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MacRobert Inc
Attorneys

51

(012) 425-3400

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 21904/2015

In the matter between:

CORRUPTION WATCH (NPC) (RF)

Applicant

and

**THE CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY**

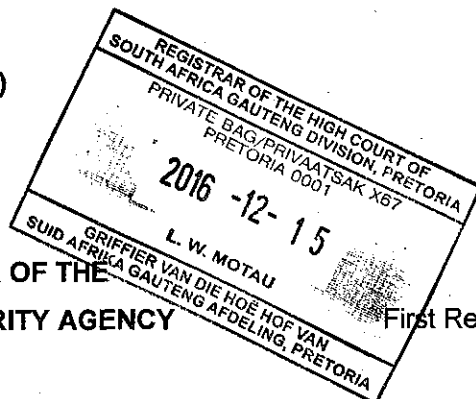
First Respondent

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY

Second Respondent

CASH PAYMASTER SERVICES (PTY) LTD

Third Respondent



FILING NOTICE

DOCUMENTS FILED: Applicant's Heads of Argument

Applicant's Supplementary Affidavit – David Harris Lewis

DATED AT PRETORIA ON THIS 15th DAY OF DECEMBER 2016


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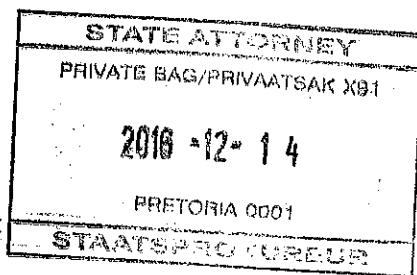
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SHOBA STREET
BROOKLYN
PRETORIA
TEL: 012 425 3400
Ref: Mr Suliman / 00001832

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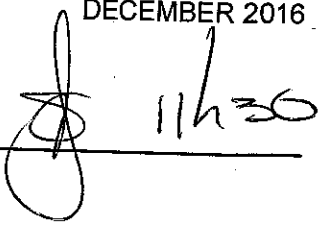
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THE STATE ATTORNEY
1ST & 2ND RESPONDENT'S ATTORNEYS
GROUND FLOOR, SALU BUILDING
316 THABO SEHUME &
FRANCIS BAARD STREETS
PRETORIA
TEL: 012 309 1582
REF: R J RAMNARAIN/2193/2015/Z21/SN



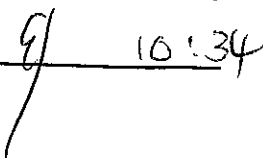
SMIT SEWGOOLAM INCORPORATED
3RD RESPONDENT'S ATTORNEYS
TEL: 011 646 0006
REF: MAT21215/OCJ/SC
c/o PRETORIUS LE ROUX INCORPORATED
339 HILDA STREET
PRETORIA
TEL: 012 342 1797
REF: T LE ROUX/TH0595

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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Case No. 21904/2015

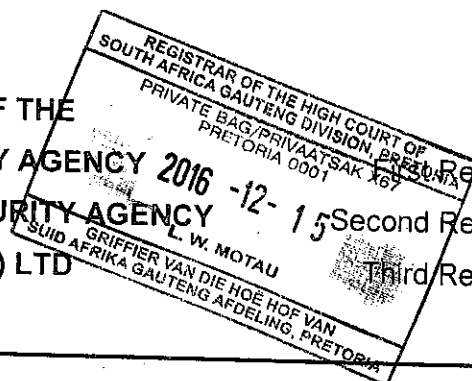
In the matter between:

CORRUPTION WATCH (NPC) (RF)

Applicant

and

THE CHIEF EXECUTIVE OFFICER OF THE Respondent
SOUTH AFRICAN SOCIAL SECURITY AGENCY 2016 -12- 15 Second Respondent
THE SOUTH AFRICAN SOCIAL SECURITY AGENCY Third Respondent
CASH PAYMASTER SERVICES (PTY) LTD



APPLICANT'S HEADS OF ARGUMENT

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A INTRODUCTION

1. At the heart of this case is a decision taken by the first and second respondents (collectively 'SASSA') to vary a services contract concluded with the third respondent ('CPS') for the distribution of social grant payments to the poorest members of society.
2. The applicant ('Corruption Watch') contends that the variation, which resulted in SASSA paying CPS an additional R316 447 361.41 – a cost ultimately borne by the fiscus – was unlawful.
3. The variation to the contract was apparently concluded orally and thereafter purportedly reduced to writing in the form of a minuted meeting. For reasons we shall come to, it was concluded absent the approval required by SASSA's own Supply Chain Management Policy ('SCM Policy'). For this reason alone it was unlawful.
4. The purported variation culminated in a second decision by SASSA to pay CPS R316 447 361.41. These funds were disbursed by SASSA to CPS in circumstances where the parties had not even agreed a cost for the varied services, and where SASSA had failed to establish that this amount was even owing to CPS. Corruption Watch contends that this too was unlawful.
5. It is against this backdrop that Corruption Watch seeks the following relief in this application:
 - 5.1. First, it seeks an order reviewing and setting aside the decision taken

by SASSA to vary the services contract concluded with CPS for the provision of certain services pertaining to the administration of SASSA's social grant scheme. We refer to this as the 'variation decision'.

- 5.2. In terms of SASSA's SCM Policy, this decision required the authorisation of SASSA's Bid Adjudication Committee ('BAC'), which was not obtained.
 - 5.3. Second, it seeks an order reviewing and setting aside a subsequent decision taken by SASSA to effect payment of the amount of R316 447 361.41 to CPS. We refer to this as the 'payment decision'.
 - 5.4. The payment decision flows from the variation decision, and is accordingly also unauthorised and unlawful. It is also unlawful for independent reasons described below.
 - 5.5. Third, it seeks an order directing CPS to repay the sum of R316 447 361.41 to SASSA. We submit that this relief, which flows from the illegality of the two decisions, is just and equitable. It will restore these unlawfully disbursed funds to SASSA and the fiscus.
6. Before addressing the illegality of these decisions, and the relief sought by Corruption Watch, it is necessary to outline the material facts on which this review is founded.

B RELEVANT FACTS**(ii) The contract and service level agreement**

7. It is common cause that SASSA enlisted CPS to distribute social welfare grants on its behalf. It did so pursuant to a tender process that was concluded on 17 January 2012, and which was ultimately declared to be unlawful and set aside by the Constitutional Court on 29 November 2013.¹
8. Before the tender award was set aside, SASSA and CPS concluded a contract and a service level agreement on 3 February 2012.²
9. In terms of the service level agreement CPS undertook to register social grant beneficiaries onto a database for a fixed fee that was determined with reference to clause 6.1 of the contract. In terms of clause 6.1 of the contract, SASSA agreed to pay CPS an amount of R16,44 (including vat) for the registration of a 'recipient' of a social grant.³
10. The parties also agreed that in the event that CPS was required to render additional social grant related services to SASSA, the parties would be required

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) ('AllPay 1'); and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) 2014 (4) SA 179 (CC) ('AllPay 2').

² Record: p 217, SASSA's answering affidavit, para 5. The service level agreement appears at Record: p 47; the contract appears at Record: p 72.

³ Record: pp79-80, clause 6.1.

to conclude a written agreement, which would include reference to a negotiated service fee for those services.⁴

(ii) The payment and Corruption Watch's initial investigations

11. During June 2014, a stock exchange announcement made by Net1 UEPS Technologies Incorporated ('Net1'), a US company listed on the Johannesburg Stock Exchange, advised that SASSA had made payment of the amount of R316 447 361.41 to a subsidiary of Net1, being CPS.⁵
12. On 26 June and 18 September 2014, Corruption Watch wrote to SASSA for further information about this payment.⁶ On 26 September 2014, SASSA responded by inviting Corruption Watch's representatives to inspect documentation pertaining to the payment.⁷ Corruption Watch's representatives visited SASSA, and they were given restricted access to limited documentation regarding the payment.⁸
13. Corruption Watch was unable to locate any documentation evidencing that the amount of R316 447 361.41 was paid pursuant to the service level agreement, or in terms of a further written agreement as contemplated in clause 6.3 of the contract, which as we have noted above not only required additional services to

⁴ Record: p. p 80, clause 6.3.

⁵ The announcement appears at Record: p 20

⁶ These letters appear at Record: pp 22 and 27 respectively.

⁷ Record: p 41

⁸ See in this regard Record: p 10 – 13, Corruption Watch's founding affidavit para 19 – 21.

be agreed in writing, but also that the parties agree a price for those additional services.⁹

14. SASSA's representative, Mr Frank Earl (who has since resigned from SASSA but was its Executive Manager of Benefits Transfer at all material times¹⁰) advised Corruption Watch that at some point a meeting had been held between representatives of CPS and SASSA to discuss the payment of R316 447 361.41 by SASSA to CPS.¹¹
15. This prompted Corruption Watch to write various letters to SASSA requesting the minutes of this meeting, together with other potentially relevant documentation.¹² SASSA did not respond.¹³

(iii) The Rule 53 record

16. On 25 March 2015, Corruption Watch instituted the present review proceedings. It sought access under Rule 53 of the Uniform Rules of Court to all information concerning the decision by SASSA to pay CPS the amount of R316 447 361.41.
17. SASSA initially filed an incomplete record of its decision and, following demands made by Corruption Watch, supplemented the record on two further

⁹ See Record: pp 12-13, Corruption Watch's founding affidavit, paras 21.5 to 21.6. This is not disputed, see Record: p 265, SASSA's answering affidavit, para 115.

¹⁰ Record: p 228, SASSA's answering affidavit, para 23.

¹¹ See Record: pp 12-13, Corruption Watch's founding affidavit, para 21.6. [SASSA response? – No response]

¹² There were three letters. These appear from Record: p 86 to 91.

¹³ See Record: pp 12-13, Corruption Watch's founding affidavit, para 21.14 [SASSA response? – no response]

occasions with documentation that is clearly relevant, and which should have been included in the record from the outset.¹⁴

18. The documentation ultimately produced by SASSA in terms of Rule 53 evidences the following:

18.1. On 10 March 2014, CPS rendered an invoice to SASSA for the amount of R316 447 361.41 (including VAT).¹⁵ It is headed "*Financial Consideration for Bulk Re-registration*" and reflects a cost of R23,20 (excluding VAT) per 're-registration' (i.e. a different, higher cost than provided for in the contract).

18.2. On 13 March 2014, Mr Earl sent a submission document to SASSA's BAC. The subject line of the document is "*Variation order: reimbursement of costs incurred by Cash Paymaster Services (Pty) Ltd (CPS) in respect of additional resources procured for the re-registration project for the period 01 January 2013 to July 2013*". (Our emphasis).

18.3. The purpose of the document is described as being to seek the BAC's recommendation for a variation order to reimburse CPS for "*the costs incurred to procure the additional resources required in respect of the re-registration project for the period 01 January 2013 to July 2013*".

18.4. It also recommended that the CEO of SASSA, "*grants approval to process part payment of the invoice for the current financial year*

¹⁴ This is detailed in Corruption Watch's supplementary affidavit at Record: pp104 to 105, paras 4 to 7. These allegations are not disputed.

¹⁵ Record: p 175.

amounting to 80% (R253,157,889.13) to Cash Paymaster Services (Pty) Ltd relating to the costs incurred, and that 20% of the total invoice be retained and paid after and (sic) independent Auditor has verified the completeness and correctness of the claim in the 2014/2015 Financial year".¹⁶ In other words, it was proposed that SASSA pay CPS 80% of the amount claimed by it, and that it hold back the balance until it had performed an audit to determine that the amount claimed by CPS was in fact due to it.

- 18.5. Under the section of the document headed "*Motivation*", it is stated that "*during the SLA negotiations it became clear that the requirement to eliminate ghost dependants, non-qualifying beneficiaries and duplicate children was critical to the effective elimination of fraud*", and that "*it was agreed that CPS would re-register all 9.2m social grant beneficiaries and recipients for a period of six months at their own cost*".
- 18.6. The document goes on to state that at the time that these "*negotiations*" took place, "*the total number of social grant recipients as well as dependents (sic) was unknown*", and that when "*the plans were compiled*" the total number of people that were required to be registered "*more than doubled*", representing an additional "*estimated 11.9 million people who had to be registered by the service provider*".

¹⁶ Record: p 176 – 178

- 18.7. Mr Earl's submission also records that "[t]he re-registration project, which commenced on 1 July 2012, should have been completed by 31 December 2012", and that only "cash" beneficiaries were registered during this period. He then states that "[b]anked beneficiaries had to be registered from January 2013 until March 2013" and that during this period "CPS continued to carry the cost of the project".
- 18.8. He then refers to an attached "audited breakdown of the costs incurred, from CPS, for the period allowed by SASSA to continue with the re-registration of all outstanding beneficiaries".
- 18.9. The "audited breakdown" to which Mr Earl referred is a report prepared by KPMG on behalf of CPS dated 10 March 2014.¹⁷ However, the KPMG report is not an audit report.¹⁸ It says so in no uncertain terms.
- 18.10. In other words, as the respondents explain in their answering affidavits, SASSA and CPS took the view that the contract and service level agreement did not cater for the re-registration of child beneficiaries, and the service level agreement was accordingly amended – an issue we return to later.
- 18.11. On 14 March 2014, the BAC made a written recommendation to the first respondent, SASSA's CEO, Ms Virginia Petersen (who has deposed to SASSA's answering affidavit), to approve the immediate

¹⁷ Record: p 179 - 182.

¹⁸ In this regard it states that had KPMG "performed additional procedures, or had we performed an audit or review of the financial statement in accordance with International Standards on Auditing or International Standards on Review Engagements, other matters might have come to our attention that would have been reported to you". See Record: p 180.

payment of 80% of CPS's claim as per Mr Earl's motivation to the BAC.¹⁹

- 18.12. Section 2 of the recommendation refers to a meeting of the BAC held on 13 March 2014, at which the BAC resolved to approve the "variation order". There are no minutes of that meeting contained in the Rule 53 record.
- 18.13. Importantly, under section 4 of the recommendation, reference is made to the KPMG report. It is stated that "[t]he remainder of the 20% of the invoice be paid in the 2014/2015 Financial Year after SASSA, through the Independent Auditor, has verified the completeness and correctness of the claim by Cash Paymaster Services (Pty) Ltd which was audited by their external auditors (KPMG)". As we have noted, the KPMG report is not an audit report.
- 18.14. On 18 March 2014, Ms Petersen, signed a document headed "Request to Procure".²⁰ It was in respect of "additional resource procured for the re-registration project for the period 01 January 2013 to July 2013", and in the amount of R316 447 361.41. On the same day she approved the BAC's recommendation regarding part-payment.
- 18.15. On 31 March 2014, SASSA's Acting Chief Financial Officer, Ms Thovhakale, wrote a letter to CPS in which she advised that SASSA had made part-payment of its invoice, but that it had retained 20% of

¹⁹ Record: p 183 – 186

²⁰ Record: p 187 – 190 .

the amount claimed *"to verify certain issues raised by SASSA's Bid Adjudication Committee"*, and that once SASSA had appointed an auditor to verify the claim the balance would be paid to CPS.²¹

18.16. CPS responded to Ms Thovhakale's letter on the same day rejecting part-payment and returning the amount paid to SASSA.²²

18.17. On 25 April 2014 SASSA's Supply Chain Management department addressed a written submission to Ms Petersen.²³

18.18. Its stated purpose was to *"request the Chief Executive Officer to consider the recommendation of the Bid Adjudication Committee and approve the variation order to effect full payment of R316 447 361.41 for the costs incurred by Cash Paymaster Services (Pty) Ltd (CPS) to re-register all the grant recipients as well as outstanding beneficiaries"*.
(Our emphasis)

18.19. In addition to recommending that the full amount of R316 447 361.41 be paid by SASSA, the submission also recommends that SASSA, *"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*

²¹ Record: p 187 - 190.

²² Record: p 192 - 195

²³ Record: p 196 - 198.

if its accepts the errors, CPS be held to refund the Agency the amount in question deemed overpaid".

18.20. The submission served before the BAC on 24 April 2014. Its contents is mirrored in the BAC's recommendations to Ms Peterson.²⁴ As with the first BAC meeting in respect of the part-payment (held on 13 March 2014), the Rule 53 record does not contain any minutes of the BAC's meeting on 24 April 2014.²⁵

18.21. On 22 May 2014 Ms Petersen approved the BAC's recommendation to pay CPS the full amount of its claim, being the amount of R316 447 361.41.²⁶ SASSA effected payment of R316 447 361.41 to CPS in June 2014.²⁷

(iv) The answering affidavits

19. In SASSA's answering affidavit it emerges for the first time that the decision to make payment was apparently based on what is described as an "SLA variation agreement", purportedly concluded by SASSA and CPS at a meeting held on 15 June 2012.²⁸ This is corroborated by CPS.²⁹

²⁴ Record: p 196 - 198.

²⁵ Record: p 114, Corruption Watch's supplementary affidavit, para 42..

²⁶ Record: p 199.

²⁷ Record: p 41.

²⁸ Record: p 232, SASSA's answering affidavit, para 38..

²⁹ Record: p 369 CPS' answering affidavit, para 9.

20. Ms Petersen describes the meeting of 15 June 2012 as a "feedback" meeting in relation to a pilot registration phase in Kyalami.³⁰ She explains that CPS raised fact that the enrolment process apparently "*was not aligned with the SLA and requested that this issue be discussed*".³¹
21. According to Ms Petersen, "*it thus became very clear during the pilot project that whereas the RFP [being the request for proposals for the tender ultimately awarded to CPS] was very broad, the SLA dealt only with the re-registration or enrolment of recipients as opposed to all beneficiaries including children and procurators*".³²
22. She then explains the variation decision in the following terms:³³

"In order to address these issues, it was clear to SASSA that the SLA and the contract needed to be varied in order to include the excluded number of children and beneficiaries whose grants were collected by procurators and to re-register the children with the beneficiaries / recipients and procurators. I took a decision to consider the variation of the agreement at the meeting of 15 June 2012."

(Our emphasis)

23. It is striking that at no stage did SASSA's representatives refer to the SLA variation agreement in the initial engagements with Corruption Watch, and none of the variation orders submitted to the BAC refer to it either. Indeed,

³⁰ Record: p 230, SASSA's answering affidavit, para 31.

³¹ Record: p 230 - 231, SASSA's answering affidavit, para 33.

³² Record: p 231, SASSA's answering affidavit, para 34.

³³ Record: p 232, SASSA's answering affidavit, para 38.

there is in fact no reference at all in the Rule 53 record to any agreement varying the contract or service level agreement.

24. SASSA attaches to its answering affidavit what it contends is the SLA variation agreement.³⁴ It is a document purporting to be the minutes of the meeting held on 15 June 2012 in Kyalami, attended by representatives of SASSA (including Ms Petersen), and representatives of CPS.

25. The minute records the following:

"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 would only be effected at the conclusion of the bulk enrolment process."

26. The minutes are signed by Ms Petersen on behalf of SASSA, and by Dr Belamant on behalf of CPS.

27. The case advanced by SASSA and CPS is that these minutes constituted a written agreement to vary the service level agreement to provide that CPS would enrol dependants and SASSA would pay CPS for doing so on conclusion of the "bulk enrolment process" at a price to be determined in the future based on CPS's costs. They contend that because the minutes record the variation in writing and were signed by representatives of SASSA and CPS, the service

³⁴ Record: p 299, SASSA's answering affidavit, Annexure "VP"

level agreement was validly varied as contemplated in the contract.³⁵

28. In their answering affidavits SASSA and CPS opportunistically raise the fact that Corruption Watch did not initially challenge variation decision. On their argument, the payment decision was based on the variation decision, and until the variation decision is set aside the payment decision is lawful.
29. For the reasons given above, Corruption Watch was unaware of the SLA variation decision until it was raised for the first time in SASSA's answering papers.³⁶ There was nothing in the Rule 53 record to suggest that the payment decision had been authorised by way of a prior variation agreement.
30. Thus, in its replying affidavit Corruption Watch made it clear that it in addition to the decision to effect payment to CPS, Corruption Watch also sought to review and set aside the variation decision. Corruption Watch also filed an amended notice of motion and invited the respondents to file rejoinders if so advised.³⁷ CPS has filed a rejoinder (discussed later). SASSA has declined the invitation to file anything further.

³⁵ See in this regard SASSA's answering affidavit at Record: p 234, paras 43 to 51 and CPS's answering affidavit at Record: p 383 – 384 , paras 42 to 48.

³⁶ See in this regard, Record: p 558, Corruption Watch's replying affidavit, paras 13.1-13.3.

³⁷ Record: p 559, Corruption Watch's replying affidavit, paras 13.3 and 13.4.

C GROUNDS OF REVIEW

(i) The SLA variation agreement was procedurally unauthorised

31. The Constitutional Court in *Allpay 1* confirmed that procurement law is prescriptive.³⁸ Referring to what Corruption Watch had submitted in that case, the Constitutional Court held,

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

32. In this case, Corruption Watch points to international authority and experience concerning the variation or extension of public procurement contracts. Transparency International has issued an International Report on Curbing Corruption in Public Procurement which contains the following findings:³⁹

"[i]n almost all countries, public procurement through government contracting represents a large if not the largest percentage of the

³⁸ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) ("AllPay 1") at para 38; See too *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at para 4; *Minister of Social Development and Others v Phoenix Cash & Carry-Pmb CC* [2007] 3 All SA 115 (SCA) at para 1.

³⁹ Record: p 566.

economy. This translates into a vast amount of money, which provides seemingly endless opportunity and temptation for corruption. The situation regarding public procurement differs widely throughout the world, and in all countries involves a complicated set of regulations and practices. This makes the area more opaque and the challenge for anti-corruption advocates even greater”.

33. Of particular relevance for this case is the fact that Transparency International has found that “contract renegotiation” in public procurement marks a critical time when corrupt influences can be brought to bear. Prices increases or changes to specifications through “change orders” pose significant risks to public entities. It is precisely for this reason that, as the Constitutional Court in *AllPay* held, strict adherence to procurement regulations is of paramount importance.⁴⁰
34. Returning to the facts of the present matter, at the time that SASSA and CPS concluded the SLA variation agreement SASSA’s 2008 Supply Chain Management Policy (‘2008 SCM Policy’) was in force.⁴¹
35. Two clauses of the 2008 SCM Policy are of relevance.
- 35.1. The first is clause 4.5.2, which reads:

“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

⁴⁰ Record: p 566.

⁴¹ The 2008 SCM Policy is located at p 160 of the Rule 53 Record.

advanced as a reason to extend projects using same suppliers and service providers. A maximum of 15% of the project fee would be allowed, closed tender should be engaged with the supplier/service providers in order to benchmark on the charges for the extension of such projects through the use of T.O.R or specifications on the extension/additions.” (Our emphasis)

35.2. The second is clause 4.7.8, which 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”. (Our emphasis)

36. The effect of these clauses is the following:

36.1. First, BAC was *required* to approve any amendment, variation or extension of a contract, *regardless* of its value.

36.2. Second, any such amendment, variation or extension could only be up to a maximum of 15% of the overall project fee.

37. The requirement that SASSA obtain approval for the conclusion of the SLA variation agreement is underpinned by important policy.

38. It is necessary to give effect to fundamental principles of public procurement enshrined in s 217 of the Constitution. Organs of state can amend, vary, expand or cancel procurement contracts, but must do so in accordance within the applicable supply chain management framework – for otherwise the process is open to corruption.

39. The fact that the 2008 SCM Policy (and in particular clauses 4.5.2 and 4.7.8) applied at the time that the SLA variation agreement was apparently concluded meant that SASSA was required to motivate to the BAC why the SLA variation agreement had to be concluded, and the BAC was *required* to rule on whether or not to sanction its conclusion.
40. The BAC's approval was a necessary jurisdictional fact for the lawfulness of the variation decision.
41. On SASSA's own version it did not obtain approval for the conclusion of the SLA variation agreement. This renders the variation decision, and subsequent payment decision, unlawful and invalid.

(ii) The first respondent's material error of law

42. A wrong or mistaken interpretation of a provision in a statute or, as in this case, a binding legal prescript such as the SCM Policy, constitutes a reviewable error of law.⁴²
43. An error of law is reviewable under section 6(2)(d) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'), and under the principle of legality.⁴³

⁴² See: Hoexter *Administrative Law in South Africa*, 2nd Edition, at p 282.

⁴³ See in this regard *Premier of the Western Cape v Overberg District Municipality* 2011 (4) SA 441 (SCA) at paras 37-38, where the Supreme Court of Appeal held that the provincial executive had misconstrued the powers conferred on it under section 139(4) of the Constitution, which offended against the principle of legality.

44. It appears from the SASSA's answering affidavit that the first respondent was under the impression that the SLA variation agreement did not require the approval of the BAC because the costs associated with the variation of the service level agreement was unknown.

45. This is apparent from the following passage of SASSA's answering affidavit:⁴⁴

"The reason why the amount was left to be calculated at the end of the bulk re-registration is because the number of additional beneficiaries, inclusive of bedridden and the disabled, children and procurators to be enrolled was not known at that stage and thus the cost could not be determined. It is precisely because the amount could not be determined that the BAC was not approached immediately to make its determination but was approached afterwards to recommend the necessary variation orders to me".

46. The statement quoted above reflects that the first respondent's variation decision appears to have been taken based on a mistaken interpretation of the 2008 SCM Policy only in cases where a value can be attributed to the varied services relative to the value main contract.

47. It is possible that the first respondent's error of law stems from the fact that a later iteration of the SCM Policy enacted after the 15 June 2012 meeting in September 2012 ('the 2012 SCM Policy') contemplates approval by the BAC of variations to contracts exceeding a certain value.

48. In this regard, clause 6.4 of the 2012 SCM Policy reads as follows:

⁴⁴ Record: p 236, SASSA's answering affidavit, para 46.

"In the event that there is a need to extend the existing or concluded contracts or agreements, approval must be sought from the Bid Adjudication Committee with valid reasons forwarded. Continuity should not be advanced as a reason to extend projects using [the] same suppliers or service providers.

Contracts / Purchase Orders may be expanded or varied by not more than 20% or R20 million (including all applicable taxes) for construction related goods, works and/or services and 15% or R15 million (including all applicable taxes) for other goods and/or services of the original value of the contract, whichever is the lowest amount. Any deviation in excess of these thresholds must be accompanied by a motivation to be forwarded to the Bid Adjudication Committee which will then recommend to the CEO for approval."

49. It is conceivable that clause 6.4 could be read as only requiring the BAC's approval in the case where a contract for services is varied by 15% or R15 million (whichever is lesser). However, it could equally be argued that this must be read with the first paragraph of clause 6.4, which contemplates the BAC's approval in all cases.
50. But as we have noted above, clauses 4.5.2 and 4.7.8 of the 2008 SCM Policy, which was in force at the time of the variation decision, make it clear that the BAC's approval must be obtained for *any* amendment, variation or extension of a contract, *regardless* of its value relative to the value of the contract.
51. The first respondent's failure to obtain the approval of the BAC for the SLA variation agreement, whether on the basis of an error of law or otherwise, vitiated the variation decision, and thus the payment decision.

52. In its rejoinder to Corruption Watch's replying affidavit CPS contends that there is no evidence to suggest that the first respondent committed an error of law. We have explained above why this is false. CPS also makes the following further arguments in relation to the 2008 SCM Policy:

52.1. First, that it is apparently "*not clear*" that clause 4.5.2 of the 2008 SCM Policy applied to the SLA variation agreement.⁴⁵

52.2. In this regard, CPS attempts to suggest that the SLA variation agreement did not constitute an "extension or variation" of the contract on the basis that the service level agreement contemplated the registration of children, but simply did not provide a costing for this service.⁴⁶

52.3. This contention is without any foundation. As we have shown above, according to SASSA the SLA variation agreement was concluded *precisely* because the scope of the services under the service level agreement were narrower than what was contemplated in the tender RFP.

52.4. Second, CPS argues that even if the 2008 SCM Policy did apply, SASSA complied with its terms.

52.5. In this regard, CPS contends that clause 4.5.2 provides that BAC approval is only required for the extension of contracts above 15% of

⁴⁵ Record: p 625, CPS's rejoinder, para 9.

⁴⁶ Record: p 625, CPS's rejoinder, para 9.

the project fee.

52.6. This contention is similarly without foundation. Clause 4.5.2 provides that BAC approval is required *regardless* of the value of a contract extension, but that a contract extension may not exceed 15% of the project fee. Clause 4.5.2 must, as we have shown above, be read with clause 4.7.8, which expressly states that the BAC, "*must also consider and rule on all recommendations/reports regarding the amendment, variation, extension, cancellation or transfer of contracts awarded*".⁴⁷

52.7. CPS argues that clause 4.7.8 "*provides merely that the BAC must "rule on" recommendations or reports regarding the amendment, variation, extension of contracts which have been awarded*" and therefore does not "*detract from the plain meaning of clause 4.5.2*".⁴⁸

52.8. This argument is wholly without merit. The import of clause 4.7.8 is clear: the BAC is required to consider and "rule" (i.e. give the final go-ahead as the body with authority to do so) on any recommendation to amend, vary, extend, cancel or transfer a contract.

(iii) The payment decision

53. SASSA's decision to make payment to CPS of the amount of R316 447 361.41 is unlawful for the reason that it was made pursuant to the variation decision, which was itself unlawful for the reasons described above.

⁴⁷ Record: p 186.

⁴⁸ Record: p 627, CPS's rejoinder, para 13.

54. The payment decision is however also unlawful on self-standing grounds. We submit that it was manifestly irrational and unreasonable for SASSA to have paid CPS this amount of money in circumstances where: (i) the parties had not even agreed a basis on which it was to be calculated; and (ii) where SASSA had not even conducted its own investigations into whether in fact this sum was owing to CPS.⁴⁹
55. It is also unlawful in that it failed to comply with s 217 of the Constitution⁵⁰ and sections 50 and 51 of the Public Finance Management Act, 1 of 1999 ('PFMA').
56. Sections 50 and 51 of the PFMA provide *inter alia* as follows:

"50. Fiduciary duties of accounting authorities

(1) The accounting authority [in this case the first respondent] for a public entity must—

- (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
- (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
- (c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*

⁴⁹ This renders it reviewable under sections 6(2)(e)(vi), 6(2)(f)(ii) and 6(2)(h) of PAJA.

⁵⁰ Section 217 of the Constitution enjoins organs of state to procure goods or services in a manner that is fair, equitable, transparent, competitive and cost effective.

- (d) *seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*

(Our emphasis)

And,

51. *General responsibilities of accounting authorities—(1) An accounting authority for a public entity—*

(b) *must take effective and appropriate steps to—*

- (i) *collect all revenue due to the public entity concerned; and*
- (ii) *prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and*
- (iii) *manage available working capital efficiently and economically.”*

(Our emphasis)

57. The first respondent, as the accounting authority of SASSA, failed to comply with the fiduciary duties and general responsibilities imposed on her office by the PFMA. In authorising the payment to CPS in the circumstances of this case she clearly 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.

58. The illegality of SASSA's actions is aptly illustrated in this case by the audit performed by Nexia, which concludes that SASSA may have overpaid CPS by at least R13 million, assuming that its claim for payment was lawfully made in the first place.⁵¹

D CONCLUSION AND REMEDY

59. We submit that the variation and payment decisions are unlawful and fall to be set aside.⁵²
60. The variation decision was procedurally unauthorised. Its illegality infected the payment decision. The payment decision is in any event unlawful for the self-standing reasons given above.
61. What, then, is a just and equitable remedy⁵³ in these circumstances?
62. In *Bengwenyama*⁵⁴ the Constitutional Court held that a court has no discretion when declaring conduct unlawful, but that the choice of a further just and equitable remedy is discretionary, based on a "*pragmatic blend of logic and experience*".

⁵¹ Record: p 330

⁵² Ordinarily, the consequence of finding that a tender award is unlawful is that it is set aside. See *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at para 11.

⁵³ The court has a broad discretion under section 172(1)(b) of the Constitution to grant just and equitable relief.

⁵⁴ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 84-85

63. Allied to this is the fact that the Constitutional Court has held that relief must be effective.⁵⁵ As stated in *Steenkamp*,⁵⁶ "in each case the remedy must fit the injury. 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".
64. In this case a remedy is not only required to vindicate the rule of law, but to restore funds that were paid pursuant to unlawful administrative action to the fiscus. We respectfully submit that if the administrative action in this case is declared unlawful, an order should be made that CPS be directed to return the sum of R316 447 361.41 to SASSA, together with interest.
65. In the event that this application fails, we respectfully submit that no costs order should be made against Corruption Watch. It is a public interest body, acting in the public interest, and it cannot be said that in advancing this case that it has acted vexatiously, frivolously or recklessly.⁵⁷

STEVEN BUDLENDER

LUKE KELLY

Applicant's counsel

Chambers

Johannesburg and Cape Town

15 December 2016

⁵⁵ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at para 97.

⁵⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 29.

⁵⁷ See in this regard: *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

LIST OF AUTHORITIES

1. *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC)
2. *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC)

3. *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA)
4. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
5. *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC)
6. *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA)
7. *Minister of Social Development and Others v Phoenix Cash & Carry-Pmb CC* [2007] 3 All SA 115 (SCA)
8. *Premier of the Western Cape v Overberg District Municipality* 2011 (4) SA 441 (SCA)
9. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)
10. *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).