

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 48/2013

In the matter between:

ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD	First Applicant
ALLPAY FREE STATE (PTY) LTD	Second Applicant
ALLPAY WESTERN CAPE (PTY) LTD	Third Applicant
ALLPAY GAUTENG (PTY) LTD	Fourth Applicant
ALLPAY EASTERN CAPE (PTY) LTD	Fifth Applicant
ALLPAY KWAZULU NATAL (PTY) LTD	Sixth Applicant
ALLPAY MPUMALANGA (PTY) LTD	Seventh Applicant
ALLPAY LIMPOPO (PTY) LTD	Eighth Applicant
ALL PAY NORTH WEST (PTY) LTD	Ninth Applicant
ALL PAY NORTHERN CAPE (PTY) LTD	Tenth Applicant
MICAWBER 851 (PTY) LTD	Eleventh Applicant
MICAWBER 852 (PTY) LTD	Twelfth Applicant
MICAWBER 853 (PTY) LTD	Thirteenth Applicant
MICAWBER 854 (PTY) LTD	Fourteenth Applicant



And

THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	First Respondent
THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	Second Respondent
CASH PAYMASTER SERVICES (PTY) LTD	Third Respondent
EZIDLUBHEDU INVESTMENT HOLDINGS (PTY) LTD	Fourth Respondent
FLASH SAVINGS CREDIT AND COOPERATIVE ENLIGHTENED SECURITY FORCE (PTY) LTD	Fifth Respondent
MOBA COMM (PTY) LTD	Sixth Respondent
EMPILWENI PAYOUT SERVICES (PTY) LTD	Seventh Respondent
PENSION MANAGEMENT (PTY) LTD	Eighth Respondent
MASINGITA FINANCIAL SERVICES (PTY) LTD	Ninth Respondent
	Tenth Respondent

THE SOUTH AFRICAN POST OFFICE	Eleventh Respondent
ROMAN PROTECTION SOLUTIONS CC	Twelfth Respondent
UBANK LIMITED	Thirteenth Respondent
AFRICAN RENAISSANCE INVESTMENT MANAGEMENT (PTY) LTD	Fourteenth Respondent
STANDARD BANK GROUP LIMITED	Fifteenth Respondent
NEW SOLUTIONS (PTY) LTD	Sixteenth Respondent
ITHALA LIMITED	Seventeenth Respondent
KTS TECHNOLOGY SOLUTIONS CONSORTIUM	Eighteenth Respondent

FILING SHEET

PRESENTED FOR FILING:

CORRUPTION WATCH'S PRACTICE NOTE AND WRITTEN SUBMISSIONS

DATED AT SANDTON ON THIS 16TH DAY OF AUGUST 2013.



VAN HULSTEDYNS ATTORNEYS

Attorneys for Corruption Watch

3RD Floor, Sandton City,

58 Fifth Street

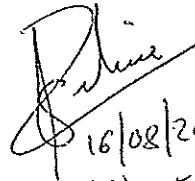
SANDTON

Ref: A Legg / D Raath

TO: THE REGISTRAR
Constitutional Court, Constitution Hill
Braamfontein
JOHANNESBURG




AND TO: NORTONS INC.
Attorneys for the Applicants
135 Daisy Street
SANDTON
Tel: 011 666 7560
Ref: A Norton / A Roets


16/08/2013
14h45

AND TO: THE OFFICE OF THE STATE ATTORNEY
First and Second Respondents' Attorneys
Ground Floor, 255 Schoeman Street
PRETORIA
Tel: 012 309 1569
Ref: 1007/12/Z1/MM

AND TO: SMIT SEWGOOLAM INC
Third Respondent's Attorneys
12 Avonworld Road
SAXONWORLD
Tel: 011 646 0006
Ref: Tiaan / 4514/0CJ/SC

16 August 2013
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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 48/2013

In the matter between:

ALLPAY CONSOLIDATED INVESTMENT
HOLDINGS (PTY) LTD

First Applicant

FOURTEEN OTHERS

Second to Fifteenth Applicants

and

THE CHIEF EXECUTIVE OFFICER OF THE SOUTH
AFRICAN SOCIAL SECURITY AGENCY

First Respondent

THE SOUTH AFRICAN SOCIAL SECURITY
AGENCY

Second Respondent

CASH PAYMASTER SERVICES (PTY) LTD

Third Respondent

FIFTEEN OTHERS

Fourth to Eighteenth Applicants

and

CORRUPTION WATCH

Amicus Curiae

CORRUPTION WATCH'S PRACTICE NOTE

A. Nature of proceedings

Application for leave to appeal from judgment of the Supreme Court of Appeal

B. The issues to be argued by the amicus curiae

- The correctness of the SCA's approach to "inconsequential irregularities"
- The approach to evidence being adduced of corruption
- The inadequacy of SASSA's investigation of corruption

C. Portions of the record that are necessary for the argument of the amicus

- The application by Corruption Watch
- The main record only where referred to in the heads of argument

D. Estimate of the duration of oral argument of the amicus

30 minutes

E. Summary of argument

a. Corruption Watch's submissions focus on three main issues.

All relate to the fact that corruption raises particular concerns in the context of public procurement.

b. First, Corruption Watch is concerned that the SCA's judgment relaxes the necessity for procedural rigour and allows for irregularities in public procurement. It is Corruption Watch's experience that these procedures are necessary to provide checks and balances in order to *inter alia* minimise procurement corruption. Corruption Watch submits that this Court should correct the approach of the SCA on this score.

c. Second, Corruption Watch is concerned that the approach of the SCA judgment will make it more difficult for parties to adduce evidence of corruption and *mala fides*. Corruption Watch submits that courts should not stand by as mere observers in cases involving allegations of procurement corruption, but should take all available steps to allow evidence of corruption to be fully ventilated in proceedings – irrespective of the stage of proceedings and whether this evidence may come from a losing bidder. In particular, courts should not exclude such evidence without at least

calling for an answer from the other parties concerned, so that the cogency of the evidence can be properly assessed.

d. Third, Corruption Watch is concerned about SASSA's failure to properly investigate corruption in the tender process. Corruption Watch contends that – whatever the outcome of the present appeal – this Court should make clear that SASSA was and remains under a duty to properly investigate

F. Authorities on which particular reliance will be placed

- *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC)
- *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC)

STEVEN BUDLENDER

MARK TOWNSEND

LUKE KELLY

Counsel for Corruption Watch

Chambers, Johannesburg and Cape Town
16 August 2013

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 48/2013

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**ALLPAY CONSOLIDATED INVESTMENT
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CASH PAYMASTER SERVICES (PTY) LTD

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FIFTEEN OTHERS

Fourth to Eighteenth Applicants

and

CORRUPTION WATCH

Amicus Curiae

CORRUPTION WATCH'S WRITTEN SUBMISSIONS

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A INTRODUCTION AND OVERVIEW OF SUBMISSIONS

- 1 At the heart of this matter is a tender award for the distribution of social security grants on behalf of the South African Social Security Agency ("SASSA").
- 2 The Supreme Court of Appeal dismissed the attempts by Allpay Consolidated Investment Holdings (Pty) Ltd and its affiliates ("Allpay") to review and set aside the tender award by SASSA to Cash Paymaster Services (Pty) Ltd and its affiliates ("CPS").
- 3 Corruption Watch has been granted admission as an amicus curiae in this matter.
- 4 Corruption Watch is an independent non-profit civil society organisation. Its main aim is to fight corruption and the abuse of public funds.¹ It also aims to promote transparency and accountability in the provision of public goods and services.
- 5 A powerful means of fighting corruption is by exposing it. Corruption Watch therefore seeks to expose corruption—
 - 5.1 by creating forums and facilities through which members of the

¹ Corruption Watch's affidavit; para 13.

public can report incidents of corruption (or suspected corruption); and

5.2 by then investigating the reports of corruption, with a view to further steps being taken against any guilty persons or institutions by the appropriate authorities.²

6 Corruption Watch also engages in litigation, through which its legal advocacy and policy unit seeks to highlight where the law has not been followed, as well as where it can be developed so as to facilitate the fight against corruption.³

7 The interest of Corruption Watch in the present matter concerns the continual risk of impropriety and corruption in tender processes, and the effect of aspects of the SCA's judgment in this regard.

8 In keeping with its limited involvement as an amicus curiae, Corruption Watch does not (and cannot) advance any submissions as to:

8.1 Whether AllPay has established any grounds of unlawfulness in respect of the tender process;

² Corruption Watch's affidavit; paras 16-17.

³ Corruption Watch's affidavit; para 17.3.

- 8.2 Whether the appeal should succeed; and
- 8.3 Whether the tender should have been awarded to AllPay or CPS.
- 9 Rather, Corruption Watch's submissions are confined to the following three issues:
- 9.1 First, Corruption Watch is concerned that the SCA's judgment relaxes the necessity for procedural rigour and allows for irregularities in public procurement. It is Corruption Watch's experience that these procedures are necessary to provide checks and balances in order to *inter alia* minimise procurement corruption. Corruption Watch submits that this Court should correct the approach of the SCA on this score.
- 9.2 Second, Corruption Watch is concerned that the approach of the SCA judgment will make it more difficult for parties to adduce evidence of corruption and *mala fides*. Corruption Watch submits that courts should not stand by as mere observers in cases involving allegations of procurement corruption, but should take all available steps to allow evidence of corruption to be fully ventilated in proceedings – irrespective of the stage of proceedings and whether this

evidence may come from a losing bidder. In particular, courts should not exclude such evidence without at least calling for an answer from the other parties concerned, so that the cogency of the evidence can be properly assessed.

9.3 Third, Corruption Watch is concerned about SASSA's failure to properly investigate corruption in the tender process. Corruption Watch contends that – whatever the outcome of the present appeal – this Court should make clear that SASSA was and remains under a duty to properly investigate the allegations of corruption concerned.

10 We deal with each of these in turn. Before doing so, however, we deal with the particular concerns that arise regarding corruption in the context of public procurement.

B CORRUPTION IN THE CONTEXT OF PUBLIC PROCUREMENT

11 The general concern about corruption and the destructive effect it has on our country has been made clear by this Court. In *South African Association of Personal Injury Lawyers*⁴ this court issued the following warning on the threat posed by corruption and maladministration:

“Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.”

12 Moreover, in *Glenister II*,⁵ this court was unequivocal and unanimous in concluding that government is constitutionally required to establish effective mechanisms to tackle corruption.

12.1 Though *Glenister II*, was a split judgment, the majority and the minority agreed on this issue.

⁴ *South African Association of Personal Injury Lawyers v Heath and others* 2001 (1) SA 833 (CC) at para 4.

⁵ *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC).

12.2 Both the majority and minority judgments recognise that corruption is a scourge that must be effectively tackled.

The majority held:

“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.”⁶

12.3 Both judgments recognise that corruption undermines the ability of the state to deliver on many of its obligations in the Bill of Rights, notably but not limited to those relating to social and economic rights.⁷

12.4 Both judgments recognise that the positive duty on the state to take effective measures to combat corruption derives from section 7(2) of the Constitution, which creates

⁶ Majority judgment at para 166; see Minority judgment at para 83.

⁷ Majority judgment at para 166 and para 175, 177; Minority judgment at para 83.

a duty on the state *"to respect, protect, promote and fulfill the rights in the Bill of Rights"*.⁸

- 13 The following regional and international instruments also establish an obligation on member states (including South Africa) to prevent and prosecute corruption: United Nations Convention against Corruption; the African Union Convention; and the Southern African Development Community Protocol against Corruption.
- 14 While the concern about corruption is a general one, it applies with particular force in the context of public procurement.
- 15 This is not a uniquely South African phenomenon. On the contrary, writing in the international context, Williams-Elegbe⁹ highlights how public procurement is especially vulnerable to corruption. She explains the reasons for this as follows:

"Public procurement is susceptible to corruption due partly to the large sums involved, the (usually) non-commercial nature of procuring entities, the nature of the relationship between the decision-maker and the public body, the measures of unsupervised discretion; bureaucratic rules

⁸ Majority judgment at para 177, 189; Minority judgment at para 105 and 106.

⁹ Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, Hart Publishing, Oxford and Portland (2012) at p 24-25.

and budgets that may not be tied to specific goals as well as non-performance-related pay and low pay. Public procurement also presents the opportunity for corruption because of the asymmetry of information between the public official and his principal – ie the government. As the public official holds more information about the procurement process and the procurement market, the official is able to use this knowledge to his advantage by manipulating the procurement process, should he choose to do so.”

- 16 In the South African context, Bolton takes the same approach on the danger of corruption in the context of public procurement:

“The size and volume of government procurement does ... give rise to considerable potential for corruption. Both contractors and public officials may resort to corrupt practices... [C]orruption impacts on all the different groups and interests outlined above; it undermines the attainment of value for money in government contracting, the fair treatment of contractors and the use of procurement as a policy tool.”¹⁰

- 17 Bolton goes on to add:

“[Corruption] is extremely damaging to the procurement process because it reduces the confidence that honest contractors and the public at large have in the government. Corruption leads to the slackening of competition for government contracts and impacts negatively on the government’s ability to obtain the best possible value for money.”¹¹

- 18 Between January 2012 and March 2013 Corruption Watch

¹⁰ Bolton, *The Law of Government Procurement in South Africa*, LexisNexis (2007) at 4.

¹¹ *Ibid* at page 59.

received 287 reports of corruption and irregularities in the context of public procurement.¹² For this reason, one of Corruption Watch's main focus areas for 2013 is "*corruption in public procurement and supply chain management*".¹³ This form of corruption is commonly referred to as "*procurement corruption*".

19. In the process of assessing and investigating these reports, Corruption Watch has found that—

19.1 deviations from standard procedures, especially without good reason, and amendments to standard procedures, particularly at a late stage, are strongly indicative of corruption;¹⁴ and

19.2 small irregularities, as they first appear, are very often symptomatic of significantly larger concerns.¹⁵

20. Corruption Watch has also found that evidence of procurement corruption is generally difficult to uncover, often only becoming available long after a contract has been awarded.¹⁶

¹² Corruption Watch's affidavit; para 20.

¹³ Corruption Watch's affidavit; para 18, annexure 'DL1'.

¹⁴ Corruption Watch's affidavit; para 22.

¹⁵ Corruption Watch's affidavit; paras 26 and 29.

¹⁶ Corruption Watch's affidavit; para 29.

21 Corruption Watch's experience is supported by the stance of both the World Bank and Transparency International, which organisations view irregularities in procurement processes as "*red flags*" or "*indicators*" of corruption.¹⁷

¹⁷ Corruption Watch's affidavit; para 27, annexure 'DL2'.

C THE APPROACH TO PROCEDURAL REQUIREMENTS

22 In *Steenkamp*,¹⁸ this Court stated that tender processes require “strict and equal compliance by all competing tenderers on the closing day for submission of tenders.” (emphasis added)

23 However, the SCA appears to have endorsed a relaxed approach to the procedural requirements for calling for, assessing and awarding tenders for public procurement. In this regard, the SCA characterised a genus of irregularities as “*inconsequential*”, and found that such irregularities do not have the effect of invalidating public contracts. It held as follows:

“There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal. It was submitted that the process of procurement has a value in itself, which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences, and extracts from various cases were cited to support that proposition. I do not think it is helpful to extrapolate from selected statements made in cases decided in a different context. The cases from which the extracts were drawn did not concern the process of tendering. I have pointed out that the public interest has a role to play in cases of this kind. It would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities.”¹⁹

¹⁸ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 60.

¹⁹ SCA judgment at para 21.

24 Corruption Watch makes two main submissions in this regard:

24.1 First, the approach of the SCA leads to considerable uncertainty regarding the requirements for a valid procurement process. Moreover, it conflates and confuses questions of unlawfulness with questions of remedy.

24.2 Second, in the experience of Corruption Watch, procedural irregularities are often indicators of corruption.

The concept of an inconsequential irregularity

25 It is not entirely clear what the SCA judgment means when it refers to an "*inconsequential irregularity*". It appears, however, that the SCA considered this to be an irregularity which, despite its existence, would not affect the final outcome of the award. In other words, where it can be shown through an *ex post facto* assessment of the process that the successful bidder would most likely have been successful despite the irregularity, such irregularity is 'inconsequential'.

26 However, there are two main problems with this approach:

26.1 First, it undermines the role that procedural requirements play

in ensuring even treatment of all bidders,²⁰ because procedural requirements are afforded little or no significance, and the focus shifts to the final outcome.

- 26.2 Second, any after-the-event assessment of the process is still likely to yield an uncertain result, because the process has already been compromised, and it can seldom be known for sure what course the process would otherwise have taken.
- 27 The SCA's reasoning on this score appears to have been driven by a concern that applying the requirements of administrative and procurement law in the ordinary fashion would lead to the wholesale invalidation of public tender awards and contracts and that this would be at odds with the public interest.
- 28 However, this is to impermissibly conflate and confuse questions of unlawfulness and remedy.
- 29 Both the SCA and this Court have always made clear that where an administrative decision is unlawfully taken, the Courts have the power to exercise a discretion regarding whether and to what extent the decision should be reviewed and set aside. This

²⁰ See for example *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 60.

discretion should be exercised with reference to all relevant factors, including the public interest.

- 30 This does not, however, involve importing an abstract and, with respect, vague notion of an inconsequential irregularity into our administrative law. Rather, the correct approach is the one articulated by this Court in *Bengwenyama*.²¹ There this Court made clear that the principle of legality requires administrative action to be declared unlawful and it is only thereafter that questions of discretionary remedy can arise:

"It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.

²¹ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.”

31 The approach of the SCA set out in paragraphs 21 and 96 of its judgment is at odds with this approach and, if allowed to stand, would introduce considerable uncertainty into our law. While it is noteworthy that the SCA judgment ultimately does not turn on that point,²² Corruption Watch contends that it is critical that this Court makes clear what the correct position is.

32 Thus, the better approach to irregularities in the tender process, and the approach that is supported by Corruption Watch, is that a tender process should be declared unlawful to the extent that it is

²² *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC): para 96.

irregular. Then, rather than merely attempting to assess the *consequences* of the irregularity, *all* relevant factors should be taken into account to determine whether the contract arising out of the tender process should remain binding (or valid) as between the parties. The factors a court could take into account in determining whether a contract should remain binding include—

32.1 the reasons given for the irregularity;

32.2 the steps taken, if any, to remedy the irregularity;

32.3 the transparency with which the irregularity was handled;

32.4 the prejudice/advantage, if any, to each bidder as a result of the irregularity;

32.5 the nature of the tender viewed as a whole;

32.6 the public interest in the proper and uninterrupted provision of the services concerned; and

32.7 the public interest in strict compliance with the procedural requirements being enforced in relation to the particular tender in question.

33 Accordingly, the focus shifts to the remedy that ought to be

imposed consequent to a finding of unlawfulness. In this way, every irregularity can be viewed in a serious light and only excused for good reason.

Procedural irregularities are indicators of corruption

- 34 The reason Corruption Watch advocates this approach is that procedural irregularities are often indicators of corruption.
- 35 Public procurement often requires the involvement of a number of state departments and many people. It also often involves large sums of money. Clear procedural guidelines, and following those guidelines, are important for establishing and maintaining checks and balances to minimise and avoid corruption in procurement processes. Detailed standard procedures also assist the officials tasked with managing the processes to maintain control.²³
- 36 In Corruption Watch's experience, the absence of a comprehensive and reasonable explanation for any deviation from a standard procedure is a strong indication of corruption in the procurement process.²⁴

²³ Corruption Watch's affidavit; para 41.

²⁴ Corruption Watch's affidavit; para 41.

37 From the reports of procurement corruption received by Corruption Watch, the following complaints are the most common:

37.1 a supplier being selected when the relevant committee has indicated a preference for another supplier;

37.2 a tender not being properly advertised;

37.3 dates being altered to accommodate a supplier's late submission;

37.4 a contract being rolled-over without cause; and

37.5 the appointment of a supplier whose scores do not reflect its tender as being the best.²⁵

38 Corruption Watch explains that these complaints are often linked to pre-existing relationships between the officials involved in the procurement process and the successful bidders.²⁶

39 Annexure "DL2" (the extract from Transparency International's Handbook on Curbing Corruption in Public Procurement) highlights the following complaints as "red flags" for corruption:

²⁵ Corruption Watch's affidavit; para 42.

²⁶ Corruption Watch's affidavit; para 43.

- 39.1 the absence of, or non-compliance with, a procurement plan;
 - 39.2 deviation from standard bidding documents;
 - 39.3 unclear specification requirements;
 - 39.4 unclear pre-qualification requirements;
 - 39.5 insufficient notice given for the preparation of bids;
 - 39.6 exclusion of experienced applicants on minor technicalities;
 - 39.7 the failure to answer requests for clarification in good time;
 - 39.8 clarification sought by bidders not being answered in writing or circulated to all bidders; and
 - 39.9 the lack of transparent procedures for handling complaints and determining remedies.²⁷
- 40 By way of example, Corruption Watch sets out how its investigation into the award of a tender by the Department of Cooperative Government to the Mvula Trust progressed:²⁸
- 40.1 The initial complaint related to the fact that part of the contract had been subcontracted to a third party. However, in terms of

²⁷ Transparency International's Handbook on Curbing Corruption in Public Procurement, p 35-36; read with Corruption Watch's affidavit; para 44.

²⁸ Corruption Watch's affidavit; para 25.

the contract, a degree of subcontracting was permissible.

40.2 Upon further investigation, however, it was discovered that the Mvula Trust had failed to disclose the identity of the subcontracting party and the functions to be subcontracted, which meant that possible conflicts of interest went unchecked. Furthermore, the ability of the subcontracting party to perform had also not been assessed.

41 Accordingly, because in Corruption Watch's experience, procedural irregularities are often indicators of corruption, Corruption Watch submits that courts should view irregularities in public procurement in a serious light and as generally avoidable.²⁹

²⁹ Corruption Watch's affidavit, paras 41-45.

D THE ADMISSION OF EVIDENCE RELATING TO CORRUPTION

42 The second of Corruption Watch's principal submissions is that the SCA adopted an inflexible and technical approach to the admission of evidence of corruption that has potentially adverse consequences for future cases involving procurement corruption.

43 The SCA refused to admit the transcript of Mr Tsalamandris' conversation with Mr Kay. In doing so the SCA cited the following reasons for its decision:

43.1 First, the SCA criticised the fact that the evidence was sought to be introduced only after the hearing of the appeal.³⁰

43.2 Second, the SCA adopted the view that the evidence "*carried no weight at all*" on the basis that it amounted to hearsay evidence on the part of a "*lay witness*".³¹

43.3 Third, the SCA reasoned that in any event, it could be "*safely assumed that the inferences of dishonesty drawn by Mr Tsalamandris will be denied by the other parties*".³²

³⁰ SCA's judgment; para 13.

³¹ SCA's judgment, para 15.

³² SCA's judgment, para 17.

- 44 The SCA thus refused to admit the evidence without even calling on SASSA and CPS to respond thereto on oath.
- 45 Corruption Watch is concerned about the approach adopted by the SCA and the effect that the judgment will have on future cases involving corruption.³³ Corruption Watch is concerned that in future cases parties seeking to exclude damaging evidence pointing toward corruption within a supply chain management system will point to the SCA's judgment as a basis for having the evidence summarily excluded.
- 46 In Corruption Watch's experience (illustrated particularly in the Mvula Trust case), evidence of corruption typically only comes to the fore late in the day and will almost always not live up to the highest standards for the admission of evidence. It will also typically be evidence of a hearsay nature, precisely because it involves corruption that invariably extends high up the procurement chain and involves individuals in positions of power who are well-placed to cover their tracks.
- 47 We submit that courts should not hastily exclude this kind of

³³ Corruption Watch's affidavit; para 52.

evidence by uncritically invoking technical rules regarding the admissibility of evidence. When evidence does emerge that points towards corruption within a tender process (particularly where it emanates from a public official within the tender process itself) courts should exercise a discretion in favour of engaging with the evidence – if only to have the evidence answered by the parties concerned before deciding whether it should be admitted.

- 48 In the present matter the evidence in question emanates from an individual within the tender process. This evidence has now been addressed (albeit inadequately) by SASSA. In seeking to deal with the evidence SASSA, through the mouth of Ms Ramokgopa, admits that aspects of the evidence are indeed correct (such as the independent process monitor purchasing spa treatments for SASSA officials and Mr Hulley not being paid by SASSA). In addition to this, SASSA's failure to address certain aspects of the evidence raises serious questions about the integrity of the process.
- 49 On the approach advocated by the SCA, however, these material facts would not have emerged. The flawed nature of the SCA's approach to new evidence concerning corruption has thus been

E THE DUTY ON ORGANS OF STATE TO INVESTIGATE CORRUPTION

Source of the duty to investigate

52 In *Glenister II*, both the majority and the minority confirmed that the state has a positive duty under section 7(2) of the Constitution to prevent and combat corruption.³⁴ The majority, for example, held that that the state is duty-bound to ensure effective mechanisms to root out corruption, including in the context of public procurement.³⁵

53. In relation to public procurement, section 217 of the Constitution enjoins organs of state in the national, provincial or local sphere of government to contract for goods or services in accordance with a system that is "*fair, equitable, transparent, competitive and cost effective*". This necessarily entails that the State is required to take positive steps to ensure the transparency of all public procurement processes through the investigation of allegations of corruption or improper conduct where they arise.

³⁴ Majority judgment at paras 175-176, minority judgment at para 106.

³⁵ *Glenister II* at para 175.

54 Moreover, the Treasury Regulations³⁶ enacted in terms of The Public Finance Management Act 1 of 1999 ("PFMA") set out specific obligations on organs of state to investigate corruption within the sphere of public procurement. The PFMA and Treasury Regulations are applicable to national or provincial government departments, including SASSA.³⁷

55 For example, the ethical standards listed in Treasury Regulation 16A8 provide that a supply chain management official, or any other role player, must:

55.1 ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality, or any other act;³⁸ and

55.2 assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.³⁹

³⁶ The Treasury Regulations were originally published in GNR.345 of 9 April 2001, and subsequently amended in total by GNR.740 of 25 May 2002, GN 2012 of 28 July 2003, GN 37 of 16 January 2004 and GNR.225 of 15 March 2005, respectively.

The Minister of Finance has, in terms of Section 76 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), amended the Treasury Regulations that were published in Government Gazette No. 23463 dated 25 May 2002 as set out in the Schedule.

³⁷ See section 3(1)(a) of the PFMA read with the definition of "department" in section 1 of the PFMA.

³⁸ See in particular Regulation 16A9.1(b)(i).

³⁹ See in particular Regulation 16A9.1(b)(ii).

56 Treasury Regulation Section 16A9(b) provides that the "accounting officer", who in terms of section 36 of the PFMA is the head of the relevant government department, must:

"investigate any allegations against an official or other role player of corruption, improper conduct, or failure to comply with the supply chain management system, and when justified:

- (i) take steps against such an official or other role player and inform the relevant treasury of such steps; and
- (ii) report any conduct that may constitute an offence to the South African Police Service.' (emphasis added)

The meaning of the obligation to "investigate":

57 Our courts have not yet had occasion to consider and provide guidance on the meaning of these provisions and, in particular, the obligation placed upon an accounting officer to investigate allegations of corruption, improper conduct or a failure to comply with the supply chain management system.

58 The meaning of "investigate" is, we submit, of critical importance in the fight against corruption within public procurement. Accounting officers within organs of state require guidance as to the nature of the substantive obligation placed on them by the

Treasury Regulations. It is evident, particularly given the facts of this case, that this Court's guidance on this issue is urgently required. In the present context, Regulation 16A9(b) must be considered in light of the Constitutional imperatives of transparency and accountability.

59 In understanding what these provisions require, it is useful to begin with what they cannot mean – with specific reference to the current facts:

59.1 We submit, in the first instance, that they cannot mean that where an accounting officer becomes aware of allegations that stem from an individual within the supply chain system, alleging that the system is compromised by corruption, that the accounting officer goes only as far as interviewing the individual in question. This is not an "*investigation*" as envisaged by the Treasury Regulations.

59.2 Even where the individual, during the interview, downplays prior emphatic allegations of corruption and irregularities, it is not enough for the accounting officer to simply accept what is said during such an interview at face value. Again, this level of scrutiny by an accounting officer falls considerably short of

the threshold for what constitutes an "investigation" for the purposes of the Treasury Regulations.

60 Corruption Watch submits that, properly interpreted, the duty placed on accounting officers within organs of state to "*investigate*" any allegations of corruption must, at the very least, entail the following:

60.1 A thorough assessment of the nature, source, and specificity of the allegations, and a preliminary determination of the parties implicated, or potentially implicated, by the allegations.

60.2 Where, based on this assessment, the accounting officer finds that specific allegations have been made which, if proven, would amount to corruption, fraud or improper conduct (including a breach of the standard code of ethics contained in the Treasury Regulations) on the part of individuals within the supply chain management system in question, the accounting officer should at least follow the following steps.

60.3 The accounting officer should formally interview all parties specifically identified and implicated by the allegations, and put to them the allegations for their formal responses thereto – which should preferably be recorded under oath;

60.4 The accounting officer should seek to obtain, where possible, independent and objective evidence from the individuals implicated by the allegations to substantiate their responses to the allegations.

60.5 The accounting officer should prepare a report based on the evidence obtained in the course of the investigation which might conclude:

60.5.1 that evidence of corruption or improper conduct has been uncovered that requires further investigation by law enforcement agencies;

60.5.2 that an individual (or individuals) within the supply chain management system has breached the code of ethics – a finding that would require some form of sanction; or

60.5.3 that no further investigation is necessary based on the findings of evidence contained in the accounting officer's report.

61 Corruption Watch recognises that it is neither possible, nor desirable, to strictly delineate the requirements for a proper

investigation as envisaged by the Treasury Regulations. Government departments should be afforded a degree of latitude in determining the precise structures of the investigations that they undertake. However, it is imperative that regardless of the precise form an investigation takes it should at the very least embody the principles set out above.

SASSA's failure to investigate

62 SASSA opposed Corruption Watch's application to intervene in these proceedings. SASSA's letter of opposition is concerning. In it, SASSA posits two reasons why it does not believe a duty to investigate the tender process has been triggered.

62.1 First, SASSA suggests that there is presently no evidence before this Court regarding corruption within the tender process (with such evidence still to be admitted by the Court) and therefore, the evidence *"at this stage begs no answer from any of the respondents"*.⁴⁰

62.2 Second, SASSA contends that because Mr Tsalamandris did not report the evidence of corruption directly to his superiors

⁴⁰ Corruption Watch's affidavit, Annexure DL5.

within SASSA, that consequently no obligation to investigate the tender process was triggered.⁴¹

- 63 The approach adopted by SASSA betrays a fundamental lack of appreciation of the duty on organs of state to investigate any allegations of corruption in terms of section 16A9 of the Treasury Regulations.
- 64 Regarding the first reason, SASSA fails to recognise that its obligation to properly investigate corruption arises independently of and irrespective of the course of the present proceedings. Its obligation does not depend on whether the evidence regarding corruption is admissible in a court nor whether it has been admitted in a court. Moreover, and in any event, as we explain below SASSA's own affidavit by Ms Ramokgopa itself discloses breaches of the Treasury Regulation's code of ethics, and raises more questions than there are answers.
- 65 Regarding the second reason, SASSA's suggestion that it is only obliged to investigate allegations of corruption that are reported directly to it is, we submit, an impermissibly narrow interpretation

⁴¹ Record 49: page 7542, para 131.1.

of Treasury Regulation 16A9.1(b).

65.1 Given the damage that corruption causes to the state, the public and private parties involved, it is inappropriate for an organ of state to side-step its obligation to investigate corruption by claiming that no allegations had been reported directly to it. We submit that this obligation is triggered irrespective of whether or not the organ of state comes to learn of allegations of corruption directly or indirectly.

65.2 Organs of state have a duty to investigate allegations of impropriety and corruption whenever they arise, however they come to the attention of the organ of state, and even if they are not backed by hard evidence at that stage. Such an interpretation, we submit, is consistent with the foundational Constitutional values of transparency and accountability.

66 One of the somewhat startling features revealed by Ms Ms Ramokgopa's affidavit is that it appears that the first time that SASSA purported to investigate these issues of corruption is when it was required to file an answer to Allpay's application in this Court.

66.1 It does not appear to have done so when allegations of corruption were published in the Mail & Guardian prior to the

High Court matter being heard.

66.2 Nor does it appear to have done so when the affidavit of Mr Tsalamandris was sought to be placed before the SCA.

66.3 We submit that this is not consistent with SASSA's duties under Treasury Regulation 16A9 and the Constitution.

67 Moreover, even once SASSA did purport to investigate the allegations of corruption, it did so in a manifestly inadequate manner.

67.1 The approach adopted by SASSA at that point was to summon Mr Tsalamandris to a meeting with two of SASSA's representatives: Ms Ogle (the general manager of SASSA responsible for fraud and corruption) and Ms Petersen (SASSA's CEO). As is evident from Ms Ogle's hand written notes of the meeting, Mr Tsalamandris feared for his life and for his job at SASSA.⁴²

67.2 Ms Ogle's minutes also reflect that Ms Petersen questioned Mr Tsalamandris about whether he had any direct evidence of

⁴² Record: 49: page 7564 (re-typed version page 7569).

"*fraud committed within the tender process*".⁴³ Mr Tsalamandris' response was to claim that no fraud had occurred, but that "*short cuts*" had been taken in the tender process.⁴⁴

68 Nothing in the record suggests that SASSA went any further than holding this one meeting with Mr Tsalamandris, after which SASSA's lawyers were instructed to prepare an affidavit on his behalf – which was filed together with Ms Ramokgopa's answering affidavit.⁴⁵

69 We submit that SASSA's handling of the matter falls far short of the injunction contained in Treasury Regulation 16A9(b) to investigate any allegations of corruption.

70 No reasonable person in the position of CEO or fraud investigator would uncritically accept Mr Tsalamandris' explanation that no fraud had been committed (but short cuts had occurred) – particularly against the backdrop of his statements that he fears for his life. What was required in the circumstances was for

⁴³ Record 49: page 7566 (re-typed page 7568).

⁴⁴ Record 49: page 7566 (re-typed page 7568).

⁴⁵ Record 49: pages 7550 – 7560.

SASSA to launch a comprehensive investigation at very least at that point into detailed allegations made by Mr Tsalamandris which are contained in the transcript of his conversation with Mr Kay. Such an investigation should have been conducted in accordance with the principles we have set out above, and should have included interviews with the individuals implicated in the tender process.

71 This is particularly so when one has regard to the very specific allegations of corruption and impropriety made by Mr Tsalamandris as contained in the transcript of his conversation with Mr Kay.⁴⁶

72 Even if, as SASSA suggests, no obligation was triggered at that point to conduct a thorough investigation, it is beyond question that the responses to Mr Tsalamandris' allegations contained in Ms Ramokgopa's affidavit before this Court have now triggered SASSA's obligation to conduct a thorough investigation into the tender process.

⁴⁶ See, in particular, the analysis of these allegations contained in AllPay's written submissions, paras paragraph 99 and paragraph 100.

73 In her affidavit Ms Ramokgopa admits to having received spa treatments purchased for her over the course of the period that the tender was being adjudicated in Stellenbosch and that these treatments were paid for by Mr Mkhabela, the independent process monitor tasked with ensuring the integrity of the tender process.

73.1 Ms Ramokgopa also states that "*apparently*" it was not only her spa treatments that were paid for by Mr Mkhabela.⁴⁷ No explanation is provided as to why Mr Mkhabela paid for her spa treatments (or indeed why she accepted them) or who else involved in the tender process had spa treatments paid for by him.

73.2 Ms Ramokgopa's admissions disclose breaches of the standard code of ethics contained in the Treasury Regulations, in particular 16A8.3(d), which stipulates that supply chain management officials should not compromise the credibility or integrity of a supply chain management system by accepting gifts or hospitality.

73.3 It is harder to find a more striking example of a breach of this rule than the present where the individual tasked with the overseeing the credibility and integrity of the tender process

⁴⁷ Record 49: page 7546 para 136.5.3.

has purchased various people within the supply chain management system gifts and/or hospitality. This fact alone triggers SASSA's obligation to investigate the tender process.

74 As regards the involvement of Mr Hulley, Ms Ramokgopa says the following: *"I have to point out that Mr Hulley did not claim payment from SASSA since he rendered advice on an ad hoc basis, probably, as part of his broader relationship with government"*.⁴⁸

74.1 Ms Ramokgopa therefore confirms that notwithstanding that Mr Hulley was appointed by SASSA as a strategic advisor to the tender process (at a cost of R21 000 per day), Mr Hulley at no stage rendered an invoice for his services to SASSA.⁴⁹

74.2 In light of the serious allegation that Mr Hulley's fees were paid by CPS, Ms Ramokgopa's response is inadequate. It begs the obvious questions: who did pay Mr Hulley? And, what is his *"broader relationship"* with government? It is striking that Ms Ramokgopa seems to have deposed to her answering affidavit without clarifying these issues with Mr Hulley beforehand.

⁴⁸ Record 49: page 7540 para 127.

⁴⁹ Record 6: page 1002 para 29.

75 A further striking feature of Ms Ramokgopa's affidavit is the fact that whilst she has elected to address certain of the allegations made by Mr Tsalamandris, she has failed to address others at all. In particular, Ms Ramokgopa has left the following allegations unchallenged:

75.1 that she directed Mr Tsalamandris to backdate letters of appointment;

75.2 that she and Mr Mkhabela (the independent process monitor) are close friends; and

75.3 that Mr Monyeki and the chairperson of BAC are close friends.

76 In all the circumstances, we submit that it is clear that SASSA failed in its duty to properly investigate allegations of corruption within the present tender process. This Court should make clear that SASSA is now obliged to do so – irrespective of the outcome of this appeal.

F CONCLUSION

- 77 The present case has ramifications far beyond the ambit of the impugned tender award.
- 78 If the approach articulated by the SCA is allowed to stand, it will have significant negative effects for administrative law and procurement law regarding the standard of lawfulness required for procurement processes. It will also make it more difficult for evidence of corruption to be placed before the courts.
- 79 In addition, if SASSA's approach to investigating tender irregularities and corruption were to be accepted, this would be a considerable set-back regarding the duties of organs of state under the Constitution and Treasury Regulations.
- 80 We therefore submit that this Court should, in its judgment, adopt and confirm the correctness of the approach urged by Corruption Watch.

STEVEN BUDLENDER

MARK TOWNSEND

LUKE KELLY

Counsel for Corruption Watch

Chambers, Johannesburg and Cape Town
16 August 2013

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