



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1029/2018

In the matter between:

CASH PAYMASTER SERVICES (PTY) LTD

APPELLANT

and

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

FIRST RESPONDENT

SOUTH AFRICAN SOCIAL SECURITY AGENCY

SECOND RESPONDENT

CORRUPTION WATCH (NPC) (RF)

THIRD RESPONDENT

Neutral citation: *Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of the SASSA and others* (1029/2018) [2019] ZASCA 131 (30 September 2019)

Coram: Navsa, Saldulker, Swain, Molemela and Plasket JJA

Heard: 10 September 2019

Delivered: 30 September 2019

Summary: Tender for the payment of social grants – whether contract included registration of recipients of social grants plus other beneficiaries in return for payment of a set fee – no lawful basis for variation of contract to provide for payment of additional fee of R316 447 361.41.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tsoka J sitting as court of first instance):

- 1 The appeal is dismissed.
 - 2 The appellant is directed to pay the third respondent's costs, including the costs of two counsel.
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JUDGMENT

Plasket JA (Navsa, Saldulker, Swain and Molemela JJA concurring):

[1] The South African Social Security Agency (SASSA) is an organ of state created by s 2(1) of the South African Social Security Agency Act 9 of 2004 (the SASSA Act). One of its functions is to 'administer social assistance in terms of Chapter 3 of the Social Assistance Act, 2004'.¹ It may, with the concurrence of the Minister, enter into contracts with service providers 'to ensure effective payments to beneficiaries'.²

[2] SASSA published a request for proposals (RFP) for the registration of beneficiaries of social grants and the payment of social grants. It awarded a tender to Cash Paymaster Services (Pty) Ltd (CPS), the appellant, in January 2012. In the following month SASSA and CPS entered into a contract and a service level

¹ SASSA Act, s 4(1)(a). Section 1 of the Social Assistance Act 13 of 2004 defines social assistance to mean 'a social grant' and that term is, in turn, defined to mean 'a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid'.

² SASSA Act, s 4(2)(a). Section 4(3) provides that such a contract 'must include provisions to ensure' inter alia 'the effective, efficient, and economical use of funds designated for payment to beneficiaries of social security'.

agreement (SLA) in terms of which CPS undertook, inter alia, to register beneficiaries of social grants on a data base, and to pay them their social grants when due.³

[3] This appeal concerns the validity of what was described by CPS and, at one stage, by SASSA as a variation of the contract, evidenced by the minutes of a meeting held on 15 June 2012. As a result of that purported variation, an amount of R316 447 361.41 was paid by SASSA to CPS. Corruption Watch, the third respondent, launched an application in the Gauteng Division of the High Court, Pretoria for the setting aside of the decision to approve payment to CPS and an order directing CPS to repay SASSA the amount it had received, together with interest.

[4] Tsoka J granted an order in the terms sought by Corruption Watch and refused CPS leave to appeal. The matter is, however, before this court pursuant to leave to appeal having been granted on petition.

Background

[5] Corruption Watch was described in the founding affidavit deposed to by its executive director, Mr David Lewis, as a 'non-profit civil society organisation' that has as its objectives 'fighting the rising tide of corruption and the abuse of public funds in South Africa' as well as the promotion of 'transparency and accountability to protect the beneficiaries of public goods and services'. It brought the application in the court below in the public interest, and its standing to do so is not in issue.

[6] CPS is a subsidiary of Net1 UEP Technologies Incorporated (Net1) which is incorporated in the United States of America and is listed on both the Nasdaq and the Johannesburg Stock Exchange (the JSE). On 6 June 2014, the JSE released a stock exchange announcement which stated (in part):

³ The regularity of the award of the tender to CPS was taken on review by an unsuccessful bidder. In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others* 2014 (1) SA 604 (CC), the Constitutional Court declared that the award of the tender was unlawful but suspended the operation of the order of invalidity 'pending the determination of a just and equitable remedy'. (Para 98.) In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others* 2014 (4) SA 179 (CC), the Constitutional Court declared that the contract between SASSA and CPS, entered into pursuant to the irregular award of the tender, was unlawful, but it suspended the operation of the declaration of invalidity pending the award of a new tender after a new tender process. (Para 78.)

'Net1 UEPS Technologies, Inc. . . . today announced that it has received approximately ZAR 275 million (or \$25.7 million at prevailing exchange rates) from the South African Social Security Agency ("SASSA"), related to the recovery of additional implementation costs incurred during the beneficiary re-registration process in fiscal 2012 and 2013. At the time, SASSA requested Net1 to biometrically register all social grant beneficiaries (including all child beneficiaries), in addition to the grant recipients who were issued with the SASSA-branded UEPS/EMV smart cards. As a result, Net1 performed approximately 11 million additional registrations that did not form part of its monthly service fee. After an independent verification process, SASSA agreed to pay the ZAR 275 million as full settlement of the additional costs incurred.'

[7] After Corruption Watch had become aware of the announcement – and of the fact that SASSA had disbursed a large sum of money to CPS – it wrote to SASSA to ascertain the details of the payment and the basis for it. SASSA invited representatives of Corruption Watch to a meeting in order to brief them and to allow them to inspect (but not copy) relevant documentation.

[8] Corruption Watch's representatives were able to ascertain that the payment was made ostensibly in respect of the registration, onto a database, of beneficiaries of social grants. It was claimed that the payment was for registrations additional to the approximately 9.7 million beneficiaries in respect of whom CPS was paid on a monthly basis.

[9] No evidence of SASSA ever requesting this additional service was placed before Corruption Watch's representatives nor was any evidence tendered of any written agreement having been concluded. All that Corruption Watch's representatives were told was that senior SASSA officials, including its chief executive officer (CEO), Ms Virginia Petersen, and CPS's managers, including its CEO, Dr Serge Belamant, had met to discuss the arrangement that led to the payment. No minutes of this meeting were made available.

[10] Corruption Watch was able to ascertain that CPS had commissioned a report from its auditors, KPMG, in order to justify its claim for payment. After receiving the claim for payment and KPMG's report (to the effect that all was in order) – and on the

basis of Ms Petersen's instructions – SASSA convened a Bid Adjudication Committee (BAC) meeting to consider CPS's claim. The BAC approved the payment of all but 20 percent of the claim which, it said, should be held back pending the finalisation of an internal audit by SASSA.

[11] The BAC's recommendation was accepted by Ms Petersen. Payment of the reduced amount was tendered by SASSA but CPS refused to accept it and returned the money to SASSA. CPS demanded payment of the full amount. The BAC convened again and recommended that the full amount be paid to CPS in the light of what it referred to as the 'external KPMG audit report'. On 25 April 2014, Ms Petersen accepted the BAC's recommendation and CPS's claim was paid in full.

[12] On the strength of this information, Corruption Watch concluded that the decision to pay CPS might well have been tainted by irregularity. It then launched its application in the court below, using the procedure provided for in rule 53 of the Uniform Rules, to review SASSA's decision to pay CPS. It alleged that the decision taken by SASSA's CEO to pay R316 447 361.41 of public funds was the exercise of a public power that was reviewable either in terms of the Promotion of Administrative Justice Act 3 of 2000 or the principle of legality; and that it was invalid because it had no lawful basis, was irrational and was contrary to both s 217 of the Constitution and ss 50 and 51 of the Public Finance Management Act 1 of 1999 (the PFMA).

[13] Eventually, when most of the record had been produced by SASSA in terms of rules 53(1)(b) and 53(3), Corruption Watch filed an amended notice of motion⁴ and a supplementary affidavit, in terms of rule 53(4).

[14] In the answering affidavits deposed to by Ms Petersen, on behalf of herself (as the first respondent) and SASSA, and by Mr Nunthakumarin Pillay, on behalf of CPS, the respondents made common cause. I shall now set out their version briefly.

⁴ The amended notice of motion referred to the exact amount paid by SASSA to CPS – R316 447 361.41 – rather than the approximation of R317 million that appeared in the original notice of motion. In addition, Corruption Watch also sought an order directing CPS to repay the money to SASSA.

[15] The RFP was published to invite tenders for the payment of social grants. This included the registration of beneficiaries. Ms Petersen stated in this regard:

'4 At the time of the tender SASSA was responsible for the payment of more than 14.5 million social grants per month to over 8.5 million beneficiaries. These figures were approximate figures given the fact that some recipients/beneficiaries of grants were receiving them on behalf of children or on behalf of those beneficiaries who have appointed procurators. As I will address further below in this affidavit, the re-registration of every social grant beneficiary, care giver, procurator and children benefitting from a social grant, under the new tender effectively saw the number of beneficiaries and recipients re-registered or re-enrolled under the new system increasing to almost 22 million.

5 SASSA issued out the tender in question to address these challenges. The main purpose of the tender was to shift from the largely cash based method of paying social grants to a more electronic environment, which would afford beneficiaries increased convenience, while at the same time reducing opportunities for duplicate payments, losses and fraud. In order to achieve this, the tender called for the biometric enrolment of every grant recipient to ensure secure payments through the biometrically enabled SASSA payment card. This biometric electronic mode of payment would address many of the challenges that SASSA was experiencing in relation to the payment of social grants. The tender was awarded to Cash Paymaster Services (Pty) Ltd ("CPS") pursuant to my approval on 17 January 2012 and the parties entered into a Contract and Service Level Agreement ("SLA") on 3 February 2012.'

[16] CPS's bid, it was alleged, was based on the number of the people who had to be paid every month, whether for themselves or on behalf of others, rather than on the total number of recipients plus beneficiaries, such as the children supported by child support grants or foster parent grants. Ms Petersen explained:

'It must be understood that for every grant recipient, there may be multiple grants paid. Each of these grants represents an individual who needed to be accounted for, if the spirit and intention of this RFP was to be met.'

[17] The contract involved three phases in order for it to be executed. In the first two phases, provision was made for beneficiaries who had been paid by service providers other than CPS to continue to be paid under the new system. According to Ms Petersen, the third phase, which had commenced on 1 June 2012 in the form of a pilot project, 'entailed the re-registration of all beneficiaries including children and

procurators and cardholders onto the CPS solution and the issue of the biometric cards’.

[18] It was, Ms Petersen said, only at this stage that it became clear that there was a problem. She explained it thus:

‘The scope of work as set out in the RFP was wide and it included in it the re-registration of all beneficiaries inclusive of children, procurators and recipients. The projected numbers provided in annexure 2 of the RFP of about 9.7 million recipients did not take into account all the children and procurators. It thus became very clear during the [registration] pilot project that whereas the RFP was broad, the SLA dealt only with the re-registration or enrolment of recipients as opposed to all beneficiaries including children and procurators.’

[19] At a meeting of SASSA and CPS officials on 15 June 2012 an agreement was reached by Ms Petersen and Dr Belamant to vary the contract. Ms Petersen said that the minutes of that meeting, which are signed by her and Dr Belamant, record the terms of the variation agreement in writing.⁵ The minute records the following:

‘The SASSA CEO confirmed that the enrolment of dependants 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 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.’

[20] In other words, it was, according to Ms Petersen, agreed that CPS would register the additional beneficiaries at cost, and that the fee for doing so would be determined after the event. In a nutshell, then, the case for SASSA (at that stage) and of CPS was that the payment was made lawfully in terms of the alleged variation agreement, which had become necessary because the SLA and the contract only made provision for the registration of recipients, and not of beneficiaries.

[21] In Corruption Watch’s replying affidavit, an attack was launched on the lawfulness of the variation agreement on the basis, inter alia, that it ‘does not exist in

⁵ Clause 18.1 of the contract requires any variation to be in writing and to be signed by the duly authorised representatives of the parties.

the form of a formal written agreement', that it was not approved by the BAC and was contrary to SASSA's supply chain management policy. It also filed an amended notice of motion that, in addition to the relief it had earlier sought, also sought to set aside Ms Petersen's decision to agree to the variation.

[22] Some months later, Corruption Watch filed a supplementary affidavit containing evidence that had not been available to it when its replying affidavit was deposed to. That evidence was a report filed by Net1 in the United States of America in terms of that country's Securities Exchange Act of 1934. The report was signed by Dr Belamant and Mr Herman Kotze, Net1's chief financial officer, both of whom certified its correctness. The relevant passage of the report concerned 'recent developments in South Africa' and it reads:

'We commenced the second phase of the enrolment process in early July 2012 and plan to be substantially complete by March 2013, in accordance with the enrolment plan agreed with SASSA. Under our agreement with SASSA, we have to enrol both the grant recipients (those individuals who receive the actual payment and are issued with our UEPS/EMV smart card), as well as the grant beneficiaries (those individuals who have qualified for the social grant, but are not necessarily the recipient of the grant). By way of example, a parent who has three children and receives a grant for all three children is the grant recipient, while the three children are each classified individually as grant beneficiaries. In this case, we capture the personal and biometric information of the parent and three children, but only the parent is issued with an UEPS/EMV smart card. While the number of grant recipients on a national basis has consistently been quantified by SASSA at 9.4 million individuals, the number of beneficiaries is continually being revised by SASSA on an ongoing basis from an initial estimate of approximately 15.5 million, to the current estimate of approximately 21.6 million.'

[23] The report continued to say:

'We do not receive additional compensation for the enrolment of grant beneficiaries who are not otherwise grant recipients because the pricing under our SASSA contract is based on the number of grant recipients we pay, rather than the number of grant beneficiaries.'

[24] On 18 April 2017, a few months after the filing of the supplementary affidavit, a notice was filed by the State Attorney withdrawing the opposition of both SASSA and its CEO, abiding the decision of the court below and tendering wasted costs.

[25] In his judgment in the court below, Tsoka J found that the variation had not been agreed to by SASSA and CPS. Instead, Ms Petersen had unilaterally varied the SLA. The result was that the payment to CPS was without any basis and unlawful.⁶ Secondly, he found, in addition, that on the assumption that agreement had been reached, it had been vague (and, on that account invalid) because no agreement had been reached as to the cost of the service CPS was to provide.⁷ Thirdly, the variation was concluded contrary to SASSA's supply chain management policy in that no prior approval from the BAC had been sought or given.⁸ Fourthly, he found that the payment to CPS had been effected for an ulterior purpose or motive; had not been 'rationally connected with the purpose for which it was made'; and was unreasonable in that 'no reasonable person in the position of SASSA could have effected such payment without any valid reasons'.⁹ Finally, he concluded that, in any event, the registration of beneficiaries was contemplated by the SLA.¹⁰

[26] Approximately two months before the appeal was to be argued, a letter was sent by the Registrar of this court to SASSA's attorneys requesting an explanation for its withdrawal of its opposition to Corruption Watch's application. An affidavit, deposed to by Ms Busisiwe Mahlobogoana, SASSA's General Manager: Legal Services, was filed in which an explanation was given for deciding not to oppose the application. (At the hearing of the appeal, counsel appeared for SASSA, as directed by the court, in order to be of assistance to the court.)

[27] Ms Mahlobogoana explained that when Corruption Watch's application was launched, Ms Petersen took the decision to oppose it on behalf of SASSA. She deposed to an answering affidavit in which she sought to justify the payment to CPS even though 'SASSA had difficulties to explain the reasons for the payment'. Despite that, SASSA's papers were finally drafted to reflect what Ms Petersen and Mr Frank Earl, the Manager: Grants Administration and Customer Services, 'understood to have been the basis for the payment and its justification'. Interestingly, Ms Mahlobogoana stated that Ms Petersen and Mr Earl had been briefed by Ms Raphaahle Ramokgopa,

⁶ Paras 16-17.

⁷ Paras 18-19.

⁸ Paras 20-22.

⁹ Para 24.

¹⁰ Para 27.

the project manager in respect of the tender, who explained to them, before the answering papers were drafted, that the RFP and the SLA envisaged 'the registration of beneficiaries, recipients and procurators' and would include the taking of biometric data of children who benefitted from social grants. Despite this, 'they persisted with their view as expressed in the answering affidavit'.

[28] After Corruption Watch filed its supplementary affidavit, SASSA's counsel, in order to draft a response, posed a number of questions to SASSA officials in relation to the disclosure made by CPS in the United States of America. Ms Mahlobogoana proceeded to explain:

'The most concerning of the issues was that for the first time it appeared that CPS was aware that the beneficiaries included children, therefore there could not have been a variation agreement to include children when they had been included all along. There were thus glaring inconsistencies between the versions given by SASSA and its then CEO (Ms Petersen) and CPS in their respective papers and what CPS declared in annexure DL30 of the supplementary affidavit.'

[29] When SASSA was not able to provide answers to the questions counsel had posed, Mr Thokozani Magwaza, who had replaced Ms Petersen as CEO, took the decision, on counsel's advice, to withdraw SASSA's opposition.

[30] Parliament's Standing Committee on Public Accounts (SCOPA) requested information from SASSA concerning its reasons for withdrawing its opposition. Mr Magwaza furnished SCOPA with a detailed report dated 23 June 2017. Having set out the problems identified by counsel and having interpreted the RFP and the SLA in order to show that they envisaged the registration of children, he concluded:

'Based on the above factors, it would appear that children and procurators were included to be re-registered as per the RFP, Contract and SLA. Therefore, SASSA cannot say with certainty that there were additional beneficiaries that had to be registered on the CPS system. If indeed there were additional people to be registered, then it is not clear why the fee was not agreed prior to that registration process or why the fixed fee of R16.44 was not used. However, this does not mean that there can be no reasons advanced, but currently commonly understood and accepted reasons from SASSA's side cannot be advanced.'

[31] SASSA's view of the answering affidavit deposed to by Ms Petersen is that while it cannot simply be disregarded, it must be seen for what it is – the 'explanation given by those who were involved in the decision-making process'. That said, it is clear that SASSA does not support the version put up by Ms Petersen. Indeed, Ms Mahlobogoana said that SASSA considered the court below's judgment to have been correct and welcomed it. She set out SASSA's position on the merits as follows:

'In particular SASSA does not stand by the interpretation of the former CEO Ms Petersen and Mr Earl that children and procurators were not included in the SLA for the following reasons:

53.1 The bid documents show that the enrolment of children was also included;

53.2 It was always known that although children are not regarded as recipients, they were included under the recipients whom they fell under;

53.3 SASSA did not follow the procedure set out in the SLA which requires that an addendum be concluded if additional work is procured;

53.4 The Bid Adjudication Committee (BAC) recommended, on conditions, for Ms Petersen's approval for payment of the additional work after the fact.'

[32] The problem of two mutually destructive versions being put up by SASSA is more apparent than real. Ultimately, the outcome of this appeal turns on an interpretation of the RFP, the SLA and the contract. It is to that issue that I now turn.

The interpretation of the contractual documents

[33] The process of interpreting documents, including contracts, is an exercise aimed at ascertaining what the parties involved meant by the words they chose. It is necessary to do so contextually and to construe the document 'in accordance with sound commercial principles and good business sense so that it receives a fair and sensible application'.¹¹

[34] These broad principles were explained as follows by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:¹²

¹¹ *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) para 5. See too *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

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

[35] I shall commence by considering the legislative context within which SASSA functions, as well as its obligations. Thereafter, I shall consider, in turn, the RFP, the SLA and the contract.

The legislative context

[36] In terms of s 2(2) of the SASSA Act, SASSA is, in its functioning, subject to the PFMA. It is a public entity for purposes of the PFMA.¹³ Section 2 of the PFMA provides that its objects are to 'secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies'. Obligations consistent with these objects are placed on the CEO of SASSA as its accounting authority.¹⁴

[37] SASSA's objects are set out in s 3 of the SASSA Act. They are to 'act, eventually, as the sole agent that will ensure the efficient and effective management,

¹³ PFMA, Schedule 3, Part A.

¹⁴ PFMA, ss 50 and 51.

administration and payment of social assistance’;¹⁵ to ‘serve as an agent for the prospective administration and payment of social security’;¹⁶ and to ‘render services relating to such payments’.¹⁷ When SASSA outsources its functions, as it did in this case, s 4(3) requires that any contract it enters into includes provisions that ensure, inter alia, ‘the effective, efficient and economical use of funds designated for payment to beneficiaries of social security’.¹⁸

[38] The principal empowering mechanism for the payment of beneficiaries is the Social Assistance Act. Its preamble states:

‘SINCE the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance, and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights;

AND SINCE the effective provision of social assistance requires uniform norms and standards, standardised delivery mechanisms and a national policy for the efficient, economic and effective use of the limited resources available for social assistance and for the promotion of equal access to government services;

THEREFORE in order to prevent the proliferation of laws, policies and approaches to the execution thereof from materially prejudicing the beneficiaries or recipients of social assistance as well as the economic interests of provinces or the Republic as a whole or from impeding the implementation of a national social assistance economic policy;

AND in order to assist in securing the well-being of the people of the Republic and to provide effective, transparent, accountable and coherent government in respect of social assistance for the Republic as a whole,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:

—’

[39] The objects of the Social Assistance Act are set out in s 3. This section reads:

‘The objects of this Act are to –

- (a) provide for the administration of social assistance and payment of social grants;

¹⁵ SASSA Act, s 3(a).

¹⁶ SASSA Act, s 3(b).

¹⁷ SASSA Act, s 3(c).

¹⁸ SASSA Act, s 4(3)(a).

- (b) make provision for social assistance and to determine the qualification requirements in respect thereof;
- (c) ensure that minimum norms and standards are prescribed for the delivery of social assistance; and
- (d) provide for the establishment of an inspectorate for social assistance.'

[40] The Social Assistance Act gives effect to the fundamental right, provided for by s 27(1)(c) of the Constitution, for everyone to have access to 'social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. In order to meet this obligation, s 4 of the Act requires the responsible Minister, with the concurrence of the Minister of Finance, to make funds available for the payment to persons who qualify of six different types of grants. They are child support grants, care dependency grants, foster child grants, disability grants, older person's grants, war veteran's grants and grants-in-aid.

[41] From the legislative provisions that I have referred to, it is apparent that two complementary sets of obligations rest on SASSA and would, of necessity, have had a bearing on, and informed, the content of the RFP, the SLA and the contract. The first set concerned the obligation to deliver a social grant payment system that could fulfil SASSA's constitutional mandate, as given effect to by the SASSA Act and the Social Assistance Act. This included not only putting in place a system that was able to deliver social grants on time but also one that respected the dignity of recipients and beneficiaries, and was user-friendly.

[42] The second set of obligations involved SASSA performing its core function in a fiscally responsible manner – as cost-effectively and efficiently as possible with systems in place to avoid fraud, duplication of payments and corrupt payments to 'ghost' beneficiaries. That, it seems to me, entails, inter alia, ensuring that accurate information is captured on the system concerning those to whom social grants are paid as well as those who are the ultimate beneficiaries of social grants. These obligations stem from the SASSA Act, the Social Assistance Act and the PFMA.

The RFP, the SLA and the contract

[43] After the RFP had, in a section entitled 'Background and Intent', recorded that SASSA was responsible for the management, administration and payment of social grants, the statement was made that more than 14.8 million people benefitted from social grants each month.¹⁹ The purpose of the RFP was to invite bidders to submit proposals 'for the provision of a Payment Service for Social Grants'.²⁰ Its general intent was for SASSA to have in place a system for the payment of social grants that improved services to beneficiaries, was flexible, reduced 'fraud, corruption and leakage at the point of payment' and reduced costs.²¹

[44] Section C of the RFP dealt with the scope of work that the successful bidder was required to perform. Clause 1 of this section stated:

1.1 As indicated in the introduction Section A of the RFP, SASSA is currently responsible for the disbursement of Social Grants to more than 8.5 million Grant Recipients per month resulting in over 14.8 million grants being paid.

1.2 This number is likely to increase in the near future, given that the age limit for child support grant has been extended up to the age of 18 years.'

[45] It will be noticed that this clause draws a distinction between 8.5 million recipients and 14.8 million grants being paid to them. In the definitions section of the RFP a distinction is drawn between 'beneficiaries', on the one hand, and 'recipients', on the other. 'Beneficiaries' are defined as 'those persons who receive Social Grants in terms of the [Social Assistance] Act', while a 'Grant Recipient' is defined as 'a Beneficiary, a primary care giver or a Procurator who receives one or more Social Grants'. A 'procurator' is defined in s 1 of the Social Assistance Act to mean 'a person appointed by a beneficiary' or SASSA to 'receive social assistance on the beneficiary's behalf'.

¹⁹ Section A, clause 1.3.

²⁰ Section A, clause 2.1.

²¹ Section A, clause 3.

[46] Clause 3 defined the scope of the work to include ‘enrolment of eligible Beneficiaries, Grant Recipients and Procurators’, the issuing of beneficiary payment cards and the payment of grants.

[47] The enrolment process was required to capture and register the identification data of ‘Beneficiaries, Grant Recipients and Procurators’.²² Two phases of enrolment were envisaged – a ‘bulk enrolment of the Beneficiaries into the Successful Bidder’s system’ and an on-going enrolment of new beneficiaries when they entered the system.²³

[48] Clause 3 provided further detail of the work that was required. According to clause 3.1.2.1.2, SASSA’s intention was to have ‘all Beneficiaries . . . to be Biometrically identified’ during the bulk enrolment process. Clause 3.1.6 provided that for ‘child support, foster child and care dependency grants, the Successful Bidder/s must ensure that the Biometrics and Data relating to the children is also captured’; and, in terms of clause 3.1.7, when a procurator is involved, the successful bidder was required to ensure that ‘the Data relating to the Procurator is also captured including Biometrics’.

[49] Clause 3.1.15 provided that when SASSA approved a grant to a parent or caregiver, ‘the details of the Beneficiary (i.e. the child) for whom the grant is intended’ will be specified ‘in order for the Successful Bidder/s to authenticate the details of the actual Beneficiary (child)’. Clause 3.2.2 stated that only ‘one Beneficiary Payment Card will be issued to the Grant Recipient irrespective of the number of grants types that the Beneficiary or Recipient qualifies for’.

[50] Section E concerns financial details of the bid. Clause 2.1 provided that in the costing of the bid, a number of ‘key cost drivers’ had to be taken into account. They were listed in clause 2.2. It provided that the transaction fees that would be due to the successful bidder covered enrolment, beneficiary payment cards, labour, payment infrastructure, phase-in costs and set-up costs. The ‘transaction fees/cost’ were, in

²² Section C, clause 3.1.

²³ Section C, clause 3.1.2.

terms of clause 2.3, capped at a maximum of R16.50, inclusive of VAT, for the duration of the contract. In the definitions clause, the 'firm price' is defined to mean 'the all-inclusive transaction fee charges per Grant Recipient charged by the Bidder to SASSA for provision of services for the duration of the contract, which Firm Price shall not be in excess of R16.50 (VAT inclusive) (Sixteen rand and fifty cents) per transaction per month'.

[51] The RFP unambiguously and clearly contemplated a contract in terms of which the successful bidder would enrol on its system both recipients and beneficiaries. It would do so at the outset and when new recipients and beneficiaries qualified for social grants. It would be paid the 'fixed price' as an all-inclusive fee for doing this and for paying social grants every month for the duration of the contract.

[52] Clause 1 of the SLA contains definitions. The term 'beneficiaries' was defined to 'bear the meaning assigned to it in the Act and includes Children'.²⁴ A child was defined as 'any person under the age of 18 (eighteen) years who is entitled to benefit directly from a Grant and in respect of whom an application was made for the Grant'. A procurator was defined with reference to the definition in s 1 of the Social Assistance Act, and a recipient was defined as 'a Beneficiary, Primary Care Giver, a claimant of Unclaimed Benefits or Procurator who is entitled to receive one or more Grants'.

[53] Clause 4 of the SLA listed the services that CPS had agreed to provide. These included the '[e]nrolment of all eligible Recipients as per the Enrolment plan . . .'.²⁵ In other words, CPS undertook, inter alia, to enrol beneficiaries, including children. Clause 5 dealt with the enrolment process. It provided that this entailed two phases, namely, a bulk enrolment phase – the 'initial Enrolment of every Recipient at the commencement of the Contract – and 'on-going Enrolment of new Recipients'.

[54] Clause 5.3 set out the information that was required to be captured by CPS when enrolling recipients. This included: the '[n]ame, surname, Digital Photograph (not

²⁴ In terms of s 1 of the Social Assistance Act, a beneficiary is 'a person who receives social assistance in terms of sections 6, 7, 8, 9, 10, 11, 12 or 13'.

²⁵ Clause 4.1.1.

applicable to Children) and identification number of the Recipient';²⁶ and '[a]ll 10 fingerprints where possible, or two palm prints, or two foot prints (new born to 6 years) and voice'.²⁷ Clause 5.3.8 placed an obligation on CPS to 'verify the identity of all Recipients and Children before Enrolment'.

[55] The contract contained a definition of the terms 'agreement' and 'contract' in clause 2. They mean 'the agreement as set out in this document together with the Service Level Agreement, Bid Documents and RFP, which documents shall be regarded as annexure hereto by reference'. The definitions of the terms 'beneficiary', 'child', 'procurator' and 'recipient' in clause 2 of the contract are identical to the corresponding definitions in clause 1 of the SLA. The 'firm price' is defined in the contract to mean 'an all-inclusive fee of R16.44 (VAT inclusive at 14%) per Recipient Paid by the Contractor'.

[56] Clause 5.2 dealt with the SLA. It stated:

'The Service Level Agreement shall include provisions contemplated in section 4(3) of the South African Social Security Agency Act, 2004 (Act No. 9 of 2004); as well as detailed Services to be provided which include: performance, quality and functionality standards; procedures, norms and standards prescribed by SASSA requiring compliance by the Contractor; practical steps for the implementation of the Services; pre-funding; enrolment of Beneficiaries; issuing and replacement of Cards to Beneficiaries; payment compliance; transfer of beneficiary data to SASSA; the respective roles of the Contractor and of SASSA and reporting, liaison; communication requirements; infrastructure, equipment and facilities to be provided and maintained; security; communications; implementation of penalties system; and related issues.'

[57] Clause 6.1 stated that in consideration for the services that were to be provided by CPS, SASSA would pay it the firm price. In the event, however, of CPS being required to render 'social grant payment related services' that are additional to the services contemplated by the contract (including the SLA), the terms of the rendering of the additional services will have to be negotiated and, if agreed, to, reduced to writing.²⁸

²⁶ Clause 5.3.1.1.

²⁷ Clause 5.3.1.4.

²⁸ Clause 6.3.

[58] It is clear from the provisions of the SLA and the contract that when CPS was required to register social grant beneficiaries, it was required to register not only recipients in the strict sense – the persons to whom payment was made – but also those who benefitted from social grants. So, if a parent received payment of child care grants in respect of three children, CPS was required to register not only the parent but the three children as well. That is consistent with the definitions in the SLA and the contract, and with the duties imposed on CPS in respect of the service it was to provide. It is also consistent with the legislative context in terms of which SASSA sought to outsource the provision of an efficient and effective, corruption free payment system for social grants. The result is that this registration process was part of the service that CPS agreed to provide in return for payment of the fixed price for the duration of the contract.

Conclusion

[59] On the basis of my interpretation of the SLA and the contract, it is evident that Ms Petersen and CPS were incorrect in their assertions that it had been necessary to vary the contract because it only required CPS to register recipients of social grants and not recipients and beneficiaries. They were also incorrect in their view that CPS was entitled to payment over and above the fixed price.²⁹

[60] There was no lawful basis for the variation agreement for this reason. In my view, CPS's claim for payment was contrived and opportunistic. There was consequently no lawful basis for the decision to pay CPS the amount of R316 447 361.41, and it must be repaid by CPS to SASSA. As a result, the appeal must fail.

²⁹ The principal focus of Corruption Watch's case was on irregularities in the procurement process. It was conceded on behalf of CPS, however, that there was no obstacle to this court deciding the matter on the basis of an interpretation of the SLA and the contract. There was, at best, muted criticism of Corruption Watch's submissions on the interpretation issues. Furthermore, in order to deal with the defence raised by CPS, it was imperative that the SLA and the contract be interpreted.

The order

[61] I make the following order:

- 1 The appeal is dismissed.
- 2 The appellant is directed to pay the third respondent's costs, including the costs of two counsel.

C Plasket
Judge of Appeal

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