



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.

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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.)

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'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.

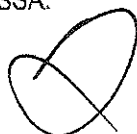
[11] The BAC's recommendation was accepted by Ms Petersen. Payment of the reduced amount was tendered by SASSA but CPS refused to accept it and returned the money to SASSA. CPS demanded payment of the full amount. The BAC convened again and recommended that the full amount be paid to CPS in the light 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 Nunthakumar 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.

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[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:

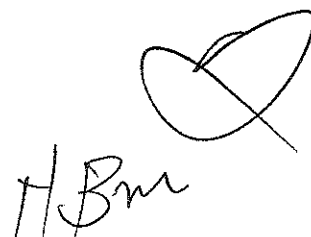
'4 At the time of the tender SASSA was responsible for the payment of more than 14.5 million social grants per month to over 8.5 million beneficiaries. These figures were approximate figures given the fact that some recipients/beneficiaries of grants were receiving them on behalf of children or on behalf 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.

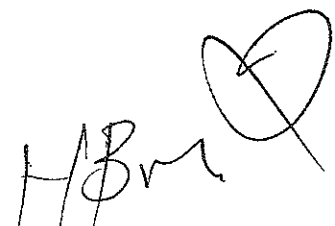
At the request of the SASSA CEO, the CEO of CPS agreed that the payment of costs associated with the enrolment of dependants would only be effected at the conclusion of the bulk enrolment process.

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/EMW 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.

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[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.

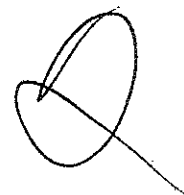
⁷ Paras 18-19.

⁸ Paras 20-22.

⁹ Para 24.

¹⁰ Para 27.

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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.'

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[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.

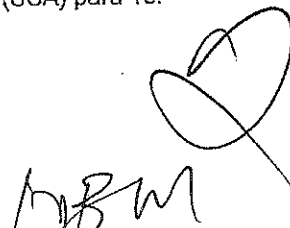
The interpretation of the contractual documents

[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.

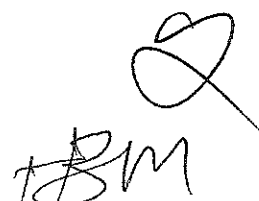
The legislative context

[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.

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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).

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- (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.

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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.

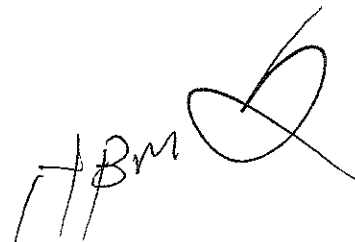
1.2 This number is likely to increase in the near future, given that the age limit for child support grant has been extended up to the age of 18 years.'

[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.

A handwritten signature in black ink, appearing to be 'HBM' followed by a large, stylized flourish.

[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.

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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.

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[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.

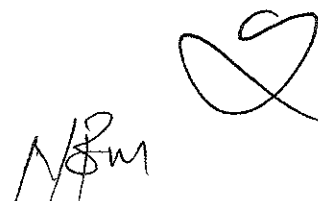
Conclusion

[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

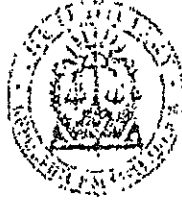
[60] There was no lawful basis for the variation agreement for this reason. In my view, CPS's claim for payment was contrived and opportunistic. There was consequently no lawful basis for the decision to pay CPS the amount of R316 447 361.41, and it must be repaid by CPS to SASSA. As a result, the appeal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

N/S
M



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
<u>23 March 2018</u>	<u><i>M. Tsoka</i></u>
DATE	SIGNATURE

CASE NUMBER: 21904/2015

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In the matter between:

CORRUPTION WATCH (NPC) (RF)

APPLICANT

And

THE CHIEF EXECUTIVE OFFICER OF THE

SOUTH AFRICAN SOCIAL SERVICES

1ST RESPONDENT

THE SOUTH AFRICAN SOCIAL SECURITY

AGENCY

2ND RESPONDENT

CASH PAYMASTER SERVICES (PTY) LTD

3RD RESPONDENT

M. Tsoka

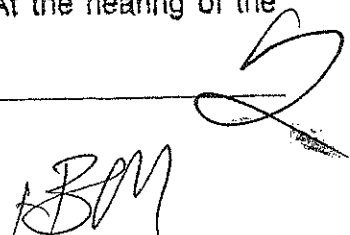
JUDGMENT

TSOKA, J

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

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

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



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

[4] The facts giving rise to this national saga are the following. On 17 January 2012 SASSA enlisted CPS to distribute social welfare grants on its behalf. For reasons that are not relevant to this application, on 29 November 2013, the Constitutional Court declared the agreement between SASSA and CPS unlawful¹. The declaration of unlawfulness was suspended pending confirmation of a just and equitable remedy. On 17 April 2014, the Constitutional Court ordered SASSA to initiate a new tender process for the payment of social grants within 30 days. Again, the court suspended the declaration of invalidity of the tender pending compliance with the new tender process to be initiated. To date, no new tender has been awarded with the result that the declaration of invalidity still remains.

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

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

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

- 10 [6] In terms of the Contract, the parties agreed on a firm price of R16.44, inclusive of VAT, to be paid by SASSA to CPS per recipient of a social grant. In terms of [V1 - P77 to 78] clause 6.3 of the contract the parties agreed that –

[V1 - P77]

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

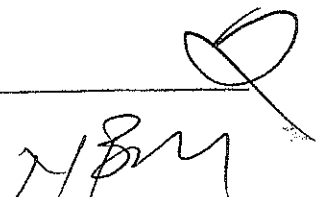
- 20 [7] During June 2014, Corruption Watch learnt through an exchange announcement made by Net 1 UEPS Technologies Incorporated (Net 1), a United States company listed on the Johannesburg Stock Exchange - the parent company of CPS - that SASSA engaged CPS to perform approximately 11 million additional registrations that did not form part of its monthly service fee. And that after the additional registrations which were independently verified, SASSA agreed to pay CPS ZAR 275 million as full settlement of the additional costs incurred.

[8] The announcement of payment of such a substantial amount, aroused the interest of Corruption Watch, whose interest, amongst others, is to act as a watchdog in ensuring that procurement systems are tightened so as to reduce their vulnerability to corruption in order to foster transparency and accountability, not only in respect of public entities but private entities as well. Sensing that public resources intended for use by millions of disadvantaged South Africans may have been directed for the benefit of the few, by non-compliance with the procurement requirements and the expenditure of public funds, it approached SASSA to confirm that its suspicions were unfounded. The latter invited Corruption Watch to its offices to inspect the documentation pertaining to the payment. Corruption Watch was however given restricted access to the limited documentation regarding the said payment. From its assessment, it was unable to locate any documentation evidencing that the said payment was made pursuant to the SLA or in terms of a further agreement as envisaged in clause [V1 - P77 to 78] 6.3 of the contract. It was, however, informed that the said payment was made as a result of the discussion between SASSA and CPS.

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

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

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

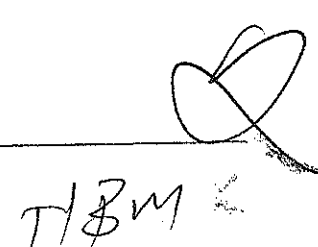

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discussions held between SASSA and CPS, the total number of social grant recipients as well as dependants was unknown resulting in the re-registration of additional grant recipients of 11.9 million by CPS. In justifying the payment, Mr Earl pointed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

- [11] Pursuant to the said BAC's recommendation, SASSA CEO, Ms Virginia Petersen approved part payment of the invoice as recommended. CPS, on the advice of their auditors, rejected the part payment. Surprisingly, on 25 April 2014 SASSA's Supply Chain Management submitted a document to Ms Peterson to consider the BAC's recommendation and pay CPS the full amount of R316 447 361.41 being in respect of ^[V1 - P182] "costs incurred by Cash Paymaster Services (Pty) Ltd to re-register all the grant recipients as well as outstanding beneficiaries." Simultaneously, it was recommended that the completeness and correctness of CPS's audited claim be submitted to an independent auditor for verification. Ostensibly, the purpose of referral of the invoice to an independent auditor was to confirm KPMG's conclusions. It was pointed out in the document that should any discrepancy be uncovered by the independent auditor, CPS would be afforded an opportunity to respond thereto. Should the latter accept the

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

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



THE SLA VARIATION AGREEMENT OF 15 JUNE 2012

[13] The alleged Variation Agreement is headed ^[V2 - P298] "Minutes of enrolment day run feedback meeting held between SASSA and CPS (Pty) Ltd at the Castle Kyalami on Friday 15 June 2012." It records the persons who attended the meeting on that day. It is signed by Ms Peterson and Dr Serge Belamant on behalf of CPS. It records the issues discussed between SASSA and CPS. Of importance and relevance to the present matter it records:

[V2 - P298 to 299]

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

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[14] As there is a dispute between the parties as to whether the above quoted¹ document is a variation agreement or not, it is apt to restate what the Supreme Court of Appeal said in *Natal Joint Municipal Pension Fund v Endumeni Municipality*² in interpreting legislation and agreements such as the one in this matter. In that matter, the Supreme Court of Appeal said the following:

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

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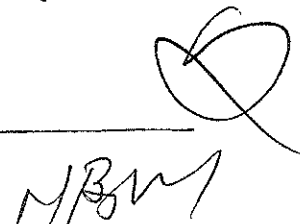
²Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18



10 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.'

10 [15] The ordinary and grammatical language of the alleged "Variation SLA Agreement" of 15 June 2012 having regard to its context and the intention of the parties reveal that –

- 15.1 the contended variation of the SLA is nothing other than the recordal of the minutes held between the parties on that day;
- 15.2 no variation of the SLA was intended but confirmation that the enrolment of dependants would proceed as per the SLA;



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

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

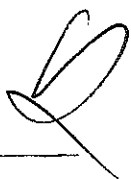
15.5 once an agreement is reached at the conclusion of the bulk enrolment process, payment would be effected;

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

[16] According to SASSA the decision to vary the SLA was that of Ms Peterson. In 10
[V2 - P231]
paragraph 38 of SASSA's answering affidavit she states --

[V2 - P231]
'... I took a decision to consider the variation of the agreement at the meeting of
15 June 2012.'

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


LJBM

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

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

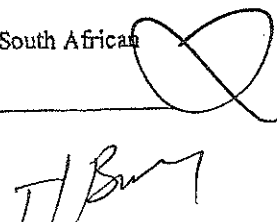
'Vagueness and uncertainty are grounds for review under section 62(1) of PAJA. Certainty in legislation and administrative action has been linked with the rule of law...'

The Constitutional Court went further and stated that –

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

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

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



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

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

[V4 - P764]

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

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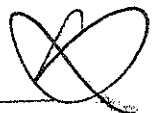

[V4 - P767]

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

[V4 - P767]

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

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

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

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

10 [25] CPS in its written submissions argues that on the basis of the definitions of “the Firm Price”, in the RFP and the definition of a “Beneficiary” in the Social Assistance Act 13 of 2004, which also does not include children, the variation agreement was concluded by SASSA and CPS for inclusion of children, in order to align the concluded SLA and the Contract with these definitions. According to CPS, the Variation Agreement not being an extension of the existing or concluded agreement, cannot be a victim of clauses 4.5.2 and 4.7.8 of the Supply Chain Management Policy (1) of 2008. In support of this submission heavy reliance was based on clause 5.3.10 of the SLA which provides that –

[V1 - P54]

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

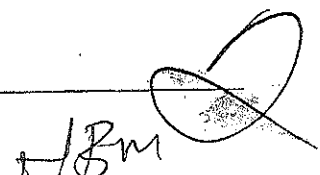
[V1 - P54]
to the contractor by SASSA in respect thereof as well as the impact on timing /
delivery schedules. If the parties are unable to agree on a suitable remuneration
and time / delivery variations, the contractor shall not be requested to render
such additional duties or functions.'

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

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[27] The argument and contention is far from the truth. In terms of the definitions of
[V1 - P48 and 72] [V1 - P48 and 72]
"Beneficiaries" in the SLA and the Contract, the definition "Beneficiaries" shall
bear the meaning assigned to it in the Act (Act No. 13 of 2004) and includes
children." In concluding the SLA and the Contract, the parties were *ad idem* that
"Beneficiaries" shall include children. That being the case the Variation
Agreement, in my view, is an additional function which should have been in strict
compliance with clause 6.3 of the Contract. There being no written agreement,
the purported Variation Agreement is nothing else but an extension of existing or

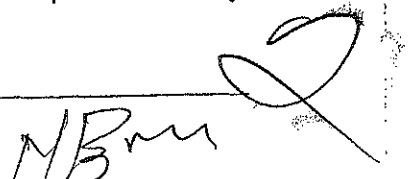
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concluded contract. Resultantly, the purported Variation Agreement is unlawful from which no lawful payment may be made.

[28] ^{[V1 - P53 to 54] [Service Level Agreement]} Clause 5.3 of the Contract deals with the information to be captured by CPS ^[V1 - P53] during the enrolment process. In terms of clause 5.3.1.2 the name and address of the school each child attends, must be captured. This is in addition of the current address (physical and postal), cell phone numbers, alternative contact numbers, employment of each grant recipient. In terms of the Contract, the parties agreed that the capturing of this information is ^[V1 - P54] "an additional function" to be performed by CPS on behalf of SASSA for an agreed price. If the parties did not agree on the remuneration, CPS was not obliged to perform this additional function. In the present matter, although the parties had not agreed on the remuneration for the additional work, CPS performed this additional work on the basis that it would be remunerated at cost. Nowhere in the papers are CPS's costs agreed upon. That the performance of this additional work was a unilateral decision by CPS, which in the absence of agreement to remuneration, was not obliged to perform, cannot be more obvious. The unilateral performance by CPS cannot be the justification for the payment of R316 447 361.41. The payment is contrary to the provisions of section 217 of the Constitution and all legal prescripts. It is therefore reviewable in terms of PAJA.

[29] ^[V1 - P54] CPS's contention that the reference in clause 5.3.10 to clause 5.3.1.2 is an error ^[V1 - P53] and should be ^[V1 - P53] 5.3.1.4 is of no assistance to it. Clause 5.3.1.4 requires not only ^[V1 - P53]



[V1 - P53]
the capturing of "all 10 fingerprints where possible or two palm prints" of the grant
recipients but [V1 - P53] "two footprints (new born to 6 years)..." of children. That both
clauses require the capturing of information relating to children, which is
[V1 - P54]
additional information in terms of clause 5.3.10 admits no doubt. In the absence
of an agreement as to CPS's remuneration, its remuneration in the amount of
R316 447 361.41 is thus unjustified and unlawful. The payment is reviewable in
terms of PAJA.

[30] Even if one were to read clause 5.3.1.2 in clause 5.3.10 to be referring to clause
[V1 - P53] [V1 - P54]
5.3.1.4, the submission by CPS, is still wrong. In terms of clause 5.3.10, if the
[V1 - P54]
parties did not reach agreement on the remuneration of the additional work, CPS
was not obliged to render such services without agreement on suitable
remuneration having been reached. In the present matter, it rendered services
without an agreement having been reached on its remuneration. In the absence
of agreement with regard to remuneration, the process was skewed in favour of
CPS. It was unfair, inequitable, opaque, anti-competitive and, probably, not cost-
effective. On the authority of *ALLPay1*, as pointed out above, the process was
flawed. It is reviewable in terms of PAJA.

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[31] International authority and experience⁴ teach us that deviations from fair process
may themselves, quite often, be the symptoms of corruption or malfeasance in
that the process is skewed in favour of one party to the exclusion of others. Such

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

process is invariably unfair and therefore reviewable in terms of PAJA. The fact that clause 5.3.10^[V1 - P54] envisages the discussion and future agreement on remuneration of costs payable to CPS, reveal that there was indeed no agreement between the parties for CPS to perform the additional functions at all or at cost. In any event, the contended "at cost" remuneration to CPS is doubted by the independent auditing firm Nexia SAB & T (Nexia) engaged by SASSA to verify the correctness of the payment to CPS. Nexia points out that as a result of the Variation Agreement, SASSA overpaid CPS by an additional amount of over R13 million. It also, correctly, in my view, called into question the inclusion of salaries, bonuses, legal fees and expended assets in the payment made by SASSA to CPS as constituting "at cost" as contended for by CPS.

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

REMEDY

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

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

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

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

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

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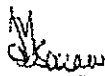
[36] Having regard to the aforesaid, the following order is granted –

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

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

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

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



M TSOKA

10 JUDGE OF THE HIGH COURT

DATE OF HEARING: 22 FEBRUARY 2018

DATE OF JUDGMENT: 23 MARCH 2018

Appearances:

Counsel for the applicant:

Adv Budlender

Adv Kelly

Instructed by:

MacRobert Attorneys



SCA Case No. 1029/2018
(GP Case No. 21904/2015)

JUDGMENT and ORDER of the High Court delivered
by the Honourable Mr Justice Tsoka
on 23 March 2018

807

Counsel for the third respondent:

Adv Cockrell SC

Adv Bleazard

Instructed by:

Smit Sewgoolam Incorporated

