IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 21904/2015

In the matter between:

CORRUPTION WATCH (NPC) (RF)	Applicant
and	
THE CHIEF EXECUTIVE OFFICER OF SASSA	First Respondent
SASSA	Second Respondent
CASH PAYMASTER SERVICES (PTY) LTD	Third Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1 The applicant has applied to review two decisions of the second respondent ("SASSA") that preceded the payment R316 million to the third respondent ("CPS"). The applicant seeks an order directing CPS to repay the full amount to SASSA.

2 At the time when the applicant launched the review, it had an imperfect understanding of the circumstances in which the R316 million had been paid to CPS. Its founding affidavit made the bald averment that the payment decision "did not comply with contract between SASSA and CPS".[1]

3 The answering affidavits of SASSA and CPS explained at length why this averment was wrong. SASSA and CPS described how the payment had been made in terms of a contractual arrangement that was intended to compensate CPS for its additional costs in performing certain enrolment services ("the SLA Variation Agreement"). In other words, the payment was made in accordance with the terms of a contract between SASSA and CPS.

4 Once the applicant was apprised of the full facts, it might have elected to withdraw the application. But the applicant pressed on. Its replying affidavit described the respondents' reliance on the SLA Variation Agreement as "plainly contrived"[2] and adopted the curious position that "the mere fact of [the SLA Variation Decision] cannot and does not render SASSA's decision of 25 April

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1 Lewis para 26.1 page 17

2 Lewis para 11 page 566

2014 to approve the payment to CPS lawful or valid".[3] The applicant purported to amend its notice of motion (even though it had no entitlement to do so)[4] so as to impugn SASSA's decision to conclude the SLA Variation Agreement.[5] The replying affidavit suggested that the applicant stood by all of the review grounds advanced in the founding papers.

5 When the applicant filed its heads of argument, it became clear that it had in fact abandoned almost all of the review grounds in its founding papers. The applicant advances only three review grounds in its heads of argument and, as we shall explain below, the second review ground is in effect indistinguishable from the first.

6 For the reasons that follow, we submit that all of the review grounds in the applicants' heads of argument are without merit.

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3 Lewis para 12 page 566

4 An amended notice of motion was attached to the replying affidavit at page 631. The applicant did not comply with Rule 28 by giving notice of intention to effect these amendments. It had at an earlier stage exercised its entitlement to amend the notice of motion in terms of Rule 53 (see page 102).

5 Amended notice of motion prayer 2 page 631

THE SEQUENCE OF EVENTS

7 We begin by summarising the chronology of events that led to the review. It is necessary to do so in some detail because the applicant's heads of argument fail to provide an accurate summary of the facts.

The RFP

8 In 2011, SASSA published a call for tenders for the provision of payment services for social grants ("the RFP").[6]

9 The RFP required bidders to indicate a "Firm Price", which was defined as follows:

> "Firm Price means the all-inclusive transaction fee charges per Grant Recipient charged by the Bidder to SASSA for the provision of services for the duration of the contract, which Firm Price shall not be in excess of R16.50 (VAT inclusive) per transaction per month."[7] (our underlining)

10 Contrary to the applicant's understanding,[8] the Firm Price was not a once-off amount. It was an amount that would be paid to CPS per transaction per month. Moreover, as the underlined words made clear, the Firm Price would be paid "per Grant Recipient". In other words, the RFP indicated that CPS would only be entitled to receive the monthly fee in circumstances where it made payment to a "Grant Recipient".

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6 The RFP is included in the Rule 53 record at page 73ff.

7 Rule 53 record: page 80

8 See, for example, Lewis para 44.1 page 582

11 The RFP defined a "Grant Recipient" as "a Beneficiary, a primary care giver or Procurator who receives one or more social grants".[9] A "Beneficiary", in turn, was defined as a person who receives Social Grants in terms of the Social Assistance Act 13 of 2004.[10]

12 The Social Assistance Act 13 of 2004 ("the Act") defines a "beneficiary" as "a person who receives social assistance in terms of sections 6, 7, 8, 9, 10, 11, 12 or 13".[11] This has the following implications:

12.1 The Act provides for child support grants,[12] care dependency grants[13] and foster child grants.[14]

12.2 A child who is the subject of these grants is a "dependant" as defined in the Act, namely "a person whom the beneficiary is legally obliged to support financially and is in fact supporting".[15]

12.3 A child is not a "beneficiary". The beneficiary is the primary care-giver, the parent or the foster parent because they are the people who will receive the grant money.

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9 Rule 53 record: page 80

10 Rule 53 record: page 79

11 Section 1

12 Section 6

13 Section 7

14 Section 8

15 Section 1

13 The RFP provided that "Bidders in their Proposal must consider the projected beneficiary numbers over the MTEF, as attached to this document as annexure 2".[16] Annexure 2 estimated that there would be 9 082 521 "existing beneficiaries" and 712 200 "new beneficiaries" in 2011/2012.[17] These estimates did not include children for whom the care-givers and procurators collected social grants.[18]

14 The RFP stated that "[f]or child support, foster child care and care dependency grants, the Successful Bidder/s must ensure that the Biometrics and Data relating to children is also captured".[19] This meant that the Successful Bidder would be required to capture the biometrics and data of children during the enrolment process. However, the RFP did not require the Bidder to do so as part of the Firm Price.[20]

The CPS bid

15 CPS priced its bid in accordance with the projected beneficiary numbers as contained in annexure 2 to the RFP.[21] In other words, CPS bid to enrol 9 082 250 existing beneficiaries at the Firm Price.[22]

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16 Rule 53 record: page 110 (section E clause 2.7)

17 Annexure MP1 to the CPS answering affidavit page 430. (This is missing from Rule 53 record page 117.)

18 Petersen para 13 page 229

19 Rule 53 record page 96 (section C clause 3.1.6). The wording is partially obscured, but the full wording appears in Pillay para 28 page 384

20 Pillay paras 29 and 30 page 384

21 Pillay para 31 page 385 read with annexure MP6 page 458

22 Pillay para 32 page 385

16 This meant that CPS had to calculate its Firm Price at a level that would allow it to cover the costs involved in registering 9 082 250 existing beneficiaries. However, CPS's Firm Price was not intended to cover the cost of enrolling children who were not beneficiaries. The RFP did not furnish any information that would have enabled CPS to estimate the costs of doing so. The costing template forming part of the RFP only allowed for costing to take place in relation to the number of beneficiaries indicated in annexure 2 to the RFP.[23]

17 In short, CPS was situated behind a veil of ignorance when it came to estimating the costs involved in capturing the data of children who were not beneficiaries. CPS could not have estimated those costs and it did not include them as part of its Firm Price.

The Agreement and the SLA

18 On 17 January 2012, SASSA announced the award of the tender to CPS.[24]

19 SASSA and CPS then entered into negotiations to conclude a contract. During the course of the negotiations, it was understood by both parties that there would be cost implications if CPS were required to capture the data of children during the bulk enrolment process. It was agreed between CPS and SASSA that the capturing of the data of children would be incorporated into a pilot of the bulk

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23 Pillay para 32 page 385

24 Pillay para 34 page 386

enrolment process, so that a proper assessment could be made before a final decision was made by SASSA.[25]

20 This state of uncertainty was reflected in the Contract for the Provision of Social Grants ("the Contract")[26] and the Service Level Agreement ("the SLA"),[27] both of which were concluded on 3 February 2012:

20.1 In the Contract and the SLA, a "Beneficiary" is defined as "[bearing] the meaning assigned to it in the Act and includes Children" (our underlining). In other words, the definition of beneficiary was extended beyond the meaning in the RFP and the Act so as to include children.

20.2 The SLA requires CPS to verify the identity of children before enrolment[28] and to capture data in relation to children when performing the enrolment process.[29]

20.3 Clause 5.3.10 of the SLA provides as follows:

> "The Parties record that the capturing of the information recorded in clause 5.3.1.2[30] is an additional function requested by SASSA. The Parties shall discuss the obligation arising from such additional function and agree on the remuneration payable to [CPS] by SASSA in respect thereof as well as the impact on the timing/delivery schedules. If the Parties are unable to agree on a suitable remuneration and/or timing/delivery variations,

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25 Pillay para 36 page 387

26 Rule 53 record page 120ff

27 Rule 53 record page 135ff

28 SLA clause 5.3.8

29 SLA clause 5.3.12 and 5.3.1.4

30 CPS has explained that this ought also to have referred to clause 5.3.1.4 (Pillay para 39 page 389).

> [CPS] shall not be required to render such additional duties or functions."

21 In short, clause 5.3.10 provides in express terms that SASSA and CPS would agree on the remuneration to be paid to CPS for capturing the data in relation to children since this was an "additional function" (i.e. a function not covered by the Firm Price).

The SLA Variation Agreement

22 Between 1 and 14 June 2012, CPS ran an extended pilot project of the bulk enrolment process that included the capturing of children's data.[31]

23 On 15 June 2012, CPS reported back to SASSA on the outcome of the pilot project.[32] The minute of that meeting was signed by the CEO of SASSA and the CEO of CPS.[33] Under the heading "Enrolment of dependents", the minute records as follows:

> "The SASSA CEO confirmed that the enrolment of dependents should proceed, as specified at the outset and agreed upon 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 dependents 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 dependents to be tabled at conclusion of bulk enrolment process."

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31 Pillay para 41 page 389

32 Pillay para 42 page 389 read with Rule 53 record page 55ff

33 Rule 53 record page 70 to 72

24 In other words, the minute records that it was agreed that CPS would carry the costs of capturing the data of children during the enrolment process and would then submit its claim for reimbursement of those costs at the conclusion of the bulk enrolment process. It was agreed that CPS would furnish CPS with an "independent report" in respect of those costs.

25 SASSA and CPS have taken the view that the agreement recorded in the minute constitutes an amendment to the terms of the SLA. This is what we have referred to as "the SLA Variation Agreement".

26 The SLA Variation Agreement has two important features, both of which are misunderstood by the applicant:

26.1 The first is that CPS would only be entitled to recover the actual costs it incurred in capturing the data of children. In other words, CPS would not be entitled to make a profit.

26.2 The second is that the costs involved in capturing the data of children would not be determined in advance but would rather be furnished by CPS after it had completed the bulk enrolment process. The reason is that it was impossible to estimate these costs: it was not known how many children would have to be enrolled or where they resided.[34]

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[34] Pillay para 45 page 390; Petersen para 46 page 242

Payment to CPS

27 CPS proceeded to capture the data of children as required by the SLA Variation Agreement. In doing so, CPS registered almost 12 million children. This means that, during the bulk enrolment process, CPS registered approximately 21 million people – more than double the number of persons that were to be registered in terms of annexure 2 to RFP.[35]

28 On 10 March 2014 and as envisaged by the SLA Variation Agreement, CPS submitted an invoice to SASSA for the costs incurred in capturing the data of children as part of the bulk enrolment process.[36] The total amount was R316 447 361 (including VAT). As required by the SLA Variation Agreement, the invoice was accompanied by a report of KPMG[37] confirming the accuracy of the costs calculation.

29 SASSA paid 80% of the invoiced amount to CPS, and retained 20% until such time as it could obtain a report from an auditor to verify the correctness of the claim.[38] However, on the advice of its auditor, CPS returned the money to SASSA.[39]

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35 Pillay para 48 page 390; Petersen para 47 page 243

36 Rule 53 record: page 31. The invoice referred to these costs under the heading "Re-registrations in excess of tender requirements".

37 Rule 53 record: page 66

38 Rule 53 record: page 43

39 Rule 53 record: page 41

30 The Bid Adjudication Committee ("the BAC") then reconsidered the matter and made the following recommendation, which was accepted by SASSA's CEO on 22 May 2014:[40]

> "(1) The variation order to effect full payment of R316 447 361.41 for the costs incurred by [CPS] to re-register all the grant recipients as well as outstanding beneficiaries.
>
> (2) The Agency to engage the services of an Independent Auditor to verify the completeness and correctness of the claim submitted by CPS which incidentally was audited by their external auditors, KPMG. Further, should any discrepancies be uncovered by the Independent Auditor, CPS shall be afforded an opportunity to respond to the allegations and if it accepts the errors, CPS be held liable to refund the Agency the amount in question deemed overpaid."

31 What this means is that SASSA resolved to pay the full invoice amount to CPS and to engage an independent auditor to verify the accuracy of the costs reflected on the invoice. If the independent auditor were to conclude that SASSA had overpaid CPS for its costs, CPS would be required to repay the overpayment to SASSA.

32 In accordance with this decision, SASSA paid the full amount to CPS and engaged Nexia to audit the costs reflected on the invoice. Nexia in due course furnished a report regarding the costs reflected in CPS's invoice.[41] There has

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40 Rule 53 record: page 48

41 Annexure VP15 page 325ff

been correspondence between CPS and Nexia regarding the report,[42] and SASSA is engaging with CPS to seek to address the issues raised in the report.[43]

Conclusion

33 The events summarised above are common cause of the papers. We draw particular attention to the following aspects, all of which are ignored by the applicant even though they undermine the entire basis for its review:

33.1 The SLA provided in express terms (in clause 5.3.10) that SASSA and CPS would have to agree on the remuneration to be paid to CPS for capturing data in relation to children as part of the bulk enrolment process.

33.2 CPS relied on this provision in order to capture the data of 12 million children. In the result, CPS registered approximately 21 million people – more than double the number of persons that were to be registered in terms of the RFP.

33.3 CPS incurred costs in capturing the data of the 12 million children. Those costs did not form part of the Firm Price in CPS's bid. Unless CPS were to be compensated for those costs, it would be out of pocket.

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42 Annexure MP13 page 513

43 Petersen para 71 page 253

33.4 SASSA agreed to remunerate CPS only for the costs it actually incurred in capturing the data in relation to children. It did so in the SLA Variation Agreement.

33.5 In accordance with the SLA Variation Agreement, CPS invoiced SASSA for the costs it had incurred in capturing the data in relation to children.

33.6 SASSA resolved to pay the invoice amount, to appoint an independent auditor who would assess the accuracy of CPS's costs, and to recover any overpayment if it were to transpire that the invoice amount exceeded CPS's costs.

33.7 The payment made by SASSA accords with CPS's assessment of the costs it incurred in capturing the data in relation to children. If it were to transpire that CPS's calculation of its costs was too high, CPS would have to repay any overpayment to SASSA.

33.8 The repayment mechanism means that, at the end of the day, CPS will never be able to make a profit from capturing the data in relation to children but will merely be compensated for its costs.

THE FIRST REVIEW GROUND IS WITHOUT MERIT

34 The applicant's first review ground is that the SLA Variation Agreement was concluded in circumstances where SASSA failed to comply with the SCM Policy. The applicant says that this vitiated the variation decision and the payment decision.[44]

35 The SLA Variation Agreement was concluded on 15 June 2012. Since the 2012 SCM Policy is dated September 2012,[45] it appears that it was not in force when the SLA Variation Agreement was concluded. Presumably the 2008 SCM Policy was in force at that time.[46]

36 The applicant contends that there was no compliance with the 2008 SCM Policy because the approval of the BAC was not obtained for the SLA Variation Agreement. For the reasons that follow, there is no merit in this contention.

The variation agreement was not an "extension" to an existing contract

37 Clause 4.5.2 of the 2008 SCM Policy is triggered "in the event that there is a need to extend the existing or concluded contracts or agreements".

38 The SLA Variation Agreement did not "extend" the SLA. That is made plain by clause 5.3.10 of the SLA, which provided as follows:

> "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

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44 Applicant's heads of argument para 41

45 Rule 53 record: page 205ff

46 Rule 53 record: page 160ff

> discuss the obligation arising from such additional function and agree on the remuneration payable to [CPS] by SASSA in respect thereof as well as the impact on the timing/delivery schedules. If the Parties are unable to agree on a suitable remuneration and/or timing/delivery variations, [CPS] shall not be required to render such additional duties or functions."

39 In short, the SLA Variation Agreement did not "extend" the SLA by requiring CPS to perform new services that did not form part of the SLA. It merely provided for the manner in which CPS would be remunerated for capturing the data of children in circumstances where the capturing of that data formed part of the SLA.

40 The applicant contends that "the SLA Variation Agreement was concluded precisely because the scope of the services under the service level agreement were [sic] narrower than what was contemplated in the tender RFP".[47] This contention makes no sense because, as we have indicated in paragraph 20 above, the scope of the services in the SLA was broader than the scope of the services in the RFP.

41 In the result, clause 4.5.2 of the 2008 SCM Policy was not triggered because there was no "extension" to the SLA.

The 15% threshold was not exceeded

42 If the Court were to find that clause 4.5.2 of the 2008 SCM Policy was triggered, then it would only have been necessary to seek approval from the BAC if the "extension" was more than 15% of the project fee. This was not the case

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47 Applicant's heads of argument para 52.3

because the amount paid to CPS in terms of the SLA Variation Agreement did not exceed 15% of the value of the Contract.[48]

43 The applicant contends that the need to seek approval from the BAC applied to all extensions, even those below the 15% threshold. This contention is wrong:

43.1 Clause 4.5.2 of the 2008 SCM Policy provides that "[a] maximum of 15% of the project fee would be allowed". This cannot mean that a maximum of 15% of the project fee would be allowed by the BAC, because if that were so it would be impossible for the BAC ever to extend an existing contract by more than 15%. Clause 4.5.2 means that a maximum of 15% of the project will be allowed without the need to seek the approval of the BAC.

43.2 The Instruction Note issued by Treasury (dated 31 May 2011) makes this plain. It provides that "any deviation in excess of these thresholds will only be allowed subject to the prior written approval of the relevant treasury" (our underlining).[49]

43.3 The successor clause 6.4 in the 2012 SCM Policy adopts the same structure. It fine-tuned the threshold (defined as 20% or R20 million for construction-related goods, works and/or services and 15% or R15 million for other goods and services) and provided that "[a]ny deviation in excess of these thresholds must be accompanied by a motivation to be

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48 Petersen para 114.2 page 271; Pillay para 12 page 638

49 Annexure DL27 para 3.9.4 page 612

forwarded to the Bid Adjudication Committee which will then recommend to the CEO for approval" (our underlining). There is no reason why the same degree of oversight would not be required of the BAC under the 2008 and 2012 SCM Policies.[50]

44 Although the applicant relies on clause 4.7.8 of the 2008 SCM Policy, this takes the matter no further. It merely provides that the BAC must "consider and rule on all recommendations/reports regarding the amendments, variation, extension, cancellation or transfer of contracts awarded". If the 15% threshold is not exceeded, there would be no "recommendation" or "report" that the BAC has to "consider and rule on".

The BAC gave its approval after the event

45 If the Court were to reject all of the submissions above, then the fact of the matter is that the BAC did give approval for the SLA Variation Agreement. It did so on 24 April 2014,[51] after the SLA Variation Agreement had been concluded but before the payment was made.

46 The applicant contends that the BAC could not give approval after the SLA Variation Agreement had been concluded. That is incorrect. There is nothing in the wording of clause 4.5.2 of the 2008 SCM Policy that requires the BAC to give approval before a contract is extended. On the contrary, clause 4.5.3 makes it

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50 Annexure DL16 page 154

51 Rule 53 record page 48

plain that "ex post facto approval" may be given: it does not invalidate such approval but merely provides for the imposition of sanctions.

Any deviation was not material

47 If the Court were to reject all of the preceding arguments and were to find that there was non-compliance with the 2008 SCM Policy, then the deviation was not material and did not vitiate the decision to conclude the SLA Variation Agreement.

48 Our courts have drawn a distinction between requirements that are "mandatory" (or "peremptory") and requirements that are "directory". The traditional view has been that requirements which are mandatory must be strictly complied with failing which the purported act will be a nullity, whereas in the case of requirements which are directory it will suffice if there has been "substantial compliance".[52] However, there has been a change of approach in recent years. It is now recognised that in appropriate cases there might be sufficient compliance with a mandatory requirement even where there has not been exact compliance. In terms of this modern approach, mandatory requirements will not be held to require exact compliance where substantial compliance will achieve all the relevant objects.[53]

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52 Le Roux v Griggs-Spall 1946 AD 244 at 250

53 JEM Motors Ltd v Boutle 1961 2 SA 320 (N) at 327-328; Beukes v Mdhlalose 1990 2 SA 768 (N) at 773-774; Makwetlane v RAF 2003 3 SA 439 (W) at 457-458; Observatory Girls Primary School v Dept of Education 2003 4 SA 246 (W) at 255D

49 In *Allpay (1),*[54] the Constitutional Court summarised the correct approach as follows:

> '[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.
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> ….
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> [30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court, O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose".' (our underlining)

50 In other words, "the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained".[55]

51 The purpose of the 2008 SCM Policy is to ensure effective oversight in the use of public resources and to prevent wasteful expenditure. These purposes have

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54 Allpay Consolidated Investment Holdings (Pty) Ltd v CEO South African Social Security Agency 2014 1 SA 604 (CC)

55 Allpay (1) para 22(b). See also para 58 ("The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantially achieved.")

been achieved in the present case. The BAC was apprised by SASSA of the SLA Variation Agreement and approved it before any payment was made to CPS in terms of the Agreement.[56] Further, as we have indicated above, the SLA Variation Agreement provided for SASSA to compensate CPS only for the costs it actually incurred in capturing data on children as part of the bulk enrolment process.

52 Since the purpose of the 2008 SCM Policy was achieved by SASSA, any defect in the process should not be regarded as material.

Conclusion

53 For the reasons set out above, we submit that the first review ground is without merit.

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56 Rule 53 record page 48

THE SECOND REVIEW GROUND IS WITHOUT MERIT

54 The second review ground is that SASSA made a material error of law by adopting the view that the 2008 SCM Policy only required the BAC's consent in circumstances where a value could be attributed to the varied services.[57]

55 This adds nothing to the first review ground. If the first review ground is good, then the second review ground would be superfluous. If the first review ground is bad, then the alleged "error of law" would not be material.

56 It is therefore unnecessary for us to say anything more about the second review ground.

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57 Applicant's heads of argument para 46

THE THIRD REVIEW GROUND IS WITHOUT MERIT

57 The third review ground is that the payment decision was unlawful.

Irrationality and unreasonableness

58 The applicant contends that the payment decision was "unreasonable and irrational" because (*a*) the parties had not agreed a basis on which the amount was to be calculated and (*b*) SASSA had not investigated whether the sum was owing to CPS.[58]

59 The applicant uses the adjectives "unreasonable" and "irrational" as if they are synonyms. This is incorrect because the words have different meanings in law:

59.1 When assessing the rationality of an administrative decision, the Court is not concerned with whether the same purpose could have been achieved by less restrictive means. It is only concerned with whether there is a rational relationship between the means chosen and the end sought to be achieved.[59] If the decision furthers the administrator's purpose, then it is a rational one and it matters not that the same purpose might have been achieved by less restrictive means.[60] The principle has been formulated as follows:

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58 Applicant's heads of argument para 54

59 Affordable Medicines Trust and others v Minister of Health and others 2006 3 SA 247 (CC) at para 78; Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 3 SA 293 (CC) at para 51; Democratic Alliance v President of the Republic of South Africa 2013 1 SA 248 (CC) at para 32

60 As Nugent JA has stated, "a decision is 'rationally' connected (to the purpose for which it was taken etc) if it is connected by reason, as opposed to being arbitrary or capricious" (Calibre

> "[R]ationality entails that the decision is founded upon reason — in contra-distinction to one that is arbitrary — which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."[61]

59.2 When it comes to reasonableness, the bar is placed at a higher level. The SCA has explained the test for reasonableness as follows:

> "there is considerable scope for two people acting reasonably to arrive at different decisions. I am not sure whether it is possible to devise a more exact test for whether a decision falls within the prohibited category than to ask, as Lord Cooke did in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) at 157 - cited with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (supra) - whether in making the decision the functionary concerned 'has struck a balance fairly and reasonably open to him [or her]'."[62]

60 The applicant contends that it was "irrational and unreasonable" for SASSA to have paid money to CPS in circumstances where "the parties had not even agreed a basis on which it was to be calculated".[63] This submission is entirely misconceived because the SLA Variation Agreement makes it plain that the parties had agreed a basis on which CPS would be remunerated: CPS would be entitled to recover its costs (but not make a profit) and its costs would have to be verified by independent audit. Those costs could not be fixed at the time of the

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Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 5 SA 457 (SCA) at para 58).

61 Minister of Home Affairs v Scalabrini Centre 2013 6 SA 421 (SCA) at para 65

62 Calibre (supra) at para 59

63 Applicant's heads of argument para 54

SLA Variation Agreement because it was not known how many children would have to be enrolled or where they were located.[64]

61 The applicant also contends that it was "irrational and unreasonable" for SASSA to have paid money to CPS in circumstances where "SASSA had not even conducted its own investigations into whether this sum was owing to CPS".[65] This contention is difficult to understand because the SLA Variation Agreement makes it plain that SASSA had investigated the matter and had accepted that it was obliged to remunerate SASSA for the registration of children. SASSA in due course resolved to pay the full invoice amount to CPS, to appoint an independent auditor and to recover any overpayment from CPS.[66] The applicant has not suggested that CPS would not be good for the money if it were to transpire that it was overpaid.[67] But in any event, SASSA could simply set-off any overpayment against its future liability towards CPS.[68]

Section 217 of the Constitution

62 The applicant contends that the payment decision was unlawful because SASSA did not comply with section 217 of the Constitution.[69] The applicant says that the

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64 Petersen para 54 page 242; Pillay para 45 page 387

65 Applicant's heads of argument para 54

66 Rule 53 record: page 48

67 On the contrary, the applicant accepts that SASSA would have a claim against CPS for any overpayment: see Lewis para 87.3 page 600

68 Petersen para 110.7 page 268

69 Applicant's heads of argument para 55

payment decision "did not meet the requirements of transparency, competitiveness and cost-effectiveness".[70]

63 Section 217(1) of the Constitution provides that, when an organ of state contracts for goods or service, "it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective" (our underlining). In other words, it is the system (not a particular procurement decision) that must be fair, equitable, transparent, competitive and cost-effective.[71]

64 SASSA complied with section 217(1) when it adopted the 2008 SCM Policy. The applicant's complaint is not directed at the 2008 SCM Policy; it is directed at the payment decision. But a decision (as opposed to a system) is not subject to review in terms of section 217(1), although it may be reviewed for non-compliance with PAJA and section 33 of the Constitution.[72] If the applicant's real complaint is that the payment decision did not comply with the 2008 SCM Policy, then the third review collapses into the first and second review grounds.

65 But even if the payment decision is directly reviewable for non-compliance with section 217(1), we submit that there has been compliance with its requirements:

65.1 The payment decision was transparent and cost-effective.

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70 Lewis para 26.3 page 17

71 Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 3 SA 121 (CC) para 33; Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others 2008 2 SA 481 (SCA) para 4

72 Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC) paras 40, 43

65.2 No competitive bidding process was possible, as CPS was already engaged in the process of registering grant recipients and beneficiaries onto its biometric database, which it alone could operate. Inter-operability would have been impossible if a different provider were to capture the data of children on a different system. The tender required a single, consolidated database for the payment of grants nationally (inter alia for the one-to-many search function that prevents fraud and duplicate payments). The technological requirements of the registration service were such that CPS was the only possible service provider.[73]

65.3 CPS obtained no profit as a result of the decision – it was required to provide the service at cost. Thus, even if there were competitors (which is not the case) the decision would not have been unfair or inequitable in the circumstances.

Sections 50 and 51 of the PFMA

66 The applicant contends that the payment decision was unlawful because there was no compliance with sections 50 and 51 of the PFMA.[74] It says that the CEO of SASSA "did not exercise the duty of utmost care imposed on her office, did not act in SASSA's best interests, and failed to take appropriate steps to prevent irregular expenditure".[75]

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73 Pillay paras 110.1 and 110.2 page 410

74 Applicant's heads of argument para 55

75 Applicant's heads of argument para 57

67 There is no merit in this contention. The CEO of SASSA has explained in her answering affidavit why the payment furthered the interests of SASSA (and, indeed, the country as a whole). She points out that it resulted in savings of R3.2 billion in the 2013/2014 financial year for SASSA.[76]

68 The applicant suggests faintly that SASSA "may have overpaid CPS by at least R13 million".[77] This Court cannot resolve on the papers whether CPS was or was not overpaid. But it does not matter because, if it were to turn out that CPS was overpaid, then SASSA would be able to recover the overpayment.

Conclusion

69 For the reasons set out above, we submit that the third review ground is without merit.

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76 Petersen para 74 page 253

77 Applicant's heads of argument para 58

RELIEF IF THE COURT WERE TO GRANT THE APPLICATION

70 We submit that the application should be dismissed. In order to cater for the possibility that this Court may take a different view of the matter, we consider below what relief would be appropriate if the Court were to grant the application.

71 In its amended notice of motion, the applicant seeks three forms of substantive relief:

71.1 Prayer 2 seeks to review and set aside "the first respondent's decision of 15 June 2012 to conclude the 'SLA Variation Agreement' with [CPS]". The applicant refers to this as "the variation decision".

71.2 Prayer 3 seeks to review and set aside the first respondent's decision to approve payment by SASSA of R316 447 361 to CPS. The applicant refers to this as "the payment decision".

71.3 Prayer 4 seeks an order directing CPS to repay the full amount of R316 447 361 to SASSA, along with interest.

72 We accept that, if this Court were minded to grant the review, it would be incumbent on the court to declare the impugned decisions invalid.[78] However, it would not be appropriate to set aside the impugned decisions, as is sought under prayers 2 and 3. Moreover, it would not be competent or appropriate for the

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78 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 4 SA 113 (CC) para 84

Court to grant the relief in prayer 4. We make these submissions for the reasons that follow.

The relief in prayer 4 would be incompetent even if prayer 2 were to be granted

73 Prayer 2 of the amended notice of motion seeks to set aside the decision of SASSA's CEO to enter into the SLA Variation Agreement. However, prayer 2 does not seek to set aside the SLA Variation Agreement.

74 There is an obvious difference between the decision of a public body to enter into a contract and the contract itself. The former is a unilateral act and the latter is a bilateral act. The applicant has elected to review the former but not the latter.

75 If follows that, even if this Court were minded to grant the relief in prayer 2, the SLA Variation Agreement would continue to stand and would continue to impose obligations on SASSA. One of those obligations is to pay CPS for the costs of capturing the data of children as part of the bulk enrolment process.

76 For as long as the SLA Variation Agreement continues to exist in fact and in law, it would not be competent for this Court to grant an order directing CPS to repay the money that it received in terms of that agreement.

Setting aside the impugned decisions and granting the relief in prayer 4 would not be just and equitable

77 Section 8(1) of PAJA provides that a Court may grant "any order that is just and equitable" in review proceedings.

78 In the present circumstances, it would be unjust and inequitable to set aside the decision of the SASSA CEO to conclude the SLA Variation Agreement (prayer 2) and to pay the money to CPS (prayer 3), and it would also be unjust and inequitable to require CPS to repay the money to SASSA (prayer 4). We make this submission for the following reasons:

78.1 It is common cause that CPS performed the work of capturing the data of children as part of the bulk enrolment process ("the children data-capture work").

78.2 It is common cause that the children data-capture work was required to meet the objects of the tender, and it is not seriously disputed that only CPS was able to provide this service.[79]

78.3 It is common cause that CPS incurred costs in performing the children data-capture work.

78.4 It is common cause that the Firm Price in the Contract was not intended to cover the costs incurred by CPS in performing the children data-capture work. SASSA[80] and CPS[81] say as much, and it is not disputed by the applicant.

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79 Petersen para 40 page 236, paras 76-77 page 251; Pillay para 110 page 410; Lewis para 92 page 601

80 Petersen para 91.6 page 259

81 Pillay para 10 page 375

78.5 It is common cause that SASSA has secured a benefit from the children data-capture work. SASSA says that it resulted in savings of R3.2 billion in the 2013/2014 financial year.[82]

79 It follows from all of these common cause facts that, if the Court were to set aside the decisions in prayers 2 and 3 and were to grant the consequential relief in prayer 4, the payment made to CPS would have no legal basis and SASSA would be enriched at the expense of CPS.[83] Remarkably, that is the very outcome asked for by the applicant. The applicant makes no attempt to explain why it would be just and equitable for SASSA to retain the benefits of the children data-capture work without having to pay anything to CPS for those benefits.

80 The unfairness of the relief sought by the applicant is highlighted by the fact that it has not sought to set aside the SLA:

80.1 Clause 5.3.10 of the SLA provides as follows:

> "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 obligation arising from such additional function and agree on the remuneration payable to [CPS] by SASSA in respect thereof as well as the impact on the timing/delivery schedules. If the Parties are unable to agree on a suitable remuneration and/or timing/delivery variations, [CPS] shall not be required to render such additional duties or functions."

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82 Petersen para 74 page 253

83 On the consequences of a setting aside order, see: Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA) paras 20-21

80.2 CPS has already performed the work in clause 5.3.1.2. It is therefore too late for CPS to exercise its remedy of declining to perform the work if it cannot agree on remuneration with SASSA.

80.3 The applicant asks the Court to direct CPS to repay the money it received pursuant to clause 5.3.10 even though the applicant does not impugn the validity of clause 5.3.10. Such relief would be unfair.

Conclusion

81 For all of these reasons, we submit that it would not be just and equitable to grant the relief in prayers 2, 3 and 4. The public coffers are adequately protected by the fact that CPS would be obliged to repay whatever portion of the R316 million may be found to constitute an overpayment.

PRAYER

82 CPS asks that the application be dismissed.

83 As regards costs, we make the following submissions:

83.1 In its answering affidavit, CPS stated that it would not seek a cost order against the applicant if it were to withdraw the application after receipt of the answering affidavit but would seek a costs order if the applicant were to persist.[84]

83.2 We have already submitted that the applicant should have withdrawn the application once it received the answering affidavits and was apprised of the facts. The applicant's failure to do so was unreasonable.

83.3 *Biowatch* held that if an application is "manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs order".[85] The Constitutional Court explained that "[w]hat matters, is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it".[86]

83.4 In *Lawyers for Human Rights*, the Constitutional Court underscored that *Biowatch* "does not mean risk-free constitutional litigation". It held that

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84 Pillay para 154 page 428

85 Biowatch Trust v Registrar, Genetic Resources 2009 6 SA 232 (CC) para 24.

86 Biowatch (supra) para 20. Helen Suzman Foundation v President of the Republic of South Africa & Others 2015 (2) SA 1 (CC) para 36.

the court may order costs in constitutional litigation where it is in the interests of justice to do so.[87]

83.5 This application was launched on the basis of a misapprehension of the facts. We respectfully submit that the applicant's persistence in this application, upon learning of the true facts, is inappropriate. The applicant's persistence has, foreseeably, led all the respondents (including the state) to incur unnecessary legal costs and has wasted judicial resources. CPS therefore asks that the applicant be directed to pay its costs, including the costs of two counsel.

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Chambers
Sandton
9 March 2017

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87 Lawyers for Human Rights v Minister in the Presidency & Others 2017 (1) SA 645 (CC) para 18