to re-register all the grant recipients as well as outstanding beneficiaries." Simultaneously, it was recommended that the completeness and correctness of CPS's audited claim be submitted to an independent auditor for verification. Ostensibly, the purpose of referral of the invoice to an independent auditor was to confirm KPMG's conclusions. It was pointed out in the document that should any discrepancy be uncovered by the independent auditor, CPS would be afforded an opportunity to respond thereto. Should the latter accept the

discrepancies, it was to refund to SASSA such discrepancy amount. On 22 May 2014 Ms Peterson approved BAC's recommendations to pay CPS in full. The payment was made in June 2014.

[12] It emerged for the first time in SASSA's and CPS's answering affidavit that the payment was in fact made pursuant to the variation of the SLA, which variation was agreed to in a meeting held on 15 June 2012 between SASSA and CPS. In the result it is necessary to examine the said SLA variation agreement to determine whether the alleged agreement and payment were in compliance with section 217 of the Constitution, the Public Finance Management Act 1 of 1999 (PFMA), the Social Assistance Act 13 of 2004, the Treasury Regulations, the SLA, the Contract and the Supply Chain Management Policy No. 8 (1). It would be re-called that in terms of section 217 of the Constitution, any organ of state when it contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. If not, such contracts are unlawful and fall foul of the provisions of PAJA and must be set aside. Similarly, in terms of the PFMA, the Social Assistance Act 13 of 2004, the Treasury Regulations, the SLA, the Contract and the SCM Policy 8 (1), any procurement of goods or services must be fair, equitable, transparent, competitive and cost effective.

THE SLA VARIATION AGREEMENT OF 15 JUNE 2012

[13] The alleged Variation Agreement is headed "Minutes of enrolment day run feedback meeting held between SASSA and CPS (Pty) Ltd at the Castle Kyalami on Friday 15 June 2012." It records the persons who attended the meeting on that day. It is signed by Ms Peterson and Dr Serge Belamant on behalf of CPS. It records the issues discussed between SASSA and CPS. Of importance and relevance to the present matter it records:

> 'The SASSA CEO confirmed that the enrolment of dependants should proceed as specified at the outset and agreed during the SLA negotiations. At the request of the SASSA CEO, the CEO of CPS agreed that the payment of costs associated with the enrolment of dependants would only be effected at the conclusion of the bulk enrolment process. The SASSA CEO requested an independent report in respect of the costs associated with the enrolment of dependants to be tabled at the conclusion of the Bulk Enrolment Process...'

[14] As there is a dispute between the parties as to whether the above quoted document is a variation agreement or not, it is apt to restate what the Supreme Court of Appeal said in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] in interpreting legislation and agreements such as the one in this matter. In that matter, the Supreme Court of Appeal said the following:

> '... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having

[2]Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18

regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[15] The ordinary and grammatical language of the alleged "Variation SLA Agreement" of 15 June 2012 having regard to its context and the intention of the parties reveal that –

15.1 the contended variation of the SLA is nothing other than the recordal of the minutes held between the parties on that day;

15.2 no variation of the SLA was intended but confirmation that the enrolment of dependants would proceed as per the SLA;

15.3 payment of the enrolment in terms of the SLA would only be effected at the conclusion of the bulk enrolment of all dependants;

15.4 the costs of the bulk enrolment would only be known at the end of the bulk enrolment whereafter such costs would be tabled for discussion and agreement;

15.5 once an agreement is reached at the conclusion of the bulk enrolment process, payment would be effected;

15.6 no variation of the terms of SLA were discussed and agreed upon on that day justifying payment of the amount of R316 447 361.41 to CPS.

[16] According to SASSA the decision to vary the SLA was that of Ms Peterson. In paragraph 38 of SASSA's answering affidavit she states –

> '... I took a decision to consider the variation of the agreement at the meeting of 15 June 2012.'

That this was a unilateral decision by SASSA and not an agreement between the parties could not be clearer. This unilateral decision cannot be the basis of the variation of the SLA. The unilateral variation cannot therefore be elevated to the status of an agreement between the parties.

[17] To contend and argue as SASSA and CPS do, would be to strain the language of the minutes of 15 June 2012. I conclude therefore that on 15 June 2012 at Kyalami SASSA and CPS did not agree to vary the terms of SLA justifying the payment of R316 447 361.41 to CPS. The payment was without any basis and is therefore unlawful.

[18] There is a further basis upon which the meeting of 15 June 2012 could not be regarded as an agreement. The alleged variation agreement is vague with regard to CPS's costs which were to be investigated independently and then tabled, possibly for discussion and agreement. In *ALLPay 1*[3] the Constitutional Court reasoned –

> 'Vagueness and uncertainty are grounds for review under section 62(1) of PAJA. Certainty in legislation and administrative action has been linked with the rule of law...'

The Constitutional Court went further and stated that –

> '... vagueness can render a procurement process, or administrative action, procedurally unfair under section 6(2)(c) of PAJA. After all an element of procedural fairness – which applies to decision-making process – is that persons are entitled to know the case they must meet.'

[19] In the instant matter, the purported variation of the SLA is not envisaged in the Request for Proposal (RFP). The exclusion of all other bidders in preference of

[3]AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) paras 87-88

CPS is therefore unfair and contrary to the rule of law which is a fundamental value of our Constitution. It being unfair and contrary to the rule of law, it ought to be reviewed and set aside in terms of PAJA.

[20] Furthermore, in terms of the PFMA an organ of state such as SASSA must determine its procurement policies. It was on this basis that the Supply Chain Management Policy (1) of 2008 (SCMP) was promulgated. Clause 4.5.2 of that Policy provides –

> 'In the event that there is a need to extend the existing or concluded contracts or agreements approval must be sought from the Bid Committee with valid reasons forwarded. Continuity should not be advanced as a reason to extend projects using same supplier and service providers...'

[21] In addition, clause 4.7.8 of the Policy is of paramount importance. It reads –

> 'The Bid Adjudication Committee must also consider and rule on all recommendations / reports regarding the amendment, variation, extension, cancellation or transfer of contracts awarded.'

[22] In the present matter, the alleged variation agreement was concluded without the approval, consideration and ruling of the BAC. In the result, the alleged variation agreement is hit by the provisions of section 6(2)(a)(i) of PAJA in that it was not authorised by the SCMP. It is accordingly unlawful and reviewable.

[23] Having found that the variation of the SLA is unlawful and ought to be set aside, it stands to reason that the payment that flows from this unlawful decision is also unlawful. It cannot stand. It must also be reviewed and set aside.

[24] In addition, the payment falls foul of the provisions of section 6(2)(e)(ii) in that it was effected for ulterior purposes or motive; the payment is also not rationally connected with the purpose for which it was made; - section 6(2)(f)(ii); the payment was unreasonable in that no reasonable person in the position of SASSA could have effected such payment without any valid reasons – section 6(2)(h) of PAJA.

[25] CPS in its written submissions argues that on the basis of the definitions of "the Firm Price", in the RFP and the definition of a "Beneficiary" in the Social Assistance Act 13 of 2004, which also does not include children, the variation agreement was concluded by SASSA and CPS for inclusion of children, in order to align the concluded SLA and the Contract with these definitions. According to CPS, the Variation Agreement not being an extension of the existing or concluded agreement, cannot be a victim of clauses 4.5.2 and 4.7.8 of the Supply Chain Management Policy (1) of 2008. In support of this submission heavy reliance was based on clause 5.3.10 of the SLA which provides that –

> 'The parties record that the capturing of the information recorded in clause 5.3.1.2 is an additional function requested by SASSA. The parties shall discuss the obligations arising from such function and agree on the remuneration payable

to the contractor by SASSA in respect thereof as well as the impact on timing / delivery schedules. If the parties are unable to agree on a suitable remuneration and time / delivery variations, the contractor shall not be requested to render such additional duties or functions.'

[26] It is therefore the contention of CPS that the additional duties performed by it in terms of the Variation Agreement was accordingly not a variation or extension of the concluded agreement resulting in it performing this additional function for SASSA at cost. It being further contended that when CPS priced its bid with the projected beneficiary numbers as per the RFP, it only bid to enrol 9 082 250 beneficiaries at the firm price. The number of the beneficiaries having escalated to more than the original number, CPS was to be reimbursed the costs incurred in enrolling the additional numbers. I disagree with this submission and interpretation of clause 5.3.10. I see the matter differently.

[27] The argument and contention is far from the truth. In terms of the definitions of "Beneficiaries" in the SLA and the Contract, the definition "Beneficiaries" "shall bear the meaning assigned to it in the Act (**Act No. 13 of 2004**) and includes children." In concluding the SLA and the Contract, the parties were *ad idem* that "Beneficiaries" shall include children. That being the case the Variation Agreement, in my view, is an additional function which should have been in strict compliance with clause 6.3 of the Contract. There being no written agreement, the purported Variation Agreement is nothing else but an extension of existing or

concluded contract. Resultantly, the purported Variation Agreement is unlawful from which no lawful payment may be made.

[28] Clause 5.3 of the Contract deals with the information to be captured by CPS during the enrolment process. In terms of clause 5.3.1.2 the name and address of the school each child attends, must be captured. This is in addition of the current address (physical and postal), cell phone numbers, alternative contact numbers, employment of each grant recipient. In terms of the Contract, the parties agreed that the capturing of this information is "an additional function" to be performed by CPS on behalf of SASSA for an agreed price. If the parties did not agree on the remuneration, CPS was not obliged to perform this additional function. In the present matter, although the parties had not agreed on the remuneration for the additional work, CPS performed this additional work on the basis that it would be remunerated at cost. Nowhere in the papers are CPS's costs agreed upon. That the performance of this additional work was a unilateral decision by CPS, which in the absence of agreement to remuneration, was not obliged to perform, cannot be more obvious. The unilateral performance by CPS cannot be the justification for the payment of R316 447 361.41. The payment is contrary to the provisions of section 217 of the Constitution and all legal prescripts. It is therefore reviewable in terms of PAJA.

[29] CPS's contention that the reference in clause 5.3.10 to clause 5.3.1.2 is an error and should be 5.3.1.4 is of no assistance to it. Clause 5.3.1.4 requires not only

the capturing of "all 10 fingerprints where possible or two palm prints" of the grant recipients but "two footprints (new born to 6 years)..." of children. That both clauses require the capturing of information relating to children, which is additional information in terms of clause 5.3.10 admits no doubt. In the absence of an agreement as to CPS's remuneration, its remuneration in the amount of R316 447 361.41 is thus unjustified and unlawful. The payment is reviewable in terms of PAJA.

[30] Even if one were to read clause 5.3.1.2 in clause 5.3.10 to be referring to clause 5.3.1.4, the submission by CPS, is still wrong. In terms of clause 5.3.10, if the parties did not reach agreement on the remuneration of the additional work, CPS was not obliged to render such services without agreement on suitable remuneration having been reached. In the present matter, it rendered services without an agreement having been reached on its remuneration. In the absence of agreement with regard to remuneration, the process was skewed in favour of CPS. It was unfair, inequitable, opaque, anti-competitive and, probably, not cost-effective. On the authority of *ALLPay1*, as pointed out above, the process was flawed. It is reviewable in terms of PAJA.

[31] International authority and experience[4] teach us that deviations from fair process may themselves, quite often, be the symptoms of corruption or malfeasance in that the process is skewed in favour of one party to the exclusion of others. Such

[4]Transparency International: Handbook for Curbing Corruption in Public Procurement (Transparency International, Berlin 2006)

process is invariably unfair and therefore reviewable in terms of PAJA. The fact that clause 5.3.10 envisages the discussion and future agreement on remuneration of costs payable to CPS, reveal that there was indeed no agreement between the parties for CPS to perform the additional functions at all or at cost. In any event, the contended "at cost" remuneration to CPS is doubted by the independent auditing firm Nexia SAB & T (Nexia) engaged by SASSA to verify the correctness of the payment to CPS. Nexia points out that as a result of the Variation Agreement, SASSA overpaid CPS by an additional amount of over R13 million. It also, correctly, in my view, called into question the inclusion of salaries, bonuses, legal fees and expended assets in the payment made by SASSA to CPS as constituting "at cost" as contended for by CPS.

[32] I conclude that the contended Variation Agreement of 15 June 2012 was thus unfair and unlawful. It was skewed in favour of CPS. The alleged Variation Agreement tainted the process followed by SASSA and the consequent payment resulting therefrom. The tainted process is reviewable in terms of PAJA.

REMEDY

[33] What then, is the remedy? In terms of section 8 of PAJA, a court may, in proceedings for judicial review in terms of section 6(1) grant any order that is just and equitable. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty)*

Ltd[5], the Constitutional Court pointed out that the granting of a just and equitable remedy is discretionary based on a pragmatic blend of logic and experience.

[34] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*[6] Moseneke DCJ reasoned that –

> '...the remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law ... and at a broader level, to entrench the rule of law.'

[35] In the instant matter, as a result of SASSA's unlawful conduct, the fiscus has been robbed of a substantial amount of money intended for the most vulnerable and poor people of our country. The fiscus is poorer as it did not receive fair value for what it paid. It is just and equitable that the payment of R316 447 361.41 made by SASSA to CPS, together with interest, be returned to the fiscus for the benefit of those for whom it was intended in the first place. This, in my view, is a just and equitable remedy that would effectively vindicate the fair process violated by the parties. The remedy would entrench the rule of law.

[36] Having regard to the aforesaid, the following order is granted –

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[5] Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) paras 84-85
[6] Steenkamp N.O v Provincial Tender Boards, Eastern Cape 2007 (3) SA 121 (CC) para 29

36.1 The Variation Agreement between SASSA and CPS made on 15 June 2012, and the resultant payment made in the sum of R316 447 361.41 are reviewed and set aside;

36.2 CPS is ordered to refund the said amount of R316 447 361.41 to SASSA, with interest from June 2014 to date of payment;

36.3 The respondents are, jointly and severally, ordered to pay the costs of the application, including the costs of two counsel.

M TSOKA

JUDGE OF THE HIGH COURT

DATE OF HEARING: 22 FEBRUARY 2018

DATE OF JUDGMENT: 23 MARCH 2018

Appearances:

Counsel for the applicant:	Adv Budlender
	Adv Kelly
Instructed by:	MacRobert Attorneys

Counsel for the third respondent:	Adv Cockrell SC
	Adv Bleazard
Instructed by:	Smit Sewgoolam Incorporated