

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case no.: 10086/2020

In the matter between:

**NET1APPLIED TECHNOLOGIES SOUTH AFRICA (PTY) LTD**

Applicant

and

**CASHPAYMASTER SERVICES (PTY) LIMITED**

First Respondent

**COMPANIES AND INTELLECTUAL PROPERTY COMMISSION**

Second Respondent

**REGISTRAR, FINANCIAL SECTOR CONDUCT AUTHORITY**

Third Respondent

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** the Applicant intends to apply, on a date to be allocated by the registrar, for an order in the following terms:

- 1 The First Respondent is placed under supervision and business rescue under section 131(1) of the Companies Act 71 of 2008.
- 2 Mr Ralph Lutchman of Concord Administrators (Pty) Ltd and Ms Lebogane Grace Mpakati of Indalo Business Consulting are appointed as the joint business rescue practitioners of the First Respondent.
- 3 The costs of this application are to be costs in the administration of business rescue proceedings.
- 4 Further and/or alternative relief.

**TAKE FURTHER NOTICE THAT** the Applicant has appointed **STEIN SCOP ATTORNEYS INC.**, Fifth Floor, Capital Hill, 6 Benmore Road, Sandton, at which the Applicant will accept notice and service of all processes in these proceedings.

**TAKE FURTHER NOTICE THAT** the accompanying affidavit of Herman Gideon Kotzé will be used in support of this application.

**TAKE FURTHER NOTICE THAT** if you intend opposing this application you are required to:

- a) notify the Applicant's attorneys in writing of your intention to do so within 5 days of service of this application and that in such notice appoint an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings; and
- b) file your answering affidavit, if any, within 15 days after you have so given notice of your intention to oppose the application.

**TAKE NOTICE FURTHER THAT** if no such notice of intention to oppose be given, the application will be made at 10h00 on 01 JULY 2020.

Dated at **SANDTON** on this the **26<sup>th</sup>** day of **MARCH 2020**.

**Stein Scop Attorneys Inc.**

Attorneys for the Plaintiffs  
Fifth Floor, Capital Hill  
6 Benmore Road  
Morningside, Sandton  
Tel: (011) 380 8080  
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Email: glenn@steinscop.com and  
sian@steinscop.com  
Ref: CAS1/0001/G Stein

To:  
The Registrar  
**Gauteng Local Division,**  
**Johannesburg**

And to:  
**Cash Paymaster Services (Pty) Ltd**  
First Respondent  
4<sup>th</sup> Floor, President Place  
Cnr Jan Smuts Ave and Bolton Road  
Rosebank, Johannesburg  
Email: nandap@net1.com

*Service by email as agreed  
to between the parties*

And to:  
**Companies and Intellectual Property  
Commission**  
77 Meintjies Street,  
Pretoria  
Email: corporatelegalservices@cipc.co.za

**SERVICE BY EMAIL**

And to:  
**Registrar of the Financial Sector  
Conduct Authority**  
41 Matroosberg Road,  
Pretoria  
Email: viloshnee.naidoo@fsca.co.za;  
mapula.legong@fsca.co.za and  
kedibone.dikokwe@fsca.co.za

**SERVICE BY EMAIL**

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no.: 10026/2020

In the matter between:

NET1APPLIED TECHNOLOGIES SOUTH AFRICA (PTY) LTD

Applicant

and

CASHPAYMASTER SERVICES (PTY) LIMITED

First Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

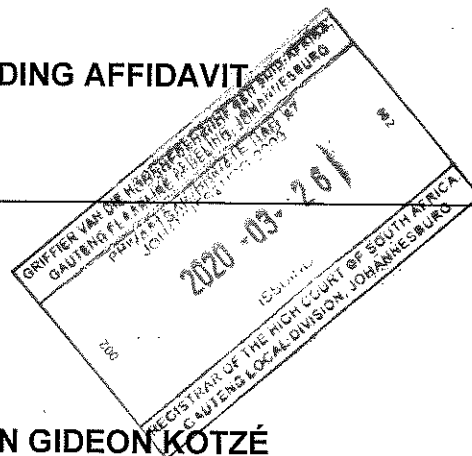
Second Respondent

REGISTRAR, FINANCIAL SECTOR CONDUCT AUTHORITY

Third Respondent

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FOUNDING AFFIDAVIT



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I, the undersigned,

HERMAN GIDEON KOTZÉ

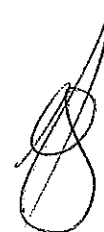
state under oath that:

- 1 I am I am an adult male and the director of the Applicant. I am duly authorised to depose to this affidavit on behalf of the Applicant.
- 2 The facts in this affidavit are true and, unless the context indicates otherwise, within my knowledge. Where I make legal submissions, I do so on the advice of the Applicant's legal representatives

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- 3 The Applicant is **NET1 APPLIED TECHNOLOGIES SOUTH AFRICA (PTY) LTD (“NET1”)**, a private company incorporated under the company law of South Africa, with its registered office at 4th Floor, President Place, Cnr Jan Smuts Ave & Bolton Road Rosebank, Johannesburg.
- 4 The First Respondent is **CASH PAYMASTER SERVICES (PTY) LIMITED (“CPS”)** a private company incorporated under the company law of South Africa, with its registered office at 4th Floor, President Place, Cnr Jan Smuts Ave & Bolton Road Rosebank, Johannesburg.
- 5 The Second Respondent is the **COMPANIES AND INTELLECTUAL PROPERTY COMMISSION**, established in terms of section 185 of the Companies Act 71 of 2008, with its principal place of administration at 77 Meintjies Street, Pretoria.
- 6 The Third Respondent is the **REGISTRAR OF THE FINANCIAL SECTOR CONDUCT AUTHORITY**, established in terms of section 56 of the Financial Sector Regulation Act 9 of 2017, with its principal place of administration at 41 Matroosberg Road, Pretoria.
- 7 Save for costs if they oppose, Net1 does not seek relief against the Second and Third Respondents, who are cited for their statutory interest in the relief sought in terms of the relevant provisions of the Companies Act, the FSCA Act, and the Financial Advisory and Intermediary Services Act (“**the FAIS Act**”).

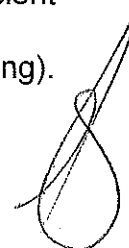
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## INTRODUCTION AND OVERVIEW


- 8 This is an application to place CPS under supervision and to commence business rescue proceedings. Net1 is CPS' majority shareholder holding 87.5% of the share capital. It accordingly has standing to apply to place CPS in business rescue in terms of section 128 of the Companies Act.
- 9 CPS' sole business was the distribution of social grants on behalf of the government (at first on behalf of provincial governments, and later on behalf of the national government). CPS did so in terms of contracts awarded to it by provincial governments and later on a national level in terms of a contract with the South African Social Security Agency ("**SASSA**").
- 10 CPS' contract with SASSA has come to an end. SASSA now pays social grants through the South African Post Office ("**SAPO**") and Postbank. CPS is no longer involved in social grant payments.
- 11 CPS is financially distressed. For reasons that I set out in this affidavit, it is unlikely that CPS will be able to pay all of its debts as they become due and payable within the immediately ensuing six months. In addition, as things stand, CPS' liabilities exceed its assets.
- 12 Net1 is of the view that business rescue is a better option for CPS than liquidation. CPS has a pending claim against SASSA that, if litigated diligently and effectively, could significantly reduce, or set off entirely, CPS' liability to its main creditor, SASSA.
- 13 Net1 proposes a business rescue plan that focuses on the diligent and efficient litigation of this claim (and other potential claims that CPS could still bring).

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Net1's proposed plan will likely result in a better return for CPS' creditors and shareholders than would result from immediate liquidation.

- 14 For its part, CPS agrees that business rescue is the better way to maximise creditors' return. CPS attempted to voluntarily begin business rescue proceedings by resolution in terms of section 129 of the Companies Act. CPS' attempts to do so were frustrated by its inability to obtain the approval of registrar of the FSCA, as the FAIS Act requires.
- 15 CPS has also applied to the FSCA registrar to approve the lapsing of its FAIS license as a result of its FAIS-related business becoming dormant as a result of the termination of the contract between SASSA and CPS. Should the FAIS license be lapsed, the registrar's approval for the business rescue application would no longer be required and there would be nothing to prevent CPS from voluntarily beginning business rescue by resolution. In short, the FSCA and the FAIS Act would no longer have any relevance to CPS. The FSCA registrar's failure to date either to approve business rescue or confirm the lapsing of CPS' licence has stymied CPS' ability to place itself in voluntary business rescue by resolution. Net1 accordingly decided to bring this application to protect its rights as an affected person and to propose a plan that is in the interests of "affected persons" generally. To facilitate the bringing of this application, the board of CPS withdrew its prior resolution commencing business rescue, as I explain in more detail below.

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## THE FACTS

### The litigation landscape

- 16 In April 2011, SASSA published a request for proposals for a service-provider to facilitate payments. The following year, in January 2012, SASSA awarded the tender to CPS on a national basis.
- 17 SASSA and CPS concluded a Service Level Agreement (“**the SLA**”), which was intended to be for a five-year period.
- 18 The tender and the SLA were the subject of several rounds of litigation, resulting in several orders made by the Constitutional Court.
- 19 The Constitutional Court’s first judgment was delivered on 29 November 2013. It is reported as *Allpay Consolidated Holdings (Pty) Ltd v CEO, SASSA 2014 (1) SA 604 (CC)* (a copy is annexed as “**FA1**”). The Court declared the award of the tender to CPS invalid, but suspended that declaration pending determination of a just and equitable remedy.
- 20 The Court’s second judgment dealt with the determination of a just and equitable remedy. Judgment was delivered on 17 April 2014 and is reported as *Allpay Consolidated Holdings (Pty) Ltd v CEO, SASSA 2014 (4) SA 179 (CC)* (a copy is annexed as “**FA2**”).
- 21 At the time, SASSA intended to take the payment system inhouse after the SLA came to an end. There were, accordingly, two possible permutations for a just and equitable remedy following the tender and the SLA having been declared unlawful: either a new five-year contract would be awarded following a proper



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tender process, or SASSA would take over the payment of social grants once the SLA came to an end on 31 March 2017.

22 In November 2015, SASSA reported to the Court that it would not be awarding a new five-year contract, but would be taking over payments, and that it would be ready to do so by the time the SLA came to an end on 31 March 2017.

23 As it transpired, SASSA did not have the technological capabilities to take over payments by that date. Indeed, when the 31 March 2017 deadline arrived, CPS was the only entity that was capable of paying social grants.

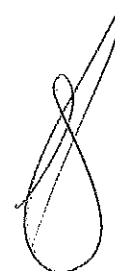
24 This led to the third round of Constitutional Court litigation in *Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)* (a copy of the judgment is annexed as "FA3").

25 By this stage, it had become clear that SASSA would not be able to take over the payment of social grants by 1 April 2017. On 17 March 2017, the Court, amongst other things:

25.1 declared that SASSA and CPS "are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so";

25.2 suspended its declaration of invalidity of the CPA/SASSA contract for a further twelve-month period from 1 April 2017;

25.3 directed SASSA and CPS to ensure payment of social grants from 1 April 2017 for a period of twelve months on the same terms and conditions as the CPS/SASSA contract;

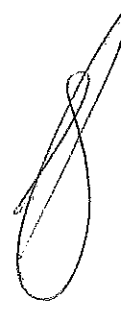


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- 25.4 put in place a mechanism for CPS to request National Treasury during the 12-month period to “investigate and make a recommendation regarding the price in the contract”;
- 25.5 directed CPS to file an “audited statement of the expenses incurred, the income received and the net profit earned under the contract”; and
- 25.6 directed SASSA to obtain an independent audited verification of the CPS’ stated of expenses, income, and net profit (and the Court also directed CPS to permit SASSA’s auditors “unfettered access to its financial information for this purpose”), which had to be approved by National Treasury.

(I refer to this as “**the Black Sash order**”).

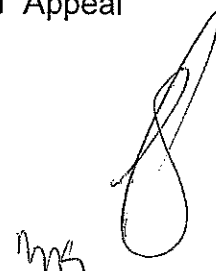
- 26 The Court emphasised that CPS’ and SASSA’s obligations after 31 March 2017 were not sourced in the SLA, but in their “mutual constitutional obligation to ensure that the right to social assistance of the many people that have been dependent on past payment through CPS are not rendered nugatory”. Nonetheless, the Court accepted that the parties’ obligations should be “the same as that of the contract that expires on 31 March 2017”, subject to the National Treasury mechanism for determining the contract price during the suspended-invalidity period.
- 27 In February 2018, SASSA applied to the Constitutional Court for a further six-month extension of the Black Sash order. On 23 March 2018 the Court, *inter alia*:

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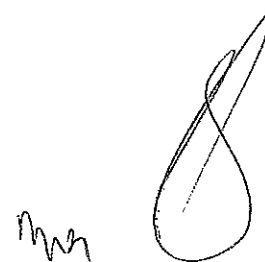
- 27.1 suspended its declaration of invalidity of the Service Level Agreement in relation to payment of social grants to beneficiaries who were paid in cash for a further six-month period from 1 April 2018;
- 27.2 provided that CPS could in writing request National Treasury during the six month period to investigate and make a recommendation regarding the price to be paid for the services it is to render; and
- 27.3 required National Treasury to file a report with the Court setting out its recommendations within 21 days of receipt of a request.

(“the **SASSA Extension Order**”, a copy of which is annexed as “**FA4**”).

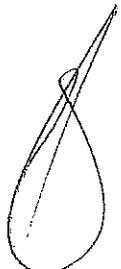
- 28 SAPO (through the Postbank) ultimately took over the payment of social grants. Following the end of the SASSA/CPS contract on 30 September 2018, CPS ceased its main business of grant distribution activities.
- 29 Meanwhile, in 2015, Corruption Watch instituted review proceedings against SASSA’s decision to pay CPS an additional amount of approximately R316 million.
- 30 Corruption Watch’s review ultimately resulted in a court order that requires CPS to repay SASSA that amount plus interest. Though CPS disputes SASSA’s calculation of interest, SASSA claims the total amount is R596 million. This is by far CPS’ biggest liability, making SASSA CPS’ largest creditor.
- 31 To explain how CPS ended with this judgment debt against it, I need to take a step back and explain Corruption Watch’s review in more detail. The factual background appears from the High Court and Supreme Court of Appeal judgments (annexed as “**FA5**” and “**FA6**”).



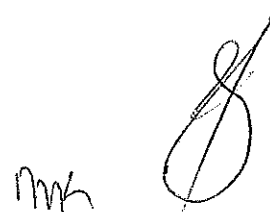
- 32 One of CPS' main responsibilities in terms of the SLA was to register social grant beneficiaries onto a database. This involved, first, bulk registration of existing beneficiaries, and then on-going registration of new beneficiaries. In terms of the SLA, SASSA paid CPS a monthly fee of R14.42 (excl. VAT) per beneficiary paid.
- 33 During the SLA negotiations following the award of the tender to CPS, SASSA requested CPS to also register all the children who benefited from social grants (and not just the grant recipients, as CPS maintained was all that the tender document required). This amounted to approximately 11 million additional registrations. CPS considered the cost of these additional registrations to be beyond its contractual obligations and not covered by the monthly service fee payable under the SLA.
- 34 CPS and SASSA agreed to vary the SLA to provide for an additional payment to CPS of approximately R316 million for these additional services, which CPS provided at cost. SASSA paid that amount to CPS in April 2014. Corruption Watch then reviewed SASSA's decision to do so, arguing that this amount should not have been paid because the additional registrations were included in the initial scope of the tender.
- 35 Corruption Watch's review succeeded, and High Court ordered CPS to refund the additional payment plus interest. The Supreme Court of Appeal dismissed CPS' appeal.
- 36 On 12 February 2020, the Constitutional Court dismissed CPS' application for leave to appeal (the Court's order is annexed as "FA7").

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- 37 Following the Constitutional Court's order, on 18 February 2020, SASSA demanded payment of approximately R596 million (made up of a capital amount of approximately R316 million, and interest of approximately R279 million). A copy of SASSA's demand is annexed as "**FA8**" (although dated 18 February 2020, CPS only received the demand on 20 February 2020).
- 38 CPS disputes the interest that SASSA alleges is owing and has attempted to engage with SASSA in his regard. On CPS' calculation, the total amount owing as at 18 February 2020, including interest, is R498 218 193.79, not R596 346 658.00 as SASSA claims.
- 39 Be that as it may, SASSA's claim of approximately R316 million plus interest is CPS' main liability.
- 40 On the other side of the ledger, CPS has a pending claim against SASSA for approximately R338 million plus interest. I attach a copy of the pleadings in that claim as "**FA9**".
- 41 CPS' claim against SASSA relates to the price that SASSA had to pay CPS during the six-month extension period ordered in terms of the SASSA Extension Order. Recall that in terms of the SASSA Extension Order, the Court suspended its declaration of invalidity of the SLA for a six-month period from 1 April 2018. During that six-month period, CPS was required to continue to pay social grants, and it was entitled to payment for its services. The Court built into the SASSA Extension Order a mechanism for adjusting the contract price to be paid to CPS during the six-month period. In terms of this mechanism, CPS could request National Treasury to recommend a price.

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- 42 On 28 March 2018, CPS asked National Treasury to make a recommendation. On 30 April 2018, National Treasury filed its recommendation, which SASSA did not dispute or review.
- 43 CPS proceeded to invoice SASSA, at the National Treasury-recommended price, for services rendered during the period April to September 2018. Despite the SASSA Extension Order expressly providing for a mechanism to increase the price payable to CPS, SASSA paid only the original price stated in the SLA (that is, the price from 2012).
- 44 In June 2019, CPS sued SASSA for payment of the difference between the National Treasury-recommended price and the price stated in the SLA, for the period April to September 2018. The difference amounts to R338 192 567.55 (excluding interest). Pleadings are now closed.
- 45 To complete the litigation landscape, there are two more claims involving CPS.
- 46 On 4 June 2013 the South African Post Office ("**SAPO**") sued CPS and its wholly owned subsidiary, Cash Paymaster Services (KwaZulu Natal) (Pty) Ltd ("**CPS KZN**"). The pleadings are annexed as "**FA10**".
- 47 SAPO's claim relates to when provincial governments were responsible for paying social grants (before SASSA took over). The KZN provincial government awarded a tender to CPS KZN to facilitate payments.
- 48 After being awarded the tender, CPS KZN and SAPO concluded a contract. SAPO agreed to provide logistical support for payments at SAPO branches in KwaZulu-Natal, and CPS KZN paid SAPO a fee for each beneficiary paid.




Although CPS was a party to the contract, on no sensible interpretation is CPS liable to pay SAPO. On the contrary, the obligation to pay is on CPS KZN alone.

49 Nonetheless, SAPO claims approximately R27 million from CPS KZN *and* CPS in respect the balance of the service fee owing to it under their contract for the period 1 July 2010 to 29 February 2012.

50 The trial was set down for hearing on 13 March 2020. On 10 March 2020, CPS KZN withdrew its opposition. On 13 March 2020, SAPO was granted default judgment against CPS KZN. By agreement between the parties, the claim against CPS was postponed *sine die*.

51 Finally, there is a claim that CPS may still bring against SASSA in respect of damages suffered as a result of SASSA's unfair, irrational, and unreasonable migration of beneficiaries from CPS-operated SASSA accounts to SAPO. This claim is worth approximately R82 million.


52 In 2018, and after the sixth-month period in the SASSA Extension Order, SASSA facilitated a handover of social grant payments to SAPO. This involved SASSA migrating approximately 8 million beneficiaries from CPS-operated SASSA accounts to SAPO accounts. SASSA did so without notifying CPS, without giving CPS an opportunity to comment on how the transition should take place, and without putting in place a sufficiently structured, phased-out transition process. SASSA also decided not to allow CPS to recover arrear transaction fees from migrated beneficiaries' SAPO accounts. As a result of SASSA's decision to migrate beneficiaries in this way, CPS was unable to properly plan for, and manage, the effect on its operations of millions of beneficiaries being migrated to Postbank accounts.

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- 53 As a result of SASSA's unfair, irrational, and unreasonable migration of beneficiaries, CPS was unable to recover transaction fees that beneficiaries had incurred during the month before they were migrated. These fees were incurred by beneficiaries when they used their SASSA cards to withdraw money from their SASSA accounts at ATMs within the National Payment System. During the contract period, and during the suspended period of invalidity, SASSA allowed CPS to recover these transaction fees in arrears directly from beneficiaries' accounts as bank fees as there was no other way to ensure the uninterrupted payment of social grants in accordance with the Constitutional Court's order. CPS had to pay these bank fees to the owners of the ATM's (the large South African retail banks) immediately when the ATM's were utilised by SASSA cardholders but could only recover these fees from grant recipients in arrears, in the month following the ATM transactions. CPS could not do so between April and November 2018 for those grant recipients who were summarily migrated .
- 54 CPS' inability to recover transaction fees from beneficiaries' accounts caused it harm in the amount of approximately R82 million—the value of unrecovered transaction fees (excluding interest).

#### CPS' current financial position

- 55 To sum up the litigation ledger:
- 55.1 CPS has a pending claim against SASSA for a capital amount of approximately R338 million plus interest to date of approximately R56 million assuming a fixed prescribed interest rate (the exact figures are R338 192 567.55 and R56 524 693.23).

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- 55.2 CPS has a potential claim against SASSA for a capital amount of approximately R82 million plus interest to date of approximately R13 million assuming a fixed prescribed interest rate (the exact figures are R82 588 691.28 and 13 660 680,03).
- 55.3 SASSA has a judgment against CPS for a capital amount of approximately R316 million plus interest (SASSA argues that the amount of interest is approximately R279 million, CPS argues that it is approximately R185 million).
- 55.4 SAPO has a pending claim against CPS for a capital amount of approximately R27 million excluding interest.
- 56 Litigation aside, CPS' assets have a current book value of approximately R15 million. These consist of:
- 56.1 A fleet of specially modified vehicles that utilised Net1's patented technology to distribute social grants during the SASSA/CPS contract period. These vehicles have been utilised extensively and are approximately six years old on average and have a current book value of R4.7 million;
- 56.2 Trade and other receivables amounting to approximately R4.3 million comprising mainly of deposits paid to various landlords and First Auto for fleet cards;
- 56.3 Insurance premium prepayment of approximately R0.9 million
- 56.4 Cash of approximately R4,7 million in the CPS bank account.



- 57 Apart from SASSA's judgment debt, CPS' other liabilities are as follows:
- 57.1 Approximately R72.5 million owing to Net1 group companies on loan account (interest free and with no fixed repayment terms and thus payable on demand) for the provision of administration and operational support services, such as accounting, outsourced labour services, human resources management and procurement provided during the last two years; and
- 57.2 Approximately R10 million owing to various trade creditors such as landlords, municipalities, etc.
- 58 That financial snapshot makes clear that CPS is financially distressed. Following the Constitutional Court's dismissal of the application for leave to appeal, CPS will be unable to pay all of its debts as they become due and payable within the immediately ensuing six months. In addition, as things stand, CPS' liabilities exceed its assets.

CPS' unsuccessful attempts to place itself in voluntary business rescue

- 59 On 19 February 2020, the directors of CPS passed a resolution to commence business rescue proceedings. Copies of the resolution and corresponding affidavit are attached as "FA11". This resolution was later withdrawn, as I explain below.
- 60 In terms of section 38A of the FAIS Act, the Registrar of the FSCA is required to consent to the commencement of business rescue proceedings of a license holder. CPS is a licenced financial services provider under the FAIS Act (but it



has applied for its licence to be lapsed because it no longer provides services governed by the FAIS Act)

- 61 On 19 February 2020, Mr Ralph Lutchman of Concord Administrators (Pty) Ltd ("**Concord**"), CPS' proposed business rescue practitioner, delivered a copy of the resolution regarding the commencement of business rescue and affidavit to the Registrar for approval.
- 62 On 26 February 2020, Ms Janie Marx (the CPS Key Individual) sent a letter on CPS' behalf to the FSCA requesting the immediate lapsing of CPS' FSP license due to CPS being dormant from December 2019. Ms Marx advised that once it received confirmation, CPS' request for the FSCA registrar to approve the commencement of business rescue proceedings would no longer be necessary and would be withdrawn (because CPS would then no longer be a FSP-licenced service provider). A copy of that letter and the covering email is attached as "**FA12**".
- 63 On 26 February 2020, Ms Kedibone Dikokwe of the FSCA emailed Ms Nicole Cartwright of Concord advising that they were "*looking into this matter and we will give you feedback*". On 2 March 2020, Ms Cartwright emailed Ms Dikokwe asking for a convenient time to have a call to discuss the matter. A copy of that e-mail exchange is attached as "**FA13**".
- 64 After not receiving feedback from the FSCA, on 11 March 2020, Ms Marx addressed a second letter to the FSCA drawing their attention to the urgency around the proposed business rescue. In that letter ("**FA14**"), Ms Marx wrote, *inter alia*:



*"2. We address this letter to you in order to draw your attention to the urgency in respect of the proposed business rescue proceedings of CPS. The directors of CPS took a resolution to place CPS into business rescue on 19 February 2020 because there were (and are) compelling reasons to do so. The delay occasioned by the failure of the FSCA to revert to CPS regarding either their application for consent or the lapsing of their license is causing prejudice to all the stakeholders of CPS and CPS therefore requires your urgent response from you in respect of the proposed business rescue.*

*3. Whilst CPS is currently liable under various court judgments to pay SASSA certain substantial sums of money, CPS has a number of valid claims against SASSA, which it is in the process of pursuing litigiously and which might be prejudiced in the event that CPS is not placed under business rescue as a matter of urgency.*

*4. An application for liquidation of CPS which becomes more likely in consequence of the delay would, if granted, cause severe prejudice to the stakeholders of CPS, who would more likely benefit from CPS being placed under business rescue.*

*5. We propose that the FSCA urgently confirm the lapsing of CPS' license, which confirmation would remove the need for the FSCA to approve the commencement by CPS of business rescue proceedings.*

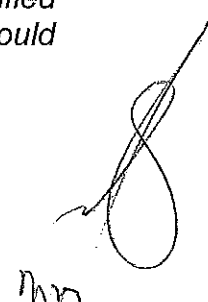
*6. As such, we would appreciate your urgent response to CPS regarding its request to lapse its license or alternatively to consent to business rescue proceedings in order to avoid a potential liquidation of CPS as set out above. If we do not receive a response from you by 12:00 on Friday, 13 March 2020 we reserve our rights to take whatever steps necessary in order to protect our rights."*

65 On 13 March 2020, CPS received a letter from the FSCA (which was dated 6 March 2020) in which it made various enquiries regarding the request to lapse CPS' license:

*"1. Outstanding Financial Statements*

*The records of this Authority reveal that 2019 financial statements were not submitted. CPS is in contravention of section 19(1) read together with section 19(2) of the Act since 31 October 2019. CPS is required to advise why it has not rectified such contravention and further motivate why this Office should not proceed with regulatory action in respect thereof.*

*2. Trading*



*It is noted that CPS is dormant since December 2019. CPS is required:*

- i. to explain the reason/s for ceasing to conduct financial services business and/or the factor/s that caused CPS dormancy since December 2019;*
- ii. to advise on the type of financial products and services that were proposed and rendered to clients of CPS;*
- iii. to submit financial records to evidence proof that its been dormant since December 2019; and*
- iv. to submit financial records for the period July 2018 until December 2019.*

### *3. Clients*

*Kindly provide the following in respect of the clients of CPS before dormancy (viz. December 2019):*

- i. The approximate number of clients;*
- ii. List the type of clients (natural and/or corporate); and;*
- iii. Advise what financial services were provided to clients.*

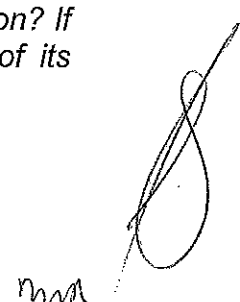
### *4. Termination of Agreement*

#### *i. Product Suppliers/ Other FSPs*

- a. CPS is required to furnish details of its product supplier/s and to provide copies of such agreements that were in place;*
- b. Explain the termination process executed by CPS with its product supplier/s.*
- c. Did CPS notify the product supplier/s of the intended lapse of its authorization? If not, furnish reasons why it did not do so. If yes, copies sent to each product supplier regarding the lapse of its authorization is requested; and*
- d. Did CPS complete all outstanding business with its product suppliers? If yes, indicate when and detail the process executed when concluding the business? If not, what measures did CPS implement in concluding such outstanding business? Further advise when will this business be finalized?*

#### *ii. Clients*

- a. Did CPS complete its business with its clients viz. before December 2019? If so, advise on the process implemented in respect thereof and forward proof to verify this;*
- b. Did CPS transfer its business to another FSP or institution? If so, advise on the process implemented in the transfer of its business;*



- c. CPS is required to furnish ten copies of the notification sent to clients advising of the transfer to the said FSP or institution;
- d. Further furnish the details of such provider/ institution, confirmation from such FSP/ institution that the clients of CPS were transferred; and
- e. Documentary proof from ten clients consenting to this transfer is also required.

#### 5. Key Individual

The records of this Authority indicate that the approved key individual is Ms J Marx.

Will the above individual remain in the financial services industry? If so, kindly provide details of her respective FAIS role and the details of such FSP/s Mrs Marx is contracted to?

#### 6. Business Rescue Proceedings

On 19 February this Office received information and/documentation of Notice of Beginning of Business Rescue Proceedings. CPS is required to advise:

- i. If it has set down business rescue proceedings and provide details of the date of such application;
- ii. When (specify date and month) will it lodge a copy of the respective Notice of Motion with its supporting affidavits to this Authority;
- iii. Reference is made to the Point 10 of the Sworn Affidavit of Mr Nunthakumarin Pillay

(Annexure 'A') that advises "the company is in the process of restructuring the business and engaging with ..."

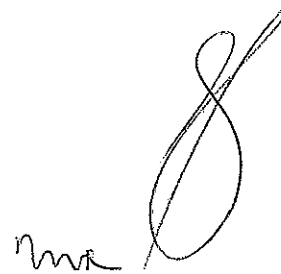
How does restructuring of the business fit into the request to lapse its FAIS authorisation?

- iv. If there is an intent to commence business rescue proceedings, why then did it submit a request to lapse its FAIS authorisation?

#### 7. Deregistration

Furnish the final notice of deregistration of CPS issued by the Companies and Intellectual Property Commission. If the deregistration is not finalized, kindly advise why and where in the deregistration process is it?"

66 A copy of that letter is attached as "FA15".



67 On 20 March 2020 CPS provided its response to the queries contained in "FA15" to the FSCA. A copy of that letter is attached as "FA16".

68 To date, no further response has been received from the FSCA.

69 In order to facilitate the bringing of this application, the board of CPS withdrew the resolution to commence business rescue proceedings taken on 19 February 2020. A copy of this resolution is attached as "FA17".

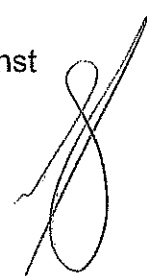
### THE PROPOSED BUSINESS RESCUE PLAN

70 For three reasons, there is a reasonable likelihood that business rescue will result in a better return for CPS' creditors than would result from its immediate liquidation. I explain each in more detail below, but in summary:

70.1 First, if CPS is placed in business rescue, Net1 is willing to contribute an amount of R50 million to CPS and subordinate its shareholder loan. The other companies that are part of the Net1 group who have advanced loans to CPS are also willing to subordinate these loans. Given that these loans are payable on demand, in the event of a liquidation these amounts would become payable. Alone, this means that if business rescue fails, and CPS is ultimately liquidated, the dividend to creditors will increase from approximately 4c/R to approximately 24c/R. This provides an obvious benefit to CPS' creditors of a guaranteed higher dividend compared to immediate liquidation.

70.2 Second, business rescue is a better way for CPS (through its appointed business rescue practitioner) to pursue its pending claim against

*nm*



SASSA. The claim has reasonable prospects of success. If CPS succeeds, CPS' asset base will increase to the benefit of its creditors. Of course, CPS succeeding in its claim would not benefit SASSA. But that is a key reason why business rescue is a better option than liquidation. As CPS' biggest creditor, SASSA will effectively control CPS' liquidation. In the circumstances, it is unlikely that a liquidator would be able to effectively pursue CPS' claim against SASSA, at least not in a way that is likely to maximise CPS' recovery.

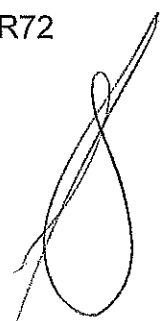
- 70.3 Third, CPS has specialised assets that are likely to fetch a higher return if sold through a planned process in business. The vehicles owned by CPS are heavily modified trucks which utilise Net1's patented technology to deliver cash to remote rural areas and the prospects of securing a better price are considerably enhanced if a liquidation "fire sale" can be avoided..

#### Net1's contribution to CPS

71 If CPS is placed in business rescue, and without conceding any obligation to do so, Net1 undertakes to:

- 71.1 contribute an amount of R50 million to CPS as a good faith attempt to ensure the efficacy of business rescue;
- 71.2 Net1 will also make a contribution for CPS' litigation costs for its pending claims;
- 71.3 subordinate its group companies' claims (valued at approximately R72 million); and

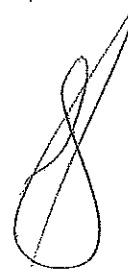
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- 71.4 fund CPS' ordinary operating expenses leading up to, and during, business rescue.
- 72 On their own, Net1's contributions outlined above mean that CPS' creditors will receive a higher dividend in business rescue no matter what ultimately happens in the pending litigation.
- 72.1 If CPS is liquidated now, its assets are R15.4 million against liabilities of R583.1 million, yielding a dividend of 2c in the Rand or at best 4c if the vehicles realise R20 million on a liquidation sale.
- 72.2 If CPS is placed in business rescue and is successful in all its claims against SASSA, its assets will be R518 million against liabilities of R583 million. Liquidation would then yield a likely dividend of 89c/R.
- 72.3 If CPS is placed in business rescue and is unsuccessful in all the pending litigation, its assets will be R15 million against liabilities of R583 million. Liquidation would then yield a likely dividend of 2-v c in the Rand. With Net1's contribution and subordination of its creditor claims, however, the likely dividend would increase to 23c/R.
- 73 Net1's contribution means that there is no downside to CPS being placed in business rescue. The potential upside is significant: if CPS succeeds in all the pending litigation—which is more likely if CPS is in business rescue than in liquidation—the likely dividend will increase from 4c/R to 89c/R.
- 74 CPS' creditors are still likely to be better off even if business rescue fails and CPS is unsuccessful in all the pending litigation. Even on that permutation, Net1's contribution will increase the likely dividend from 4c/R to 23c/R.

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75 For this reason alone, business rescue is likely to result in a better return for CPS' creditors than would result from the immediate liquidation of the company.

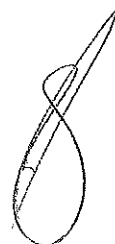
CPS' pending claim against SASSA can be more effectively pursued if CPS is in business rescue

76 As is apparent from the summary of CPS' claim set out earlier in this affidavit, and from the attached pleadings, CPS' claim against SASSA has reasonable prospects of success. The claim is for approximately R338 million (excluding interest), and so it may significantly increase return for creditors.

77 It is unlikely that CPS' claim will be effectively litigated if CPS is placed in liquidation. A liquidator would need a contribution from CPS' creditors to fund the litigation. But SASSA is unlikely to be willing to fund litigation against itself. As CPS' largest creditor, SASSA could use CPS' liquidation as a way to avoid CPS' claim against it altogether.

78 Even if a liquidator finds funds to litigate CPS' claim, it remains unlikely that the claim will be litigated effectively. As the biggest creditor, SASSA would effectively control CPS' liquidation. In those circumstances, there is little prospect that a substantial claim against that very same creditor would be effectively litigated.

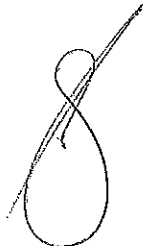
79 If CPS is placed under business rescue, Net1 will make a contribution to CPS to enable the business rescue practitioner to effectively litigate CPS' claim. In this way, the business rescue practitioner will have greater freedom to litigate CPS' claim without being beholden to SASSA's direction as the driving creditor.



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CPS' specialised assets are likely to realise more if sold under business rescue

- 80 CPS owns three categories of specialised trucks:
- 80.1 387 ordinary passenger vehicles ("bakkies") used for administration;
  - 80.2 310 heavily modified pick-up trucks (payment vehicles) with specially designed canopies built into the rear of the chassis, capable of housing Net1's proprietary payment solution comprising of four cash dispensers, biometric readers and battery packs; and
  - 80.3 16 trailers.
- 81 A business rescue practitioner would be able to put in a place a better process to dispose of the trucks at the highest possible price. The trucks were retrofitted specifically to be used as part of CPS' payment infrastructure. They are not well-suited to an ordinary sale in liquidation. If they are sold at a liquidation sale, they are unlikely to fetch more than R20 million.
- 82 In contrast, the business rescue environment would avoid the rush of a fire sale and allow the practitioner to explore better disposal options. Net1 estimates, based on its experience and expertise in this industry, that a tailored process in that environment could increase the proceeds from the disposal of the trucks to approximately R50 million with a concomitant increase in dividend to creditors.
- 83 Here too, business rescue has no risk to CPS' creditors. At worst, the practitioner would achieve the same disposal price for the trucks as a liquidation sale. Weighing against that is the potential benefit of a better price through a specialised sale in business rescue.

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Proposed business rescue practitioner

84 Net1 proposes that Mr Ralph Lutchman of Concord Administrators (Pty) Ltd and Ms Lebogane Mpakati (**Ms Mpakati**) be appointed an interim business rescue practitioners under section 131(5) of the Companies Act. Affidavits deposed to by Mr Lutchman and Ms Mpakati respectively confirming their willingness to be appointed will be delivered with this affidavit.

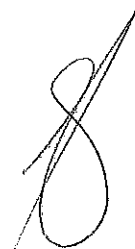
**CONCLUSION**

85 Business rescue is likely to result in a better return for CPS' creditors than liquidation. In light of Net1's tendered contributions, business rescue does not prejudice creditors. To the contrary, on any permutation of what happens in business rescue, CPS' creditors are likely to end up with a better return than they would under immediate liquidation.

86 Net1 asks for an order in terms of the notice of motion.

  
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**HERMAN GIDEON KOTZÉ**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at ROSEBANK on this the 25 day of March 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



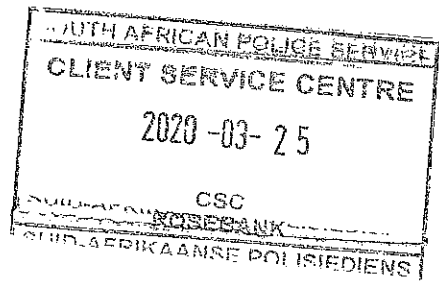
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**COMMISSIONER OF OATHS**

Full names: *CAROLINA MARIE MUSEM*

Address: *15 STURDEE AVE, ROSELAND,  
2196*

Capacity: *CONSTABLE*



*ma*

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"FA1"



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/13  
[2013] ZACC 42

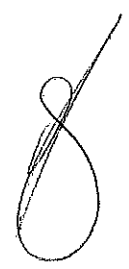
In the matter between:

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 KWA-ZULU NATAL (PTY) LTD	Sixth Applicant
ALLPAY MPUMALANGA (PTY) LTD	Seventh Applicant
ALLPAY LIMPOPO (PTY) LTD	Eighth Applicant
ALLPAY NORTH WEST (PTY) LTD	Ninth Applicant
ALLPAY 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

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

and



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CORRUPTION WATCH

First Amicus Curiae

CENTRE FOR CHILD LAW

Second Amicus Curiae

Heard on : 10 September 2013

Decided on : 29 November 2013

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JUDGMENT

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FRONEMAN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

*Introduction*

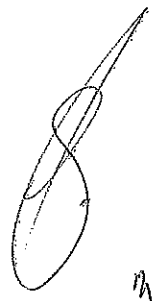
[1] For many people in this country the payment of social grants by the state provides the only hope of ever living in the material conditions that the Constitution's values of dignity, freedom and equality promise. About 15 million people depend on the payment of these social grants. They are vulnerable people, living at the margins of affluence in our society.

[2] The dispute in this case turns on whether the award of a tender by the South African Social Security Agency<sup>1</sup> (SASSA) to Cash Paymaster Services (Pty) Ltd<sup>2</sup> (Cash Paymaster), for the countrywide payment of social grants to beneficiaries, was

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<sup>1</sup> The second respondent.

<sup>2</sup> The third respondent.



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constitutionally valid. An unsuccessful tenderer, AllPay Consolidated Investment Holdings (Pty) Ltd<sup>3</sup> (AllPay), contends that it was not. It brought a review application in the North Gauteng High Court, Pretoria (High Court) for the setting aside of the tender award. The High Court declared the tender process invalid, but declined to set the award aside because of the practical upheaval this would have involved.

[3] AllPay appealed to the Supreme Court of Appeal against the refusal to set the award aside, while Cash Paymaster cross-appealed the declaratory order granted by the High Court. The Supreme Court of Appeal upheld the cross-appeal, and dismissed AllPay's appeal. Aggrieved by this, AllPay now seeks leave to appeal to this Court against the adverse orders made by the Supreme Court of Appeal.

*Leave to appeal*

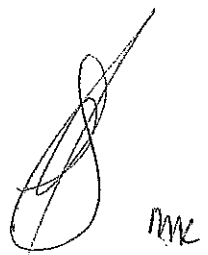
[4] It is as well to get the old chestnut of leave to appeal out of the way immediately. Procurement disputes about the proper interpretation and application of section 217 of the Constitution<sup>4</sup> raise constitutional matters.<sup>5</sup> The outcome of this case is a matter of national importance and public interest. It is because procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner. Here the right of access to

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<sup>3</sup> The applicant, in different legal capacities, as cited above in the header.

<sup>4</sup> The provisions of section 217 are set out in [32] below.

<sup>5</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at paras 20-3.

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social security for people who are unable to support themselves,<sup>6</sup> particularly children,<sup>7</sup> is implicated. Procurement policy under section 217 also involves the protection and advancement of persons or categories of persons disadvantaged by past unfair discrimination. The public interest in the fairness of that vital aspect of the economic transformation of our country is also clear. There are reasonable prospects of success. Leave must be granted.

*Issues*

[5] AllPay relied on a number of alleged irregularities in the tender process. The Supreme Court of Appeal, in the end, found that there were no unlawful irregularities, but also commented in general terms on the proper approach to matters of this kind.<sup>8</sup> Both its findings on the irregularities and its general approach were criticised in argument before us. AllPay also sought leave to introduce further evidence before us, which it attempted and failed to introduce before the Supreme Court of Appeal.

[6] Initially, it is necessary to examine the following:

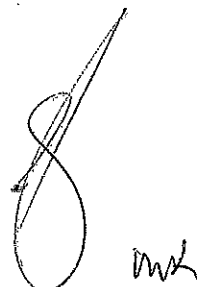
- (a) The alleged irregularities in the procurement process.

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<sup>6</sup> Section 27(1)(c) of the Constitution provides: “[E]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

<sup>7</sup> Section 28(1)(c) of the Constitution provides: “Every child has the right to basic nutrition, shelter, basic health care services and social services”.

<sup>8</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZASCA 29; 2013 (4) SA 557 (SCA) (Supreme Court of Appeal judgment) at para 96.

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- (b) The proper legal approach to the existence and legal effect of proven irregularities.
- (c) The application of this approach to the facts.

[7] The remaining issues will be dealt with in the light of the conclusions reached on these three aspects.


*Factual background*

[8] SASSA was established to unify the fragmented provincial systems under a single, national authority for the payment of social grants.<sup>9</sup> When SASSA inherited its responsibilities, there were serious flaws in the methods of payment. Many grants were paid in cash by contracted service providers who had to transport large sums to various payment points. This resulted in serious security risks. Deficiencies in the system caused duplication of payments. Fraudulent conduct was widespread, including claims being submitted by persons who were not entitled to grants or on behalf of beneficiaries who were deceased. The existing contracts with service providers were scheduled to come to an end on 31 March 2012. There was some time pressure to ensure that a national system could become operational.

[9] On 15 and 17 April 2011, SASSA published an invitation to tender (Request for Proposals), calling on bidders to present proposals to pay social grants on SASSA's

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<sup>9</sup> SASSA was established in terms of the South African Social Security Agency Act 9 of 2004.



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behalf. The Request for Proposals sought solutions to several issues, but it was directed primarily at finding a payment solution that was convenient for recipients and limited the risk of theft and fraud. At several points in the Request for Proposals, SASSA made it clear that a solution involving biometric<sup>10</sup> verification – an effective means of avoiding fraud – would be given preference.

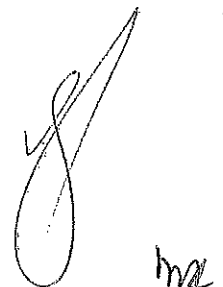
[10] The process for accepting bids was as follows:

- (a) Bidders were invited to submit bids for any number of provinces.
- (b) Once the bids had been submitted, there would be a compulsory briefing session, where questions of clarification or queries concerning the requirements of the Request for Proposals were to be addressed. The briefing procedure envisaged that bidders would submit written questions by a specified date and that clarifying responses would be provided at the briefing session.
- (c) The bids were to be evaluated by a Bid Evaluation Committee and awarded by a Bid Adjudication Committee. A Supply Chain Management Circular<sup>11</sup> (Circular) indicated how the committees were to be constituted, and how their functions were to be performed.

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<sup>10</sup> The Request for Proposals defines biometric as “the means by which a person is uniquely identified by evaluating one or more distinguishable biological trait[s] based primarily on ten (10) fingerprints”.

<sup>11</sup> Circular 10 of 2008 published on 29 September 2008. This circular was circulated in compliance with regulation 16A6.2 of Treasury Regulation R 225 published in *Government Gazette* 27388 of 15 March 2005 (Treasury Regulations).

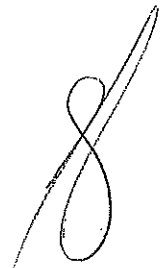
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- (d) The bids were to be evaluated in two stages. At the first stage, bids would be assessed on the merit of the technical solutions offered to fulfil the requirements of the tender. Solutions that crossed a substantial threshold - scoring a minimum of 70% - would be reconsidered after a further oral presentation on functionality.
- (e) Bidders whose solutions maintained a minimum score of 70% after the oral presentation would proceed to the second stage, where they would be evaluated on financial and preference-point merit.

[11] Following the Request for Proposals, SASSA held a bid clarification meeting on 12 May 2011. On 19 May 2011 SASSA provided written responses to certain of the questions posed by bidders.

[12] On 10 June 2011, SASSA issued a document (Bidders Notice 2), which it said was a final clarification regarding frequently asked questions. On the same day AllPay wrote to SASSA requesting an extension of the closing date for bid submissions. On 13 June 2011, SASSA extended the closing date for bid submissions from 15 June 2011 to 27 June 2011.

[13] Out of 21 bids received, only AllPay and Cash Paymaster met the initial 70% scoring threshold. AllPay received a 70.42% score and Cash Paymaster 79.79%. On 7 October 2011 both parties made oral presentations. These presentations were still part



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of the first stage of the functionality assessment. After these presentations AllPay's score fell to 58.68% and Cash Paymaster's score rose to 82.44%. The effect of this was that AllPay did not qualify for the next round – the assessment on finances and preference points.

[14] Satisfied with Cash Paymaster's proposal on its financial and preference-point merits, the Bid Evaluation Committee recommended to the Bid Adjudication Committee that Cash Paymaster be awarded the contract for all nine provinces. The Bid Adjudication Committee accepted the recommendation and forwarded it to the Chief Executive Officer of SASSA,<sup>12</sup> who awarded the tender to Cash Paymaster on 17 January 2012. On 3 February 2012 SASSA concluded the contract with Cash Paymaster to provide services for payment of social grants over a period of five years for all nine provinces. Cash Paymaster commenced its service on 1 April 2012. This litigation then ensued.

*Consequences of alleged irregularities*

[15] As in the Supreme Court of Appeal, the debate about the alleged irregularities centred on the following:

- (a) The requirement of separate bids for the nine provinces.
- (b) The composition of the Bid Evaluation Committee.

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<sup>12</sup> The first respondent.



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- (c) The attendance of members when the Bid Adjudication Committee made its final decision.
- (d) The assessment of the functionality of the black economic empowerment component of Cash Paymaster.
- (e) The nature and effect of Bidders Notice 2.

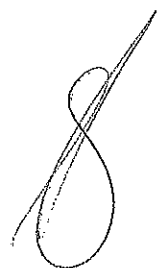
[16] Although the Supreme Court of Appeal eventually decided the matter on the ground that there were no unlawful irregularities in the procurement process, AllPay and Corruption Watch<sup>13</sup> contend that certain passages in its judgment lend themselves to an interpretation that impermissibly endorses a relaxed approach to the procedural requirements of public procurement tenders.

[17] The Supreme Court of Appeal stated that the public interest dictates that a procurement process should not be invalidated for minor, inconsequential flaws:

“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. . . . I have pointed out that the public interest has a role to play in cases of

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<sup>13</sup> Corruption Watch, the first amicus curiae (friend of the court), is an independent, non-profit civil society organisation that seeks to promote transparency and accountability to protect beneficiaries of public goods and services. It also seeks to fight corruption and the abuse of public funds.



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this kind. *It would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities.*<sup>14</sup> (Emphasis added.)

[18] It also held that, in spite of the alleged procedural irregularities, the facts point to the inescapable conclusion that SASSA considered the technical solution offered by Cash Paymaster to be materially superior to that of AllPay according to a key criterion of the Request for Proposals:

“The [Cash Paymaster] solution was able to biometrically verify that every payment of a grant was made to an authentic beneficiary, at the time it was made, irrespective of the method of payment. The AllPay solution was not able to do that. AllPay was able to biometrically verify cash payments, but was able to verify the authenticity of beneficiaries paid electronically only once a year.”<sup>15</sup>

On this approach, regardless of whether the process was flawed, it is apparent that Cash Paymaster won the tender because its solution met all the requirements of the Request for Proposals and addressed all of SASSA’s concerns, whereas the AllPay solution did not.<sup>16</sup>

[19] AllPay argues that the Supreme Court of Appeal’s analysis was flawed. On the approach of the Supreme Court of Appeal, an inconsequential irregularity is an irregularity which, despite its existence, would not affect the final outcome of the award.

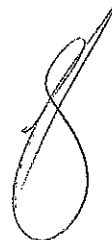
On this approach, an irregularity is inconsequential when, on a hindsight assessment of

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<sup>14</sup> Supreme Court of Appeal judgment above n 8 at para 21. See also para 96: “It seems to me that it would be most prejudicial to the public interest if *inconsequential irregularities* alone were to be capable of invalidating the contract.” (Emphasis added.)

<sup>15</sup> Id at para 44.

<sup>16</sup> Id at para 46.



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the process, the successful bidder would likely still have been successful despite the presence of the irregularity. This focus on an *inconsequential irregularity* is a different enquiry from that commonly used where the courts look at *immaterial irregularities*.

[20] All the irregularities relied upon by AllPay relate to alleged non-compliance with the requirements SASSA itself set for the tender. The Supreme Court of Appeal rejected some of them on the basis that the requirements did not have the force of law and that, consequently, legal invalidity did not flow from non-compliance.<sup>17</sup> This approach was supported by SASSA and Cash Paymaster in argument before us.

[21] The Supreme Court of Appeal also held that the procurement process did not require SASSA to investigate whether the assertion made by Cash Paymaster, that its black economic empowerment partners would manage approximately 75% of the projects, was correct.

*Proper legal approach*

[22] This judgment holds that:

- (a) The suggestion that “inconsequential irregularities” are of no moment conflates the test for irregularities and their import; hence an assessment of

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<sup>17</sup> Id at paras 50-3 (multiple bids); at paras 54-64 (non-compliance with Bid Evaluation Committee and Bid Adjudication Committee requirements); at paras 65-6 (black economic empowerment requirements); at paras 67-85 (Bidders Notice 2); and at paras 86-95 (scoring of bids).

the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

- (b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.
- (c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.
- (d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act<sup>18</sup> (PAJA).
- (e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.
- (f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.

(a) *Fairness and lawfulness independent of result*

[23] To the extent that the judgment of the Supreme of Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that even if proven irregularities

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<sup>18</sup> 3 of 2000.

exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.

[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.

[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b).<sup>19</sup> Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.<sup>20</sup>

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<sup>19</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at paras 81-3. See also *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*) at para 19 and *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 104.

<sup>20</sup> Section 8(1) of PAJA provides:



[26] This clear distinction, between the constitutional invalidity of administrative action and the just and equitable remedy that may follow from it, was not part of our pre-constitutional common-law review. The result was that procedure and merit were sometimes intertwined, especially in cases where the irregularity flowed from an error of law.<sup>21</sup> This was not, however, a general rule and did not necessarily apply where procedural fairness was compromised.<sup>22</sup> Even under the common law the possible blurring of the distinction between procedure and merit raised concerns that the two should be not be confused:

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“The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

- (a) directing the administrator—
  - (i) to give reasons; or
  - (ii) to act in the manner the court or tribunal requires;
- (b) prohibiting the administrator from acting in a particular manner;
- (c) setting aside the administrative action and—
  - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
  - (ii) in exceptional cases—
    - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    - (bb) directing the administrator or any other party to the proceedings to pay compensation;
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
- (e) granting a temporary interdict or other temporary relief; or
- (f) as to costs.”

<sup>21</sup> See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC); *South African Veterinary Council and Another v Veterinary Defence Association* [2003] ZASCA 27; 2003 (4) SA 546 (SCA); and *Hira and Another v Booysen and Another* [1992] ZASCA 112; 1992 (4) SA 69 (AD).

<sup>22</sup> *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135; 2003 (2) SA 460 (SCA) (*Logbro*) at paras 24-5 and *Administrator, Transvaal, and Others v Zenzile* [1990] ZASCA 108; 1991 (1) SA 21 (AD) at 37C-F.

"Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly."<sup>23</sup>

[27] There is a further consideration. As Corruption Watch explained, with reference to international authority and experience,<sup>24</sup> deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.

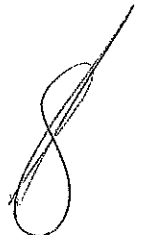
(b) *Materiality*

[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of

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<sup>23</sup> Wade *Administrative Law* 6 ed (Oxford University Press, New York 1988) at 533-4. The remarks are as applicable to our law as they are to English law.

<sup>24</sup> Transparency International *Handbook on Curbing Corruption in Public Procurement* (Transparency International, Berlin 2006).



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compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

[29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.<sup>25</sup>

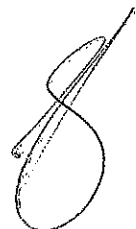
[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance.<sup>26</sup> That strict mechanical approach has been discarded.<sup>27</sup> Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being “whether what the applicant did constituted compliance with the statutory

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<sup>25</sup> *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) (*Millennium Waste*) at paras 28-32.

<sup>26</sup> Hoexter *Administrative Law in South Africa* 2 ed (Juta and Co Ltd, Cape Town 2012) at 48-50 and 292-5.

<sup>27</sup> Compare *Maharaj and Others v Rampersad* 1964 (4) SA 466 (AD). See also *Weenen Transitional Local Council v Van Dyk* [1990] ZASCA 108; 2002 (4) SA 653 (SCA) at para 13.



provisions viewed in the light of their purpose”.<sup>28</sup> This is not the same as asking whether compliance with the provisions will lead to a different result.

(c) *Procurement framework legality*

[31] In *Steenkamp*, Moseneke DCJ stated:

“Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).”<sup>29</sup> (Footnotes omitted.)

In *Millennium Waste* the Supreme Court of Appeal (per Jafta JA) elaborated:

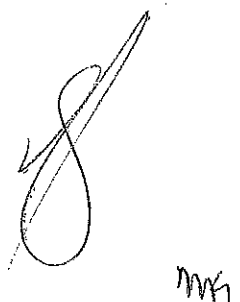
“The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (section 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be ‘fair, equitable, transparent, competitive and cost-effective’. Finally, as the decision to award a tender constitutes administrative action, it follows that that the provisions of [PAJA] apply to the process.”<sup>30</sup> (Footnotes omitted.)

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<sup>28</sup> *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) (*ACDP v Electoral Commission*) at para 25.

<sup>29</sup> *Steenkamp* above n 5 at para 33.

<sup>30</sup> *Millennium Waste* above note 25 at para 4.

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[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus section 217 of the Constitution:

- “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

[33] The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act<sup>31</sup> (Procurement Act). The Public Finance Management Act<sup>32</sup> is also relevant.

[34] An “acceptable tender” under the Procurement Act is any “tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”.<sup>33</sup> The Preferential Procurement Regulations<sup>34</sup> (Procurement Regulations)

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<sup>31</sup> 5 of 2000.

<sup>32</sup> 1 of 1999.

<sup>33</sup> Section 1(i) of the Procurement Act.

<sup>34</sup> R502, published in *Government Gazette* 34350 of 8 June 2011, issued in terms of section 5 of the Procurement Act.



define a tender as “a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals”.<sup>35</sup>

[35] An organ of state must indicate in the invitation to submit a tender:

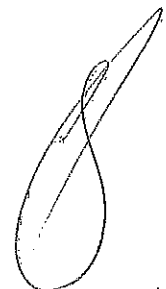
- (a) if that tender will be evaluated on functionality;
- (b) that the evaluation criteria for measuring functionality are objective;
- (c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;
- (d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and
- (e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems.<sup>36</sup>

[36] The object of the Public Finance Management Act is to “secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions” to which it applies, SASSA being one of them. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain “an

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<sup>35</sup> Id regulation 1(s).

<sup>36</sup> Id regulation 4.



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appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”.

[37] The Treasury Regulations issued pursuant to section 76 of the Public Finance Management Act require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that must be fair, equitable, transparent, competitive and cost-effective.<sup>37</sup> In the case of procurement through a bidding process the supply chain management system must provide for the adjudication of bids through a bid adjudication committee; the establishment, composition and functioning of bid specification, evaluation and adjudication committees; the selection of bid adjudication members; bidding procedures; and the approval of bid evaluation and/or adjudication committee recommendations.<sup>38</sup> The accounting officer or accounting authority must ensure that the bid documentation and the general conditions of contract are in accordance with the instructions of the National Treasury,<sup>39</sup> and that the bid documentation includes evaluation and adjudication criteria, including criteria prescribed by the Procurement Act and the Broad-Based Black Economic Empowerment Act<sup>40</sup> (Empowerment Act).<sup>41</sup>

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<sup>37</sup> Regulation 16A3.1 and 16A3.2(a) of the Treasury Regulations.

<sup>38</sup> Id regulation 16A6.2.

<sup>39</sup> Id regulation 16A6.3(a).

<sup>40</sup> 53 of 2003.

<sup>41</sup> Regulation 16A6.3(b) of the Treasury Regulations.

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[38] SASSA issued the Circular establishing a Bid Specification Committee, a Bid Evaluation Committee and a Bid Adjudication Committee and their competencies in terms of regulation 16A6.2. It also issued the Request for Proposals in compliance with its legal obligations under the constitutional and legislative procurement framework. There is no dispute that it did so in a legally proper manner. The Circular and the Request for Proposals, read together with the constitutional and legislative procurement provisions, thus constituted the legally binding and enforceable framework within which tenders had to be submitted, evaluated and awarded.<sup>42</sup> This was made clear in the Request for Proposals. It expressly stated that the Constitution, the Procurement Act, the Social Assistance Act,<sup>43</sup> the South African Social Security Agency Act<sup>44</sup> and the Public Finance Management Act would apply during the adjudication of the bids. The Request for Proposals, all the appended documentation and the proposal in response thereto, read together, formed the basis for the formal contract “to be negotiated and finalised between SASSA and the Successful Bidder/s to whom SASSA awards the contract in whole or in part.”<sup>45</sup>

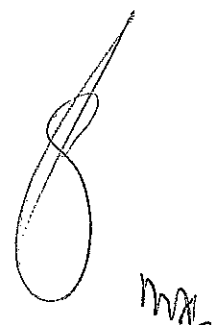
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<sup>42</sup> *Chief Executive Officer of the South African Social Security Agency NO and Others v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13; 2012 (1) SA 216 (SCA) (*SASSA v CPS*) at para 15.

<sup>43</sup> 13 of 2004.

<sup>44</sup> 9 of 2004.

<sup>45</sup> Request for Proposals at clause 13.1.



[39] In *Firechem*<sup>46</sup> Schutz JA, dealing with a situation where the award of a tender outside the applicable legal framework arose, stated:

“One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender. . . . That would deprive the public of the benefit of an open competitive process.”<sup>47</sup>

In *Steenkamp* this Court stated that tender processes require “strict and equal compliance by all competing tenderers on the closing day for submission of tenders.”<sup>48</sup>

[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim.<sup>49</sup> To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.<sup>50</sup> Once a particular administrative

<sup>46</sup> *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA) (*Firechem*).

<sup>47</sup> *Id* at para 30.

<sup>48</sup> *Steenkamp* above n 5 at para 60.

<sup>49</sup> *SASSA v CPS* above n 44.

<sup>50</sup> Bolton *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, Cape Town 2007) at 57:

“One of the primary reasons for the express inclusion of the five principles in section 217(1) of the Constitution is to safeguard the integrity of the government procurement process. The inclusion of

process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.<sup>51</sup>

(d) *Procurement framework and PAJA*

[41] This Court has stated that a cause of action for the judicial review of administrative action now ordinarily arises from the provisions of PAJA and not directly from the right to just administrative action in section 33 of the Constitution.<sup>52</sup> The grounds for judicial review under PAJA are contained in section 6, which reads in relevant part:

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the principles, in addition to ensuring the prudent use of public resources, is also aimed at preventing corruption.”

See also *R (on the application of the Law Society) v Legal Services Commission; Dexter Montague & Partners (a firm) v Legal Services Commission* [2008] All ER 148 (CA) at paras 42-3. Currie *The Promotion of Administrative Justice Act: A Commentary* (Siber Ink, Johannesburg 2007) at 113-4 says the following with regard to section 3(5) of PAJA, which allows an administrator discretion to follow procedures that are “fair but different” from the ones mandated in section 3(2):

“Only procedures in empowering provisions can qualify as fair but different. An empowering provision is defined as ‘a law, rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.’ Some empowering materials – such as internal department circulars – are not generally publicly accessible. At least for the purposes of the fair but different provision, it is submitted that an empowering provision can only qualify as ‘fair’ if it is itself publicly accessible. A law that is not publicly accessible cannot provide publicly known and thus fair procedures.”

<sup>51</sup> Compare section 3(4) of PAJA and *Member of the Executive Council, Department of Education, Gauteng and Others v Governing Body of Rivonia and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC) at para 49(c).

<sup>52</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73; *New Clicks* above n 19 at paras 95-7; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 25-6.

- “(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if—
- (a) the administrator who took it—
    - (i) was not authorised to do so by the empowering provision;
    - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
    - (iii) was biased or reasonably suspected of bias;
  - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
  - (c) the action was procedurally unfair;
  - (d) the action was materially influenced by an error of law;
  - (e) the action was taken—
    - (i) for a reason not authorised by the empowering provision;
    - (ii) for an ulterior purpose or motive;
    - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
    - (iv) because of the unauthorised or unwarranted dictates of another person or body;
    - (v) in bad faith; or
    - (vi) arbitrarily or capriciously;
  - (f) the action itself—
    - (i) contravenes a law or is not authorised by the empowering provision; or
    - (ii) is not rationally connected to—
      - (aa) the purpose for which it was taken;
      - (bb) the purpose of the empowering provision;
      - (cc) the information before the administrator; or
      - (dd) the reasons given for it by the administrator;
  - (g) the action concerned consists of a failure to take a decision;
  - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative



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- action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.”

[42] It is apparent from section 6 that unfairness in the outcome or result of an administrative decision is not, apart from the unreasonableness ground,<sup>53</sup> a ground for judicial review of administrative action. That is nothing new. The section gives legislative expression to the fundamental right to administrative action “that is lawful, reasonable and procedurally fair” under section 33 of the Constitution. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.

[43] The legislative framework for procurement policy under section 217 of the Constitution does not seek to give exclusive content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution.<sup>54</sup> The framework thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed.<sup>55</sup> The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of

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<sup>53</sup> Section 6(2)(h) of PAJA.

<sup>54</sup> In this regard it differs from the Labour Relations Act 66 of 1995. In *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 65, this Court held that these factors placed state employment decisions outside the ambit of the provisions of PAJA.

<sup>55</sup> Bolton “Public Procurement Systems in South Africa: The Main Characteristics” (2007-2008) 37 Pub. Cont. L.J. 781 at 782-3. See also *SASSA v CPS* above n 44 at para 18.



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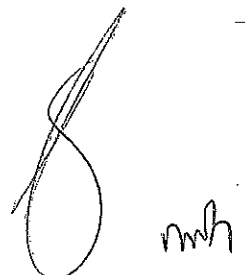
review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

[44] Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

[45] Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act<sup>56</sup> provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in

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<sup>56</sup> This also includes other relevant legislation referred to in these Acts.

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PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.

(e) *Black economic empowerment*

[46] The transformation that our Constitution requires includes economic redress. In the context of the past exclusion of black people from access to mineral resources Mogoeng CJ stated in *Agri SA*:<sup>57</sup>

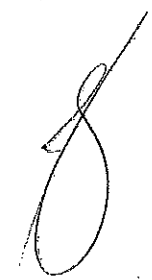
“[B]y design, the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans.”<sup>58</sup>

[47] Economic redress for previously disadvantaged people also lies at the heart of our constitutional and legislative procurement framework. Section 217(2) provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

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<sup>57</sup> *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (*Agri SA*).

<sup>58</sup> *Id* at para 61.



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Section 217(3) provides for the means to effect this, in the form of national legislation that must prescribe a framework within which the policy must be implemented.

[48] The Procurement Act provides that an organ of state must determine its preferential procurement policy within a preference-point system for specific goals, which may include “contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability”.<sup>59</sup> The Procurement Regulations provide more detail on the evaluation for functionality<sup>60</sup> and the price-preference system.<sup>61</sup> In relation to the latter it sets out how points should be awarded to a tenderer for attaining a Broad-Based Black Economic Empowerment (B-BBEE) status level of contributor.<sup>62</sup> B-BBEE status level means the status level acquired in terms of the provisions of the Empowerment Act.

[49] The definition of broad-based black economic empowerment under the Empowerment Act indicates an intention not merely to afford inclusion or redistribution, but to involve black people in management and control of businesses, and to facilitate skills development. “Broad-based black economic empowerment” means—

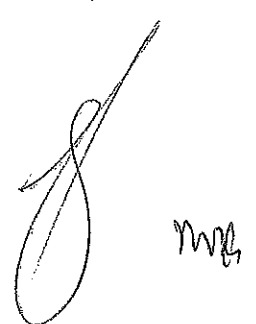
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<sup>59</sup> Section 2(1)(a)-(d) of the Procurement Act.

<sup>60</sup> Id section 4.

<sup>61</sup> Id sections 5 and 6.

<sup>62</sup> For works above R1 million see section 6(2)-(4). Section 1(d) of the Procurement Act defines a B-BBEE status level as “the B-BBEE status received by a measured entity based on its overall performance using the relevant scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the [Empowerment Act]”.

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“the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to: *increasing the number of black people that manage, own and control enterprises and productive assets*; facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; human resource and skills development; achieving equitable representation in all occupational categories and levels in the workforce; preferential procurement; and investment in enterprises that are owned or managed by black people”.<sup>63</sup> (Emphasis added.)

[50] The objectives of the Empowerment Act similarly place an emphasis on management, control and skills development. They state:

“The objectives of this Act are to facilitate broad-based black economic empowerment by—

- (a) promoting economic transformation in order to *enable meaningful participation of black people in the economy*;
- (b) achieving a *substantial change in the racial composition of ownership and management structures* and in the skilled occupations of existing and new enterprises;
- (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
- (d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
- (e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and

<sup>63</sup> Section 1 of the Empowerment Act.



- (g) promoting access to finance for black economic empowerment.”<sup>64</sup> (Emphasis added.)

[51] Various Codes of Good Practice have also been issued under the Empowerment Act. These include measures and scores of management control and of skills development.<sup>65</sup> The Empowerment Act and the regulations make it clear that broad and sustainable involvement by black people is required, and that the development and transfer of the necessary skills are an integral part of such transformation.<sup>66</sup>

[52] The Request for Proposals echoed this emphasis on substantive participation by historically disadvantaged people in the management and control of the successful tenderer. It provided that preference points for historically disadvantaged individuals “are calculated on their percentage shareholding in a business, provided that they are actively involved in and exercise control over the enterprise”.<sup>67</sup> Equity ownership was defined as “the percentage ownership and control, exercised by individuals in an enterprise”<sup>68</sup> and is equated to the percentage of an enterprise which is owned by

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<sup>64</sup> Section 2 of the Empowerment Act.

<sup>65</sup> Codes of Good Practice on Broad Based Black Economic Empowerment promulgated in GN 1106, published in *Government Gazette* 33857 of 10 December 2010.

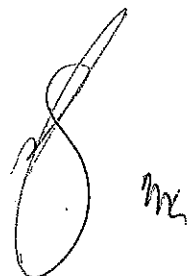
<sup>66</sup> Id at para 5.21 which sets out the principles of B-BBEE transactions as follows:

“5.21.1 B-BBEE ownership initiatives should be aimed at promoting the productive and sustainable participation of Black companies and Black people in each sector of the economy;

5.21.2 Ownership will be particularly encouraged if it adds value to the companies involved and includes meaningful participation in management and control”. (Emphasis added.)

<sup>67</sup> Clause 6.1 of the Request for Proposals.

<sup>68</sup> Id clause 2.9.

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historically disadvantaged individuals “who are actively involved in the management and daily business operations of the enterprise and exercise control over the enterprise, commensurate with their degree of ownership”.<sup>69</sup> Where individuals “are not actively involved in the management and daily business operations and do not exercise control over the enterprise commensurate with their degree of ownership, equity ownership may not be claimed”.<sup>70</sup>

[53] In *Viking Pony*<sup>71</sup> this Court, in relation to a specific complaint, held:

“The complaint is that the historically disadvantaged individuals neither exercised control over the tendering enterprise nor were they actively involved in its management, to the extent commensurate with their degree of ownership. The converse is the requirement for awarding preference points in terms of regulation 13. It follows from this regulation that it is not enough merely to have the historically disadvantaged individuals holding the majority shares in a tendering enterprise. *The exercise of control and the managerial power actually wielded by the historically disadvantaged individuals, in proportion to their shareholding, are what matter.*”<sup>72</sup> (Emphasis added.)

[54] The Court further held that an investigation into “[w]hat happens behind the scenes matters the most when the shareholding is said to be a façade”.<sup>73</sup> Does this mean that an investigation into the propriety of empowerment credentials becomes necessary only after

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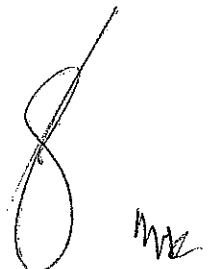
<sup>69</sup> Id clause 3.1.

<sup>70</sup> Id clause 3.2.

<sup>71</sup> *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (*Viking Pony*).

<sup>72</sup> Id at para 46.

<sup>73</sup> Id at para 47.



a complaint has been lodged, and that there was no obligation on SASSA to ensure that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made? I think not, for the reasons that follow.

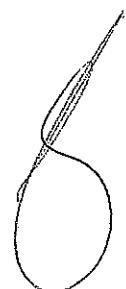
[55] Substantive empowerment, not mere formal compliance, is what matters.<sup>74</sup> It makes a mockery of true empowerment if two opposite ends of the spectrum are allowed to be passed off as compliance with the substantive demands of empowerment. The one is a misrepresentation that historically disadvantaged people are in control and exercising managerial power even when that is not the case. That amounts to exploitation. The other is to misrepresent that people who hold political power necessarily also possess managerial and business skills. Neither situation advances the kind of economic empowerment that the Procurement and Empowerment Acts envisage. Both employ charades.

*(f) Approach to remedy*

[56] Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely

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<sup>74</sup> Id at para 46.

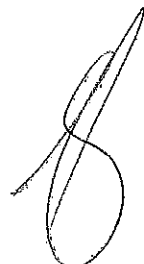


associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context.

*Application of law to the facts*

[57] In accordance with the approach set out above it is now necessary to consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review under PAJA exist.

[58] The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved. One of the main objects of SASSA, in establishing a new system for the payment of social grants, was to ensure proof of life of beneficiaries as an integral part of the payment process and to reduce fraud, corruption and leakage at the point of payment. The verification requirements, whether preferential or mandatory, were thus an important part of the Request for Proposals. This important overall purpose of the Request for Proposals must be kept in mind when assessing whether any non-compliance with its particular provisions was material. It is also necessary, however, to emphasise the particular nature of the process. The first stage, that of functionality, determined who would be able to proceed to the second stage, that of assessment on price. Disqualification at the first



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stage meant that there was no possibility for a bidder who may have scored better on price in the second stage to be considered at all.

[59] Before moving on it is necessary, briefly, to refer to an argument raised by SASSA, namely that PAJA's procedural fairness provisions are not implicated because it has not been shown that AllPay's rights or legitimate expectations have been materially and adversely affected by the conduct in relation to each of the irregularities.<sup>75</sup> That assertion is not correct.

[60] First, tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender.<sup>76</sup> Second, the subject matter of the review is the decision to award the contract to Cash Paymaster, not each decision along the way in the process. Third, the "no effect" argument wrongly seeks to splinter the process in asserting that AllPay's rights were not affected. The decision to exclude AllPay from the second, pricing stage certainly affected its rights and legitimate expectations. Because of its exclusion we are not in a position to know what the outcome of the pricing stage would have been; it is mere speculation. Fourth, in *Grey's Marine*<sup>77</sup> it was stated, with

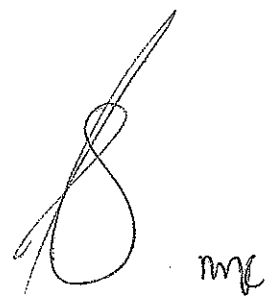
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<sup>75</sup> Section 3(1) of PAJA provides:

"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

<sup>76</sup> *Logbro* above n 22 at para 20.

<sup>77</sup> *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) (*Grey's Marine*).

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reference to the phrase “adversely affect the rights of any person” in section 1 of PAJA,<sup>78</sup> that what “was probably intended [was] rather to convey that administrative action is action *that has the capacity to affect legal rights.*”<sup>79</sup> Irregularities in the process, which may also affect the fairness of the outcome, certainly have the capacity to affect legal rights.<sup>80</sup>

(a) *Separate bids*

[61] The special conditions for submitting proposals in the Request for Proposals stipulated that bidders could submit proposals in respect of one or more provinces, but that each bid per province had to be submitted separately. This simple requirement was even illustrated: “For example, if bidding for two Provinces, submit two separate proposals”.<sup>81</sup> SASSA reserved the right to disqualify any bidder who failed to submit all mandatory documents specified in the Request for Proposals. Cash Paymaster, which bid for all nine provinces, did not submit nine separate sets of documents.

[62] In terms of the Request for Proposals, the failure “to submit all mandatory documents specified in the [Request for Proposals]” was one of the bases for

<sup>78</sup> Section 1(i)(b) of PAJA defines administrative action as—

“any decision taken, or any failure to take a decision, by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.”

<sup>79</sup> *Grey’s Marine* above n 80 at para 23. (Emphasis added.)

<sup>80</sup> *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) 2010 (3) BCLR 212 (CC); at para 27.

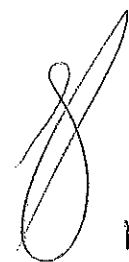
<sup>81</sup> Request for Proposals at clause 3.7.

disqualifying any bidder. What one is left with is non-compliance with what the Request for Proposals regarded as mandatory. This means that a mandatory condition prescribed by an empowering provision was not complied with, which is a ground for review under section 6(2)(b) of PAJA. But the sub-section also requires that the non-compliance must be of a material nature. The purpose of separate bids for the provinces was surely to enable SASSA to assess whether the bidder would be able to provide the necessary services in each of the provinces for which it bid. This purpose was attained. The irregularity was not material. No ground for review under PAJA exists.

*(b) Bid Evaluation Committee composition*

[63] In terms of the Circular the Bid Evaluation Committee had to consist of at least five officials, one of whom should be a Supply Chain Management Practitioner. The Bid Evaluation Committee, however, consisted of only four members, without a Supply Chain Management Practitioner.

[64] The Bid Evaluation Committee formed an integral part of the process of deciding to whom to award the tender. Without its evaluation and recommendation the Bid Adjudication Committee would not have been able to do its work. Its composition was prescribed in the Circular in terms of the Treasury Regulations. A Supply Chain Management Practitioner "should" have been appointed in terms of the Circular. SASSA states that a practitioner was available to advise the Bid Evaluation Committee on technical aspects. That was indeed so. There is no suggestion that the Supply Chain



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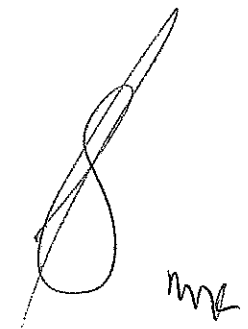
Management Practitioner did not perform this role and function. However, because of his expertise, he may have voted differently on material issues before the Committee, had he been fully part of it. While it is speculative to say that his vote would not have made any difference, given the non-mandatory nature of the Circular's prescription ("should"), it is not possible to find a review ground under section 6(2)(a)(i) of PAJA.

*(c) Non-attendance of Bid Adjudication Committee member*

[65] The non-attendance by a member of the Bid Adjudication Committee at one of the final adjudication meetings was fully explained in the papers. There was a quorum for the meeting and the concerns of the member who could not attend were taken into consideration. No irregularity occurred.

*(d) No proper empowerment assessment*

[66] Section 16A6.3(b) of the Treasury Regulations provides that bid documentation must include evaluation and adjudication criteria prescribed in terms of the Procurement Act and the Empowerment Act. The Request for Proposals included a preference certificate that served as a claim form for historically disadvantaged individual preference points as well as a summary for preference points claimed for attainment of other specified goals. It indicated that responsive tenders would be evaluated using a system which awards points on the basis of the tendered price and equity ownership. The points system and equity ownership operated on the explicit premise of active management and

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control of the enterprise.<sup>82</sup> In the event of a contract being awarded as a result of points claimed for equity ownership, the contractor could have been required to furnish documentary proof that the claims were correct.

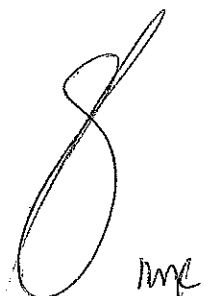
[67] On the papers AllPay brought a challenge against the failure of SASSA to assess the ability of Cash Paymaster's black economic empowerment partners to perform the tender. In considering the matter, the Supreme Court of Appeal dismissed the argument and found that evaluation of the bid was SASSA's prerogative. It found that it was permissible for SASSA to cover this requirement by imposing appropriate contractual consequences on Cash Paymaster. But this does not address the point. By looking only at whether there was a general obligation to investigate the capabilities of a bidding consortium's partners, the analysis falls short of considering the crucial role reserved for transformation in the procurement process.

[68] The Procurement Act provides that an organ of state must determine its preferential procurement policy within a preference-point system for specific goals, which may include "contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability".<sup>83</sup> The handling of the tender process by SASSA made this a nullity, in that the black economic empowerment preference points – which were to be assessed in the second stage – played

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<sup>82</sup> See [52] above.

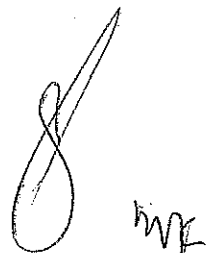
<sup>83</sup> Section 2(1)(a)-(d) of the Procurement Act.

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no actual role in the decision because by that stage there was no competitor. An investigation into the propriety of empowerment credentials does not become necessary only after a complaint has been lodged. There was an obligation on SASSA to ensure that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made. That obligation became even more crucial when there were no other competitors left in the second stage. There is then an even greater obligation for the tender administrator to confirm the empowerment credentials of the winning bidder.

[69] Cash Paymaster claimed that its equity partners would manage and execute over 74% of the tender. Its tender did not substantiate this. All it did was to provide particulars of the management capabilities of its workforce, which included previously disadvantaged people. On the face of the information provided by Cash Paymaster in its tender it was not possible to determine whether its claimed empowerment credentials were up to scratch or not.

[70] Despite this failure, SASSA did not call on Cash Paymaster to substantiate its claimed empowerment credentials, presumably because by that stage the preference points could not have affected the outcome. This effectively made the consideration of empowerment an empty shell, where preference points were calculated as a formality but where the true goal of empowerment requirements was never given effect to.

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[71] AllPay's attack on the irrationality of SASSA's failure to consider Cash Paymaster's empowerment partners' ability to manage almost three-quarters of the venture was not primarily based on this perspective of the substantive purpose of empowerment. It was a more generalised argument, based on the irrationality of awarding a tender when the tenderer's own assertions about its ability to implement the tender are not assessed. This irrationality argument gains further crucial traction when the Constitution's substantive transformative imperatives are brought to the forefront.

[72] Given the central and fundamental importance of substantive empowerment under the Constitution and the Procurement and Empowerment Acts, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed was fatally defective. It is difficult to think of a more fundamentally mandatory and material condition prescribed by the constitutional and legislative procurement framework than objectively determined empowerment credentials.<sup>84</sup> The failure to make that objective determination fell afoul of section 6(2)(b) of PAJA (non-compliance with a mandatory and material condition) and section 6(2)(e)(iii) (failure to consider a relevant consideration).

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<sup>84</sup> Compare *Bengwenyama* above n 19 at paras 72-4; *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at para 72; and *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (AD) at 577H-578F.



*(e) Bidders Notice 2*

[73] There are a number of provisions in the Request for Proposals that relate to biometric verification of the identity of grant beneficiaries, both in the enrolment process and in the payment process. Biometric verification was mandatory for registration or enrolment purposes.<sup>85</sup> The requirement for verification at payment was couched in less strict terms. In the "Scope of Work" section, the Request for Proposals provided that payment services of social grants "must be secured, *preferably*, Biometric based. [The Bidder's proposal] should provide detail on the measures that the Bidder/s will put in place to ensure that the right person is paid the correct amount."<sup>86</sup> The Request for Proposals provided that "[a]ny amendments of any nature made to this [Request for Proposals] shall be notified to all Bidder/s and shall only be of force and effect if it is in writing, signed by the Accounting Officer or his delegated representative and added to this [Request for Proposals] as an addendum."<sup>87</sup>


[74] On 10 June 2011 SASSA issued Bidders Notice 2.<sup>88</sup> Its stated purpose was to give final clarity on frequently asked questions, after which "no additional questions [would] be answered." The notice reiterated that a one-to-many biometric search had to be conducted at the time of registration. In addition, it provided:

<sup>85</sup> See above n 10 for the definition of biometric according to the Request for Proposals.

<sup>86</sup> Clause 3.3 of Section C "Scope of Work", in the Request for Proposals. (Emphasis added.)

<sup>87</sup> Clause 14.6 of Section B "Conditions for Acceptance" in the Request for Proposals.

<sup>88</sup> Though Bidders Notice 2 is dated 6 June 2011, AllPay says it did not receive it until 10 June 2011.


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“In order to ensure that the right Beneficiary receives the right amount at the right time, *Biometric verification must be performed* when a Beneficiary receives his Grant regardless of the Payment Methodology”. (Emphasis added.)

[75] AllPay argued that Bidders Notice 2 amended one of the bid requirements in a manner not sanctioned by the Request for Proposals, and that the ambiguity and confusion surrounding the requirement of biometric verification at the payment stage was exacerbated by the content of Bidders Notice 2. SASSA and Cash Paymaster countered that AllPay’s confusion was its own fault, because verification was required at the time of the payment into a beneficiary’s account and not at the time the money was withdrawn from the account. In any event, they submitted, biometric verification at the time of payment was always the preferential mode and Bidders Notice 2 did not change anything material in relation to that requirement.

[76] It is true that AllPay understood the initial preference for biometric verification at the payment stage to relate to actual payment in the hands of a beneficiary and that it did not consider biometric verification by way of fingerprints to be possible at payments from ATMs. In this regard, it appears that AllPay might have subjectively misread what was stated. But it was not alone in that. The minutes of the Bid Evaluation Committee meetings show that this was an issue that also concerned members of the Bid Evaluation Committee.<sup>89</sup> The Bid Evaluation Committee’s initial assessment on functionality was

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<sup>89</sup> Minutes of the Bid Evaluation Committee meeting, 31 August 2011 at para 4.4-4.6 and handwritten notes taken at the Bid Evaluation Committee meeting, 5 October 2011.

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based on the criteria set out in the Request for Proposals.<sup>90</sup> That functionality assessment gave AllPay a score of more than 70%, which would have qualified it to enter the next stage of assessment based on price and preference points. After the oral presentation, AllPay's scores were reduced to below the minimum and it fell out of further consideration. The crucial question is whether the change from the preferential requirement of biometric verification at payment to the mandatory requirement articulated in Bidders Notice 2 had anything to do with the change in scores.

[77] There is little doubt that the change influenced the scoring. The minutes record that AllPay could not comply with the mandatory requirement of biometric payment verification and that this was a major reason for the downward adjustment in its functionality score.<sup>91</sup> In contrast, Cash Paymaster assured the Bid Evaluation Committee that it could provide biometric verification in the form of voice identification.<sup>92</sup> Its score improved. The doubt and uncertainty that surrounded the effect of the change from preferential biometric payment verification, as stated in the Request for Proposals, to mandatory biometric verification in terms of Bidders Notice 2 did not, however, end there. It was raised again later in the process by the Bid Adjudication Committee.<sup>93</sup>

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<sup>90</sup> Minutes of the Bid Evaluation Committee meeting, 31 August 2011 at para 4.6.1.

<sup>91</sup> Minutes of the Bid Evaluation Committee meeting, 7 October 2011 at para 2.1.1 and 2.4 and Minutes of the Bid Evaluation Committee meeting, 19 October 2011 at para 2.1.

<sup>92</sup> Minutes of Cash Paymaster's presentation to the Bid Evaluation Committee, 7 October 2011 at para 4.

<sup>93</sup> Preparations for Bid Adjudication Committee Meeting: Key Issues for Discussion at para 3.2 and 3.4.

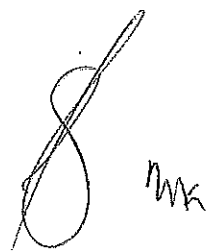
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[78] Even if one disregards AllPay's possible subjective misreading that biometric verification had to take place at the payment stage, the following has, objectively, been established:

- (a) The Request for Proposals required biometric verification as a preferential mode at the payment stage. Bidders Notice 2 changed that to a mandatory requirement. The change was not done in accordance with the Request for Proposals, nor was its import adequately explained.
- (b) The initial functional assessment was done in terms of the requirements set in the Request for Proposals.<sup>94</sup> Both AllPay and Cash Paymaster received more than the 70% minimum score on this assessment.
- (c) At various stages during the evaluation and adjudication of the bids, certain members of the Bid Evaluation and Adjudication Committees and their advisors expressed confusion about whether a preferential or mandatory standard of verification was required for biometric verification at the payment stage.
- (d) The mandatory requirement of biometric verification in terms of Bidders Notice 2 was raised during the oral presentations of both AllPay and Cash Paymaster. AllPay indicated that it could not comply with Bidders Notice 2. Cash Paymaster indicated that it could do so by way of biometric voice verification.

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<sup>94</sup> Addendum to the Bid Evaluation Committee Report, 25 November 2011 at para 3.2.5-6 and Minutes of the Bid Evaluation Committee meeting, 31 August 2011 at para 4.6.1.

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- (e) After these oral representations AllPay's score was lowered to below the necessary 70% threshold, whilst Cash Paymaster's score passed the threshold.
- (f) The biometric verification accepted by SASSA in relation to verification at the payment stage was that of voice identification, not primarily fingerprint identification as originally defined and required in the Request for Proposals.
- (g) Because of its exclusion at the functionality stage, no comparison of the competitiveness of AllPay's and Cash Paymaster's bids was made regarding price.

[79] All these factors created vagueness and uncertainty about the nature and importance of the verification requirements in relation to payments. They were highly material.

[80] This gives rise to two crucial, interrelated questions. Both have a direct bearing on the objective clarity of the evaluation criteria and thus, the fairness of the process. The first question is whether it was clear to bidders that their bids would be evaluated on the basis of the mandatory requirement of biometric testing under Bidders Notice 2 or the preference for biometric testing under the Request for Proposals. The second question is whether it was clear when and where biometric testing was sought. That is, could bidders appreciate that beneficiaries' identities would have to be biometrically verified annually,

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at the time of enrolment (for example in a government office); at the time of monthly payment; or whenever the beneficiary withdrew the funds (at an ATM or another point of sale device)? Confusion over the second question appears to have given rise to confusion over which form of biometric verification was acceptable.<sup>95</sup>

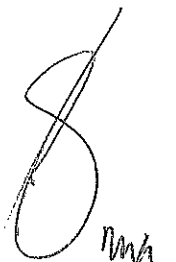
[81] The answer to each question has a bearing on the answer to the other. For instance, if biometric verification were only a preference, other more cost-effective means of securing payment might ultimately have won the day. If verification were sought at payment points, neither fingerprint nor voice recognition would have been feasible. If it were mandatory only at the time of enrolment, or at the time of monthly payment, it might have been feasible in one form or another for several bidders.<sup>96</sup> Thus, a lack of clarity regarding which criteria would be applied in the evaluation of bids – those in the Request for Proposals or those in Bidders Notice 2 – could cause confusion on all of these questions.

[82] Cash Paymaster addressed both of these questions in its argument in this Court. It argued, first, that in view of the express terms of the Request for Proposals, AllPay could not have been, or could not reasonably have been, under any misapprehension about the

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<sup>95</sup> See the handwritten notes to the Minutes of the Bid Evaluation Committee meeting, 31 August 2011, showing that biometric testing was equated with fingerprinting, and para 4.5.2.1 of the official Minutes, which states, “[b]iometric standards – the supporting documents issued with the Bid specification provide for a specific standard requiring fingerprints to be captured of all beneficiaries.”

<sup>96</sup> AllPay alleges that, had the specifications been clear that verification was sought monthly, at the time SASSA paid the grants into bank accounts, it could have offered voice-recognition verification as a solution. It says the fact that it offered this solution for annual enrolment demonstrates it had the capacity to do so. It was only at withdrawal points that it was unable to provide this solution.

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need for their bid to offer a solution which ensured that before payment there had to be verification of the recipient of the payment. Second, it argued that the Request for Proposals' requirement of when and where biometric verification was sought was clear all along: SASSA sought identity verification monthly, at the time of every payment into the beneficiaries' bank accounts. This last point was hammered home several times in oral submissions by Cash Paymaster's counsel, who argued that AllPay's confusion about when and where biometric verification was required was the result of its own misreading of the Request for Proposals' terms, and not the result of any ambiguity in its language.

[83] Notwithstanding the vigour of Cash Paymaster's arguments on these points, the record of the evaluation process says otherwise. At various stages during the evaluation and adjudication of the bids, certain members of the Bid Evaluation and Adjudication Committees and their technical advisors expressed confusion over both of the above questions.<sup>97</sup>

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<sup>97</sup> The key evidence of this confusion appears in the Minutes of the Bid Evaluation Committee meeting, 31 August 2011. In those minutes, we see confusion about "conflicting messages arising from the Bid specification document and Bidders Notice 2". There is confusion about the Request for Proposals requiring only a "payment solution" and Bidders Notice 2 requiring "biometric verification". There is confusion about whether biometric verification was required at ATMs and point of sale devices – which might have resulted in bidders withdrawing. And there is confusion over whether proof of life was required annually or at the time of every payment, as stipulated in Bidders Notice 2.

This confusion is further demonstrated by evidence that appears elsewhere in the record – specifically, in handwritten notes from the Bid Evaluation Committee meeting, 5 October 2011, where members of the Committee expressed confusion about the where and when of biometric verification (whether it applied only to annual enrolment, was a requirement or was flexible); in handwritten notes from the Bid Evaluation Committee meeting, 31 August 2011, where Bid Evaluation Committee members said that the requirement of Bidders Notice 2 favoured one bidder and excluded 20 others; and in a 14 November 2011 memorandum, where legal advisors to the Bid Adjudication Committee said that, because proof of life biometric confirmation went to the heart of the specification and the final scoring given to the two service providers, "proper analysis of the intention, meaning and application of [Bidders Notice 2] must be conducted as a matter of urgency."

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[84] Given the reservations of the tender evaluators and their own requests for clarification on how bids were to be evaluated and the meaning of the Bidders Notice 2 requirements, it can hardly be maintained that AllPay's confusion was wholly subjective and self-induced.

[85] Cash Paymaster claimed that the switch from evaluation according to the terms of the Request for Proposals to those of Bidders Notice 2 was irrelevant, because biometric verification was preferred all along, and that AllPay's attempt to argue otherwise is a hindsight argument that ignores the facts. This argument found favour in the Supreme Court of Appeal.<sup>98</sup> But it is contradicted by the actual scoring process. When bidders were scored on the basis of the Request for Proposals, AllPay received a score of 70.42%. When it was scored on the basis of Bidders Notice 2, it received only 58.68%. There is thus little doubt that the changes in the bases of evaluation influenced the scoring. Where AllPay's solution, which did not include monthly biometric verification, was previously acceptable, it suddenly became unacceptable. As noted by the members of the Bid Evaluation Committee, the effect of this change was substantial. It reduced the number of viable bids to one, rendering the process entirely uncompetitive and obviating any true, comparative consideration of cost-effectiveness.

[86] The Bid Evaluation and Adjudication Committees were unsure about the proper effect of Bidders Notice 2 right up to the end of the process. The effect was to knock

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<sup>98</sup> Supreme Court of Appeal judgment above n 8 at paras 73-5.

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AllPay out of contention altogether at the functionality stage. Without any competitor in the financial and preference-point stage, the process became entirely uncompetitive.

[87] Vagueness and uncertainty are grounds for review under section 6(2)(i) of PAJA.<sup>99</sup> Certainty in legislation and administrative action has been linked to the rule of law. In *New Clicks*, this Court made the connection between the two and clarified where vagueness would fall as a ground for review in PAJA:

“It seems to have been assumed by the parties, and in my view correctly so, that vagueness is a ground for review under PAJA. Although vagueness is not specifically mentioned in PAJA as a ground for review, it is within the purview of section 6(2)(i) which includes as a ground for review, administrative action that is otherwise ‘unconstitutional or unlawful’. This Court has held that the doctrine of vagueness is based on the rule of law which is a foundational value of our Constitution. In *Affordable Medicines* this Court explained the doctrine in the following terms:


‘[L]aws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly’.<sup>100</sup>  
(Footnotes omitted.)

[88] There is another, related concern with the clarity of administrative action: vagueness can render a procurement process, or an administrative action, procedurally

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<sup>99</sup> Hoexter above n 26 at 332-4 and 356-7.

<sup>100</sup> *New Clicks* above above n 19 at para 246.

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unfair under section 6(2)(c) of PAJA.<sup>101</sup> After all, an element of procedural fairness – which applies to the decision-making process – is that persons are entitled to know the case they must meet.

[89] Section 3(2)(b)(i) and (ii) of PAJA reads in part:

“In order to give effect to the right to procedurally fair administrative action, an administrator . . . must give—

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- [and]
- (ii) a reasonable opportunity to make representations”.<sup>102</sup>

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<sup>101</sup> Section 6(2)(c) of PAJA provides: “A court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair”.

<sup>102</sup> Section 3 of PAJA in full reads:

- (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
- (2) (a) A fair administrative procedure depends on the circumstances of each case.  
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
  - (i) adequate notice of the nature and purpose of the proposed administrative action;
  - (ii) a reasonable opportunity to make representations;
  - (iii) a clear statement of the administrative action;
  - (iv) adequate notice of any right of review or internal appeal, where applicable; and
  - (v) adequate notice of the right to request reasons in terms of section 5.
- (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—
  - (a) obtain assistance and, in serious or complex cases, legal representation;
  - (b) present and dispute information and arguments; and
  - (c) appear in person.
- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).  
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
  - (i) the objects of the empowering provision;





[90] In the context of a tender process, the tender documents give notice of the proposed administrative action, while the responding bids in effect constitute representations before the decision is made.<sup>103</sup> Adequate notice would require sufficient information to enable prospective tenderers to make bids that cover all the requirements expected for the successful award of the tender.<sup>104</sup>

[91] Given the confusion over the requirements of the tender on the part of both bidders and members of the Bid Evaluation Committee, the notice given by the tender documents in this case was inadequate. It did not specify with sufficient clarity what was required of bidders. The requirements of section 3(2)(b) of PAJA were thus also not met.

[92] The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive.<sup>105</sup> Because of the uncertainty caused by the

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- (ii) the nature and purpose of, and the need to take, the administrative action;
  - (iii) the likely effect of the administrative action;
  - (iv) the urgency of taking the administrative action or the urgency of the matter; and
  - (v) the need to promote an efficient administration and good governance.

- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.”

<sup>103</sup> Quinot “Administrative Law” (2010) *Annual Survey of South African Law* 41 at 63.

<sup>104</sup> See Currie above n 52 at 105. See also Baxter *Administrative Law* (Juta and Co Ltd, Cape Town 1984) at 546.

<sup>105</sup> See *Minister of Social Development and Others v Phoenix Cash and Carry Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA) at para 2:

wording of the Request for Proposals and Bidders Notice 2, that purpose was not achieved in this case.

[93] For all these reasons the decision to award the tender to Cash Paymaster is constitutionally invalid.

*Remaining issues*

(a) *New evidence*

[94] AllPay sought to introduce new evidence before us, as it did after the hearing but before delivery of judgment in the Supreme Court of Appeal.<sup>106</sup> The only difference was that we also had the benefit of an affidavit by Mr Tsalamandris,<sup>107</sup> in which he disavowed any imputation of irregularity or wrongdoing in the procurement process. The evidence sought to be introduced fails the test of being so crucial that, if accepted, it would likely change the outcome of the matter.<sup>108</sup> It remains hearsay evidence and introduces no new independent evidence of major irregularities. Counsel for AllPay was constrained to

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“[A] tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal . . . [A] public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price.”

See also *Firechem* above n 48 at para 30: “[A] tender should speak for itself. Its real import should not be tucked away, apart from its terms.”

<sup>106</sup> Supreme Court of Appeal judgment above n 8 at para 6.

<sup>107</sup> Mr Tsalamandris, a SASSA employee, was a member of the support team for the tender evaluation and was responsible for taking minutes at meetings of the Bid Evaluation Committee.

<sup>108</sup> *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 41-3; *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (SCA) at 378; and *Colman v Dunbar* 1933 AD 141 at 161-2.



concede that the new evidence's worth was that it provided an explanation for the apparently disjointed irregularities. That is an insufficient basis for introducing the evidence. There was some suggestion in written argument by Corruption Watch that the requirements for the admission of new evidence at a late stage should be relaxed in procurement cases in order properly to combat corruption. The answer is that no material evidence of corruption is sought to be admitted here.

(b) *SASSA's duty to investigate*

[95] Corruption Watch made submissions on the duty of state organs to investigate, independently and proactively, any possible irregularities in the procurement process.<sup>109</sup>

SASSA accepted that it had that obligation, but asserted that it had done all it could in

<sup>109</sup> Corruption Watch relies on regulation 16A9.1(b) of the Treasury Regulations, as amended, which states that an accounting officer 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.”

The Regulations in terms of the Public Finance Management Act, 1999 *Government Gazette* 25767 of 5 December 2003: Framework For Supply Chain Management similarly state in regulation 9:

“(1) The accounting officer or accounting authority of an institution to which these regulations apply must—

- (a) take all reasonable steps to prevent abuse of the supply chain management system;
- (b) 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 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”.

that regard. It is not possible or prudent for us to assess and pronounce on this collateral issue, effectively as a court of first instance.

### *Remedy*

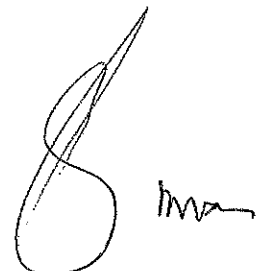
[96] The national system for the payment of social grants has been in operation for some 20 months now. SASSA and Cash Paymaster assert that it is running smoothly and efficiently and that setting the tender aside would cause great disruption. The Centre for Child Law<sup>110</sup> made submissions in relation to the appropriate remedy in order to protect the rights of child grant beneficiaries. Part of the submissions dealt with the constitutional obligation that Cash Paymaster may have to continue with the current system even if the tender award is set aside, until a new system is in place. These considerations raise difficult factual and legal issues. The information currently before us is outdated and inadequate. It would be inappropriate to make a decision on a just and equitable remedy in the absence of further information and argument on these issues. Our order will thus contain directions requiring further submissions and a hearing on the issue of a just and equitable remedy before a final decision is made.

### *Costs*

[97] Whatever remedy eventually follows, AllPay has been substantially successful in having the award of the tender declared invalid. It is entitled to costs.

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<sup>110</sup> The second amicus curiae.

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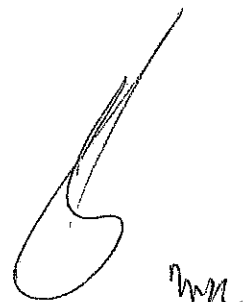
*Order*

[98] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds and the order of the Supreme Court of Appeal is set aside.
3. It is declared that the award of the tender to Cash Paymaster (the third respondent) to provide services for payment of social grants over a period of five years for all nine provinces is constitutionally invalid.
4. The declaration of invalidity is suspended pending determination of a just and equitable remedy.
5. The parties and the amici curiae are directed to furnish factual information on affidavit, as well as further written submissions, on the following aspects:
  - 5.1 The time and steps necessary, and the costs likely to be incurred, in the initiation and completion of a new tender process for a national social grant payment system.
  - 5.2 The time and steps necessary, and the costs likely to be incurred, in the implementation of a new system after the tender process is completed.
  - 5.3 The just and equitable arrangements that should be made for the continued operation of the payment of social grants until a new system is implemented.

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- 5.4 Cost implications for:
    - 5.4.1 the third respondent if a new tender process is ordered and implemented, and how these costs could be ameliorated or offset; and
    - 5.4.2 the state if a new tender process is ordered and implemented, and how these costs could be ameliorated.
  - 5.5 What would be in the public interest when determining a just and equitable remedy.
  - 5.6 Data and statistics on the implementation of the tender to date.
  - 5.7 Whether the third respondent is under a public duty or is constitutionally or otherwise obliged to assist in the transitional arrangements.
  - 5.8 Whether there is any other remedy available to the applicant to protect or enforce its private interests in the event that a new tender process is not ordered.
  - 5.9 Any other information considered relevant.
- 6. The parties and the amici must comply with the directions in paragraph 5 above by not later than Thursday, 30 January 2014.
  - 7. The matter is set down for further hearing on Tuesday, 11 February 2014.
  - 8. The grant of a just and equitable remedy is reserved pending the further hearing on Tuesday, 11 February 2014.

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FRONEMAN J

9. The first, second and third respondents are ordered to pay the applicants' costs, including the costs of three counsel, in the High Court, the Supreme Court of Appeal and in this Court.

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For the Applicants:

Advocate G Marcus SC, Advocate D Unterhalter SC, Advocate M Du Plessis, Advocate C Steinberg and Advocate A Coutsoudis instructed by Nortons Inc.

For the First and Second Respondents:

Advocate S Cilliers SC, Advocate M Mostert and Advocate A Higgs instructed by the State Attorney.

For the Third Respondent:

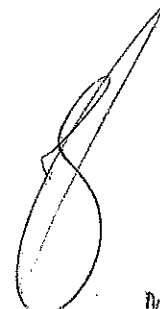
Advocate T Beckerling SC, Advocate R Strydom SC, Advocate N Ferreira and Advocate J Bleazard instructed by Smit Sewgoolam Inc.

For the First Amicus Curiae:

Advocate S Budlender, Advocate M Townsend and Advocate L Kelly instructed by Van Hulsteyns Attorneys.

For the Second Amicus Curiae:

Advocate T Ngcukaitobi and Advocate M Bishop instructed by the Legal Resources Centre.



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"FAZ"



CONSTITUTIONAL COURT OF SOUTH AFRICA

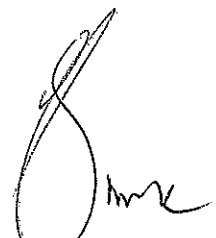
Case CCT 48/13

In the matter between:

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

and

<b>CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY</b>	First Respondent
<b>SOUTH AFRICAN SOCIAL SECURITY AGENCY</b>	Second Respondent
<b>CASH PAYMASTER SERVICES (PTY) LTD</b>	Third Respondent
<b>EZIDLUBHEDU INVESTMENT HOLDINGS (PTY) LTD</b>	Fourth Respondent
<b>FLASH SAVINGS AND CREDIT COOPERATIVE</b>	Fifth Respondent
<b>ENLIGHTENED SECURITY FORCE (PTY) LTD</b>	Sixth Respondent
<b>MOBA COMM (PTY) LTD</b>	Seventh Respondent
<b>EMPILWENI PAYOUT SERVICES (PTY) LTD</b>	Eighth Respondent
<b>PENSION MANAGEMENT (PTY) LTD</b>	Ninth Respondent
<b>MASINGITA FINANCIAL SERVICES (PTY) LTD</b>	Tenth Respondent
<b>SOUTH AFRICAN POST OFFICE</b>	Eleventh Respondent
<b>ROMAN PROTECTION SOLUTIONS CC</b>	Twelfth Respondent
<b>UBANK LIMITED</b>	Thirteenth Respondent
<b>AFRICAN RENAISSANCE INVESTMENT MANAGEMENT (PTY) LTD</b>	Fourteenth Respondent
<b>STANDARD BANK GROUP LIMITED</b>	Fifteenth Respondent
<b>NEW SOLUTIONS (PTY) LTD</b>	Sixteenth Respondent
<b>ITHALA LIMITED</b>	Seventeenth Respondent
<b>KTS TECHNOLOGY SOLUTIONS CONSORTIUM</b>	Eighteenth Respondent
and	
<b>CORRUPTION WATCH</b>	First Amicus Curiae
<b>CENTRE FOR CHILD LAW</b>	Second Amicus Curiae



**Neutral citation:** *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12

**Coram:** Moseneke ACJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

**Heard on:** 11 February 2014

**Decided on:** 17 April 2014

**Summary:** Remedy – unlawful tender – just and equitable remedy – tender set aside – new tender ordered – existing contract to remain in place until final decision on whether to award new tender

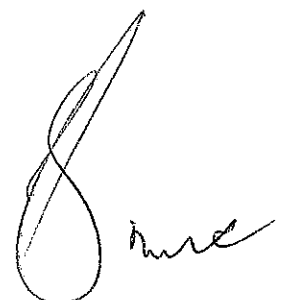
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## ORDER

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Judgment on the just and equitable remedy arising from this Court's order in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) declaring that the tender was invalidly awarded.

The Contract for the Payment of Social Grants between the South African Social Security Agency and Cash Paymaster Services (Pty) Ltd is declared invalid. The declaration of invalidity is suspended pending the decision whether to award a new tender after the tender process is re-run. The full order is at [78].

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## JUDGMENT

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FRONEMAN J (Moseneke ACJ, Cameron J, Dambuza AJ, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J concurring):

### *Introduction*

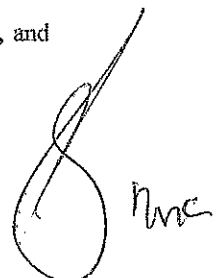
[1] This judgment deals with the remedy that should follow upon the judgment on the merits.<sup>1</sup> This Court declared the award of the tender by the South African Social Security Agency (SASSA) to the third respondent, Cash Paymaster Services (Pty) Ltd (Cash Paymaster), constitutionally invalid.<sup>2</sup> The declaration of invalidity was based

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<sup>1</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC).

<sup>2</sup> The full order reads:

- “1. Leave to appeal is granted.
2. The appeal succeeds and the order of the Supreme Court of Appeal is set aside.
3. It is declared that the award of the tender to Cash Paymaster (the third respondent) to provide services for payment of social grants over a period of five years for all nine provinces is constitutionally invalid.
4. The declaration of invalidity is suspended pending determination of a just and equitable remedy.
5. The parties and the amici curiae are directed to furnish factual information on affidavit, as well as further written submissions, on the following aspects:
  - 5.1 The time and steps necessary, and the costs likely to be incurred, in the initiation and completion of a new tender process for a national social grant payment system.
  - 5.2 The time and steps necessary, and the costs likely to be incurred, in the implementation of a new system after the tender process is completed.
  - 5.3 The just and equitable arrangements that should be made for the continued operation of the payment of social grants until a new system is implemented.
  - 5.4 Cost implications for:
    - 5.4.1 the third respondent if a new tender process is ordered and implemented, and how these costs could be ameliorated or offset; and
    - 5.4.2 the state if a new tender process is ordered and implemented, and how these costs could be ameliorated.



on two grounds. The first was that SASSA failed to ensure that the empowerment credentials claimed by Cash Paymaster were objectively confirmed.<sup>3</sup> The second was that Bidders Notice 2 did not specify with sufficient clarity what was required of bidders in relation to biometric verification,<sup>4</sup> with the result that only one bidder was considered in the second stage of the process. This rendered the process uncompetitive and made any comparative consideration of cost-effectiveness impossible.<sup>5</sup>

[2] Section 172(1)(b) of the Constitution provides that following upon a declaration of constitutional invalidity a court—

“may make any order that is just and equitable, including—

- (i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

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- 5.5 What would be in the public interest when determining a just and equitable remedy.
  - 5.6 Data and statistics on the implementation of the tender to date.
  - 5.7 Whether the third respondent is under a public duty or is constitutionally or otherwise obliged to assist in the transitional arrangements.
  - 5.8 Whether there is any other remedy available to the applicant to protect or enforce its private interests in the event that a new tender process is not ordered.
  - 5.9 Any other information considered relevant.
  - 6. The parties and the amici must comply with the directions in paragraph 5 above by not later than Thursday, 30 January 2014.
  - 7. The matter is set down for further hearing on Tuesday, 11 February 2014.
  - 8. The grant of a just and equitable remedy is reserved pending the further hearing on Tuesday, 11 February 2014.
  - 9. The first, second and third respondents are ordered to pay the applicants’ costs, including the costs of three counsel, in the High Court, the Supreme Court of Appeal and in this Court.”

<sup>3</sup> Merits judgment above n 1 at para 72.

<sup>4</sup> Id at para 91.

<sup>5</sup> Id at para 86.

[3] Paragraph 4 of the order suspended the declaration of invalidity pending the determination of a just and equitable remedy. In paragraph 5 the parties were directed to provide factual information and written submissions for the purpose of determining a just and equitable remedy. A further oral hearing took place on 11 February 2014.

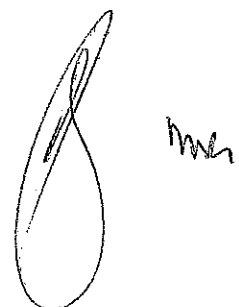
[4] The structure of this judgment is as follows. First, I set out a summary of the factual information provided by the parties and their submissions about the appropriate remedy. I then consider the proper legal approach to determining a just and equitable remedy in the procurement context. I will deal with each of the relevant aspects relating to that before coming to a final conclusion on the appropriate remedy. At the outset it is necessary to say that the remedy will not disrupt the payment of existing grants.

*Factual information and submissions*

[5] The information provided by the parties and their submissions are helpful. There are, however, disputes about the relevance and correctness of certain facts. The provisions allowing the receipt of factual information in this Court<sup>6</sup> do not cater for the resolution of disputed evidence. The order we make is not dependent on any factual finding in relation to disputed facts. Nevertheless, the uncontested information provides a useful background for determining a just and equitable remedy.

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<sup>6</sup> Rule 31 of the Rules of the Constitutional Court.

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[6] AllPay Consolidated Investment Holdings (Pty) Ltd (AllPay) recognised that SASSA and Cash Paymaster were best positioned to assess the time, necessary steps and cost implications of a new tender process. It did, however, commission reports from various experts to gather factual information in support of what it envisages should take place in the event that a fresh tender is ordered.<sup>7</sup> The best indication of the time and steps required for a new tender process to take place is to consider what was required in the previous tender. On that basis, AllPay contended that an entirely new tender process, from the amendment of the Request for Proposals to the handover to the successful tenderer, could be concluded in no more than nine and a half months.

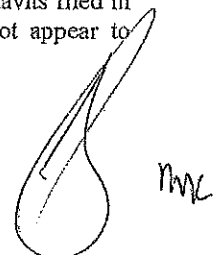
[7] The key question is whether the implementation of a new system would cost SASSA more than it is currently paying for the service. Because the cost of ordering a fresh tender is the normal consequence of an unlawful tender process, any expense considerations must be viewed in the light of the benefits of a more competitive tender. This underlies the principle in section 217 of the Constitution that fair public tendering leads to more cost-effective solutions.

[8] The expert evidence proffered by AllPay<sup>8</sup> suggests that, had it been awarded the tender instead of Cash Paymaster, SASSA would have saved approximately

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<sup>7</sup> AllPay requested data and statistics from SASSA in relation to the implementation of the tender. None of the information was provided.

<sup>8</sup> As a result of Cash Paymaster's refusal and SASSA's failure to provide AllPay (or even its legal team subject to confidentiality undertakings) with access to various documentation including relevant financial information, AllPay commissioned a financial expert to produce a report based on the publicly available documents (including Cash Paymaster's financial model which formed part of its response to the Request for Proposals, public announcements by Cash Paymaster's holding company NET1, as well as statements in affidavits filed in this litigation). He concluded that the contract between SASSA and Cash Paymaster does not appear to represent "value for money" for either SASSA or the South African public.

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R926 million over five years. AllPay contends that the price discrepancy between Cash Paymaster's and AllPay's original offerings makes it clear that there may be significant financial benefits to running a fresh tender. On this basis the cost of re-doing the tender may well be recouped by the state receiving a more cost-effective solution. The expert contends that, even on conservative assumptions, Cash Paymaster has, after just two years, already covered all its costs in implementing the tender and is actually making a profit. By the time a new tender process is implemented, Cash Paymaster would have earned a reasonable internal rate of return on its investment.

[9] AllPay also argued that the current system is far from perfect. As a result, it contends that Cash Paymaster is not providing the best service and that beneficiaries are forced to endure a sub-optimal system for which SASSA is paying more than it should. Because Cash Paymaster has already embarked on a bulk enrolment process, including the collection of biometric data, which is now owned by SASSA, there is no reason why a new successful bidder could not take this over. The new tenderer could thus make use of that information to allow for a seamless takeover of the current payment of beneficiaries without the need for a large scale re-enrolment of all beneficiaries.

[10] AllPay submitted that, in the ordinary course, effective remedial relief must follow a declaration of unlawfulness. If the rule of law is to be vindicated, the starting point must be the re-running of the tender process. Given the nature and materiality of

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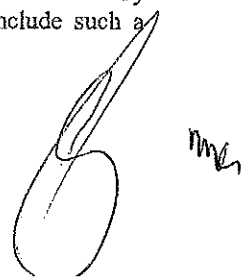


the irregularities, the only just and equitable remedy is one that suspends the declaration of invalidity and allows for a fresh tender process to run, with a revised Request For Proposals and with prospective bidders being allowed to submit fresh bids. Cash Paymaster's contract with SASSA should be kept in place until the successful bidder is able to take over. This will ensure the uninterrupted payment of social grants to beneficiaries and also provide Cash Paymaster with the chance to mitigate any prejudice that would arise if the award to it were invalidated with immediate effect.

[11] AllPay contended that, pending the outcome of the new tender process, Cash Paymaster would not be entitled to "walk away" from the existing contract – it is effectively the government's agent for the provision of social grants and therefore has a constitutional obligation to protect the interests of the beneficiaries by continuing to perform under its existing contract with SASSA. It would also be unlawful for Cash Paymaster to resile from the contract. This is because the effect of the interim suspension of the declaration of invalidity would be that the parties remain bound by the existing contract until the new contract becomes operational. However, if Cash Paymaster were to refuse to perform under its current contract, emergency arrangements could be put in place to ensure that beneficiaries are paid. In particular, SASSA would be entitled to enter into an emergency contract in terms of the relevant treasury regulations.<sup>9</sup>

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<sup>9</sup> Treasury Regulations GN R556 *Government Gazette* 21249 promulgated on 31 May 2000 as amended by GN R225 *Government Gazette* 27388 promulgated on 15 March 2005. The authority to conclude such a contract is in Regulation 16A6.4.

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[12] SASSA's starting premise, like AllPay's, was that a new tender would need to follow largely the same process as the first tender. This process took nearly three years with an overall cost of approximately R6 million.<sup>10</sup> Based on the previous process, SASSA estimated that the total time for implementing a new system would be not less than 24 months and would cost between R5 million and R10 million.

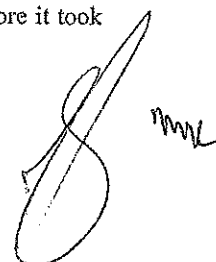
[13] SASSA pointed out that its contract with Cash Paymaster was intended to be the last time that it outsourced its obligation to pay social grants, since it intends to take over the system by April 2017. An advisory committee is currently analysing the possible ways that SASSA may take over the payment system by that time. If a new tender were to be awarded it would therefore have to be for a much shorter period than five years.<sup>11</sup> Moreover, for any tenderer to recoup the pre-implementation costs, the price of a shorter tender would have to be significantly higher. Any delays attributed to a new service provider would also hamper SASSA's own target of being self-sufficient by 2017.

[14] SASSA maintained that the current services are being provided in an efficient and uninterrupted way. Nearly 21 million people (99.76% of beneficiaries) have been re-enrolled under the new system. The registration process has resulted in the Department of Social Development declaring unspent funds of R2 billion and the

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<sup>10</sup> SASSA also noted that a previous attempt had been made at the same process in 2006, which had cost some R16 million.

<sup>11</sup> SASSA submitted that if a new tender were awarded it would run for little more than one year before it took over.

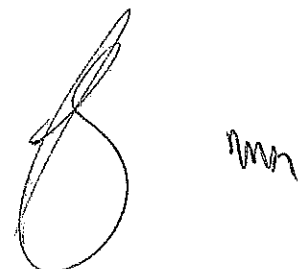
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service fees have been reduced from R32 per person to R16.44 per person. This will result in a saving of R800 million per year.

[15] SASSA argued that, because of the practical implications, the tender should not be set aside. The Court has an obligation to declare the award of the tender constitutionally invalid, but that does not necessarily require that the contract with Cash Paymaster be set aside.

[16] The public has an interest in having a procedurally correct process, but this must be balanced against the essential need for uninterrupted service delivery in line with the obligations under sections 27 and 28 of the Constitution. SASSA contended that the contract is too far advanced to be undone, and that it is strongly in the interests of grant beneficiaries that the contract be allowed to run to completion. There has been no finding of fraud or corruption, and little or no loss to the unsuccessful tenderers, who in all likelihood would not have won the tender even under a different process.

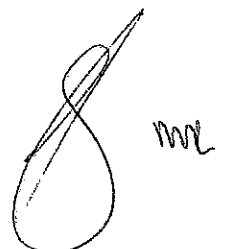
[17] However, SASSA contended that, if the Court were to declare the contract invalid, its declaration should be suspended for three years, until the contract expires. If the Court were to set aside the tender before the expiration of the current contract, given the time it would take to run a new tender process, the declaration of invalidity should be suspended for two years, which would allow SASSA sufficient time to take over the administration of the payment system.

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[18] Cash Paymaster also accepted that it is not best placed to indicate how long a new tender process would take and what the costs involved would be. It estimates that it would take at least 12 months to prepare, issue and adjudicate a new tender. On the costs involved, Cash Paymaster offered no comment and alluded only to the capital expenditure of R1.3 billion it has already incurred. It highlighted potential difficulties with the availability of the required technology and infrastructure, the issuing of new smart cards, the probable re-registration of beneficiaries and the likelihood that new bank accounts will need to be opened.

[19] It indicated that, if its contract were to be cancelled, it would be willing to assist a new tenderer during the transition. However, this was conditional upon payment for its services in terms of the current contract and on the basis that its facilitation of a takeover would not result in the erosion of intellectual property rights. Cash Paymaster emphasised that additional obligations to facilitate the takeover would have financial implications for it – and would be caused by SASSA's, rather than its own, administrative irregularities. In the event of an expedited termination, Cash Paymaster submitted that it would face financial exposure of R41.5 million (if terminated within six months) or R32 million (if terminated within 12 months).

[20] Cash Paymaster submitted that any remedy granted should not result in an interruption in payment services; any decrease in the quality of the service currently enjoyed by recipients or any other inconvenience; or uncertainty in respect of the

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on-going payment of grants. The only remedy that would guarantee this, and thus the one that is just and equitable in the circumstances, is to allow Cash Paymaster to run its contract to completion. This can be achieved either by declining to set aside the contract or suspending any order setting it aside for the remainder of the contract period.

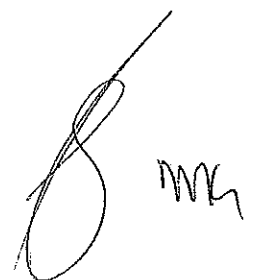
[21] Cash Paymaster submitted that, in terms of sections 3 and 4(1)(a) of the South African Social Security Agency Act<sup>12</sup> (Agency Act), SASSA is statutorily empowered to act as the sole agent to ensure the efficient and effective management of the administration of the grants. It thus asserted that SASSA is best placed to make a decision on the feasibility of a new tender.

[22] Cash Paymaster indicated that it is no longer of critical importance to determine whether it is constitutionally bound to distribute social grants, as it has undertaken to do so subject to certain conditions. However, it argued that sections 27(1)(c) and 28(1)(c) are not binding on it, at least not to the extent that it is duty-bound to continue to provide a public service on behalf of the state and to expend its own resources under terms to which it has not agreed.

[23] Corruption Watch drew attention to the composition of the decision-making bodies in a fresh bid process. SASSA was requested to provide information relating to the steps taken, if any, to investigate the irregularities. While SASSA undertook to

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<sup>12</sup> 9 of 2004.

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provide the information, none has been forthcoming, and Corruption Watch remains concerned about the irregularities that occurred in the tender process.

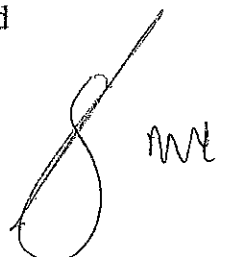
[24] Corruption Watch did not make firm proposals on the appropriate remedy. It raised more general rule of law concerns. Prejudice to third parties is relevant but not determinative and, while damage to the public is a major concern, a court should be slow to conclude that there is no possible order that sets the tender award aside and also adequately protects members of the public.

[25] In oral argument, Corruption Watch proposed that this Court should declare the contract invalid unless it is satisfied that there is a real risk that setting it aside will lead to significant prejudice and that the risk cannot be ameliorated.

[26] The other amicus curiae, the Centre for Child Law (Centre), expressed a preference to suspend the declaration of invalidity until the end of the existing contractual period. The Centre's basic premise is that it would be inappropriate for the Court to order a new tender if it would result in a new registration process.

[27] According to the Centre, the relevant factors when considering setting the tender aside are the—

- (a) interest of beneficiaries in the uninterrupted payment of social grants, especially that of children;
- (b) cost to the public purse versus the proper use of public funds; and

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- (c) need to promote respect for the rule of law, including both the value of deterrence and the maintenance of and respect for a fair and lawful procurement system.

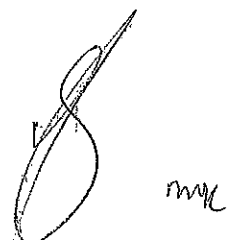
It lays the strongest emphasis on the first consideration.

[28] The Centre also contended that Cash Paymaster would be under a contractual and constitutional duty to continue to administer the social grants until a new tender has been awarded. The Centre urged the Court to supervise the implementation of any order that sets aside or shortens the duration of the contract, so as to ensure that the interests of beneficiaries are protected.

*Proper approach to remedy*

[29] In *Steenkamp Moseneke* DCJ stated:

“It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. . . . Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective

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public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”<sup>13</sup> (Footnote omitted.)

The emphasis on correction and reversal of invalid administrative action is clearly grounded in section 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made “to allow the competent authority to correct the defect.” Remedial correction is also a logical consequence flowing from invalid and rescinded contracts<sup>14</sup> and enrichment law generally.<sup>15</sup>

[30] Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.<sup>16</sup>

[31] In the merits judgment this Court stated:

“Once a finding of invalidity . . . is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the

<sup>13</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at para 29.

<sup>14</sup> *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at para 101. See Van der Merwe et al *Contract General Principles* 4 ed (Juta & Co, Cape Town 2012) at 176-7.

<sup>15</sup> *Opperman* id at para 15. See Visser *Unjustified Enrichment* (Juta & Co, Cape Town 2008) at 4 and 442 where he describes the basic function of the law of unjustified enrichment as “to restore economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which by the defendant there is no legal justification.” See further Du Plessis *The South African Law of Unjustified Enrichment* (Juta & Co, Cape Town 2012) at 113.

<sup>16</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at para 85.





constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context.”<sup>17</sup>

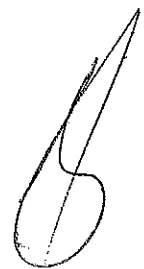
[32] This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social-security matters.

[33] The primacy of the public interest in procurement and social-security matters must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range.

[34] Corruption Watch proposed that we should articulate a general formulation for when it would be just and equitable to deviate from the corrective principle. For the

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<sup>17</sup> Merits judgment above n 1 at para 56.



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moment, I only wish to point out that a general statement of this kind may not be desirable or even feasible once it is accepted that the application of the corrective principle is not uniform.<sup>18</sup> The corrective principle may be capable of implementation at certain levels, but not others.

[35] In the discussion that follows, I will first consider the practical difficulties raised as obstacles to ordering a new tender process, before dealing with the alleged legal problems in that regard.

*Practical difficulties*

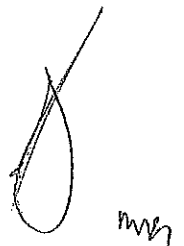
[36] SASSA and Cash Paymaster argued that the risk of disruption to beneficiaries militates against declaring the contract invalid. Similarly, the Centre submitted that the only just and equitable remedy would be one that ensures the timely and uninterrupted payment of social grants to beneficiaries. If the contract were declared invalid, it contended, the only guarantee against disruption would thus be to suspend the declaration of invalidity until the end of the contractual period. To strengthen its argument, the Centre submitted that the interests of children are of particular importance.<sup>19</sup> A significant proportion of social-grant beneficiaries are children. This means that any assessment of the possible disruption in the payment process should be the subject of even greater scrutiny where the rights of children are at stake.

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<sup>18</sup> *Bengwenyama* above n 16 at para 85.

<sup>19</sup> Section 28(2) of the Constitution provides:

“A child’s best interests are of paramount importance in every matter concerning the child.”

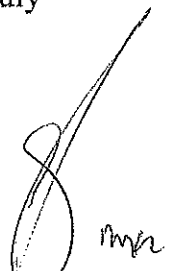


[37] To this SASSA and Cash Paymaster added that the system is in any event working well and that there is no realistic possibility that anyone else would be able to take over. This argument must be rejected. The judgment on the merits showed that the irregularities prevented a proper competitive process because no price comparison could in the end be made.

[38] The likelihood of a disruption of payments to beneficiaries is disputed. So are a number of other issues, including the extent to which SASSA will be able to take over the administration and payment of social grants at the end of the current contract period. These disputed factual issues cannot be determined by us in these proceedings.

[39] I have alluded to the multi-dimensional aspects of the just and equitable enquiry. Factual disputes, at a practical level, add another dimension to be considered. In these circumstances, a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between, with competing aspects assessed differently. The order made at the end of this judgment is of this kind.

[40] The order makes provision for a re-run of the tender, but it does not attempt to impose a final solution on SASSA. We acknowledge that we are not in a position to determine what the effect of making a new tender award will be on a number of interests. These include: the ability of other potential tenderers to make truly

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competitive bids; whether a new system will necessarily disrupt existing payments; whether SASSA will be able to run the administration and payment of social grants independently at the time envisaged; and what advantages Cash Paymaster may derive from its incumbency. A new tender process will make it possible for SASSA to have more information available to it when it makes a decision whether to award a new tender at the end of the process. It is true that this will come at some cost, between R5 million and R10 million at current estimates, but in the context of the vast sums involved, and considering the potential for a more cost-effective solution, this is a justifiable price to pay to ensure that the rule of law and the demands of transparency and accountability are met.

[41] This practical approach also meets the argument made by SASSA that ordering a new tender process for the original period, namely five years, would impinge on the separation of powers because SASSA intends to take over in 2017.

#### *Separation of powers*

[42] There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.<sup>20</sup> On this basis, there can be no question that requiring SASSA

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<sup>20</sup> See *Mvumvu and Others v Minister for Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 46 and 48 and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.



to re-run the tender falls squarely within this Court's remit. What the public lost in the flawed tender process was the chance to secure a contract with the most competitive and cost-effective tenderer, as the merits judgment explained.

[43] As counsel for AllPay was at pains to point out, if the tender process is re-run without extending the duration of the new contract beyond the current period, Cash Paymaster will have an insuperable advantage because of its incumbency. In fact, as SASSA explained it is probable that no one else would even bid, because only a long-term contract could conceivably be profitable. This is because a long period is essential to recoup the tenderer's huge initial outlay.

[44] This means that re-running the tender without specifying an extended contract period of at least five years would simply perpetuate the consequences of the unlawful tender award to Cash Paymaster. Far from providing "effective relief", this would entrench the unlawfully obtained status quo. Ordinarily, the term of a procurement contract would be within the powers of the executive. Here, however, the facts require a different approach. It would be just and equitable to specify that the term of the fresh tender be for five years.

[45] Hence, the answer to the separation of powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency, in this case, an invalid award of the tender for five years.

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[46] This approach would have the added benefit of providing SASSA with a renewed opportunity of considering and assessing all the practical risks during the renewed tender process.

*Constitutional obligations*

[47] In terms of section 27(1)(c) of the Constitution everyone has the fundamental right to “have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.” Section 27(2) states that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”<sup>21</sup> The state has done so. The Social Assistance Act<sup>22</sup> (Assistance Act) makes provision for social assistance.<sup>23</sup> Chapter 3 deals with the administration of social assistance, including payments to beneficiaries.<sup>24</sup>

[48] SASSA must, under the Agency Act, administer social assistance in terms of Chapter 3 of the Assistance Act.<sup>25</sup> The objects of SASSA are to act, eventually, as the sole agent for the administration of social assistance, but also to act as an agent for the prospective administration and payment of social security.<sup>26</sup> SASSA may, with the

<sup>21</sup> As well as the other rights enumerated in section 27(1).

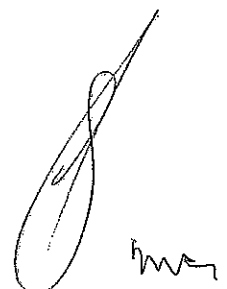
<sup>22</sup> 13 of 2004.

<sup>23</sup> Section 3.

<sup>24</sup> Sections 14-23.

<sup>25</sup> Section 4(1)(a) of the Agency Act.

<sup>26</sup> Section 3(a) and (b).



concurrence of the responsible Minister, enter into an agreement with any person to ensure effective payments to beneficiaries.<sup>27</sup> The agreement must include provisions to ensure the effective and economical use of funds for payment to beneficiaries; the promotion and protection of the human dignity of beneficiaries; the protection of confidential information held by the Agency; honest, impartial, fair and equitable service delivery; mechanisms to regulate community participation and consultation; and financial penalties for non-compliance.<sup>28</sup>

[49] Organs of state have obligations that extend beyond the merely contractual.<sup>29</sup> In terms of section 8 of the Constitution, the Bill of Rights binds all organs of state. Organs of state, even if not state departments or part of the administration of the national, provincial or local spheres of government, must thus “respect, protect, promote and fulfil the rights in the Bill of Rights”.<sup>30</sup>

[50] The founding values of our Constitution include a democratic government based on the principles of accountability, responsiveness and openness.<sup>31</sup> The public administration, which includes organs of state,<sup>32</sup> “must be accountable”,<sup>33</sup> and

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<sup>27</sup> Section 4(2)(a).

<sup>28</sup> Section 4(3).


<sup>29</sup> *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) (*Joseph*) at paras 25 and 34.

<sup>30</sup> Section 7(2) of the Constitution.

<sup>31</sup> Section 1(d).

<sup>32</sup> Section 195(2)(b).

<sup>33</sup> Section 195(1)(f).



“[t]ransparency must be fostered by providing the public with timely, accessible and accurate information.”<sup>34</sup>

[51] Section 239 of the Constitution defines an “organ of state” as—

- “(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer”.

[52] That SASSA is an organ of state is clear. But, for the purposes of the impugned contract, so too is Cash Paymaster. In determining whether an entity is an organ of state, the presence or absence of governmental control over that entity is a factor, but in our constitutional era, is not determinative.<sup>35</sup> In Cash Paymaster’s case the “control test” is not helpful; although it may be independent from SASSA’s control, the function that it performs – the country-wide administration of the payment of social grants – is fundamentally public in nature.

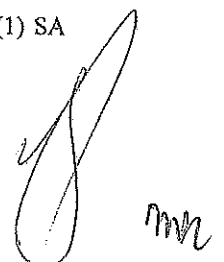
[53] In *AAA Investments*<sup>36</sup> Yacoob J, writing for the majority of this Court,<sup>37</sup> stated:

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<sup>34</sup> Section 195(1)(g).

<sup>35</sup> *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* [2006] ZASCA 93; 2007 (1) SA 66 (SCA) (*Mittalsteel*) at para 22.

<sup>36</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (*AAA Investments*).

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“Our Constitution ensures . . . that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.

It does so by a relatively broad definition of an organ of state. . . . An organ of state is, among other things, an entity that performs a public function in terms of national legislation. If [an entity] performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the privacy protection. In our constitutional structure, [the entity] does not have to be part of government or the government itself to be bound by the Constitution as a whole.”<sup>38</sup> (Footnotes omitted.)

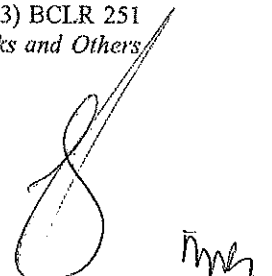
[54] SASSA must administer social assistance in terms of the Assistance Act. It is legislation that seeks to give effect to the right of access to social security in terms of section 27(1)(c) and (2) of the Constitution. SASSA may enter into an agreement with any person “to ensure effective payments to beneficiaries” in terms of section 4(2)(a) of the Agency Act. In terms of the agreement between SASSA and Cash Paymaster the latter administers the payment of social grants on SASSA’s behalf. In doing so, Cash Paymaster exercises a public power and performs a public function in terms the Agency Act, enacted to give effect to the right to social security.<sup>39</sup>

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<sup>37</sup> The minority judgments of Langa CJ and O’Regan J did not differ on this point. See paras 68 and 119-20 of their respective judgments.

<sup>38</sup> *AAA Investments* above n 36 at paras 40-1.

<sup>39</sup> See *Mittalsteel* above n 35 at paras 8-22. See further, on the nature of public power, *Joseph* above n 29 at paras 43-7; *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 138; and *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) at paras 26-8.



[55] But it does more than that. It plays a unique and central role as the gatekeeper of the right to social security and effectively controls beneficiaries' access to social assistance. For all practical purposes it is not only the face, but also the operational arm, of the "administration in the national . . . sphere of government",<sup>40</sup> insofar as the payment of social grants is concerned.

[56] The contract between SASSA and Cash Paymaster also makes it clear that the latter undertook constitutional obligations. The Request for Proposals further stipulates that the tender is subject to the Constitution. The contract itself indicates that the Request for Proposals forms part of the contract and was incorporated by reference. The preamble of the contract states that "SASSA is in terms of the applicable legislative framework responsible for the administration, management and payment of social grants in line with the Constitution".

[57] These public aspects of the procurement contract have important constitutional consequences for both SASSA and Cash Paymaster.

[58] SASSA does not, by the conclusion of the contract, divest itself of its constitutional responsibility and public accountability for rendering the public services.<sup>41</sup> It remains accountable to the people of South Africa for the performance of those functions by Cash Paymaster. In its own case, accountability is ensured by

<sup>40</sup> Paragraph (a) of the definition of "organ of state" in section 239 of the Constitution.

<sup>41</sup> See *AAA Investments* above n 36 at para 40 where it was held that "government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity."

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financial compliance with the Public Finance Management Act<sup>42</sup> and general ministerial oversight.<sup>43</sup>

[59] When Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs. This does not mean that its entire commercial operation suddenly becomes open to public scrutiny. But the commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects.

[60] These general principles must inform and underlie the discussion of whether the present contract should be set aside and a re-run of the tender process ordered. They are also relevant for determining the temporary arrangements if the award of the tender is set aside but suspended.

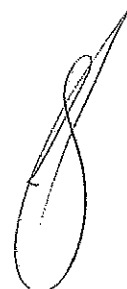
*Invalidity and suspension of the contract*

[61] Both SASSA and Cash Paymaster submitted that a re-run of the tender process would create legal difficulties, because the Court has no power to make a contract for SASSA and Cash Paymaster, or to amend the existing contract. If the existing contract is declared invalid Cash Paymaster would have no further obligations towards anyone and would be entitled to walk away from the contract without any sanction for doing so. This submission cannot be sustained.

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<sup>42</sup> 1 of 1999. See also section 10 of the Agency Act.

<sup>43</sup> Section 11 of the Agency Act.



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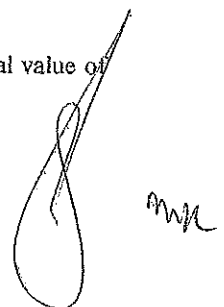
[62] The answer lies, first, in the explicit wording of section 172(1)(b)(ii) of the Constitution, and second, in Cash Paymaster's constitutional obligations.

[63] Section 172(1)(b)(ii) provides that a court may, using its just and equitable remedial powers, make an order "suspending the invalidity for any period and on any conditions, to allow the competent authority to correct the defect." So this Court, under constitutional warrant, may suspend the declaration of invalidity of the contract until any new payment process is operational. During the period of suspension the contract remains operational and Cash Paymaster stays bound to its contractual and constitutional obligations. The continued operation of these contractual obligations thus finds its source in this Court's powers under section 172(1)(b)(ii). The Court's sanction will give any possible future breach by Cash Paymaster of these obligations a dimension beyond mere breach of contract.

[64] In addition, the argument ignores the public accountability aspect that accompanies the conclusion of procurement contracts for the performance of public functions.<sup>44</sup> Cash Paymaster undertook constitutional obligations by entering into the social grant payment contract with SASSA. During the existence of the contract these obligations stem from the contract it concluded. But even after the dissolution of the contract, but before the appointment of another service provider, Cash Paymaster will have constitutional obligations.

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<sup>44</sup> See *AAA Investments* above n 36 at para 89. Langa CJ aptly states that "accountability is a central value of our Constitution."

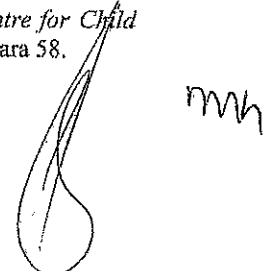


[65] In *Juma Masjid Nkabinde J* explained that private persons may also have the obligation to respect socio-economic rights:

“This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, made it clear that socio-economic rights . . . may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however, that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the ‘intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state’.”<sup>45</sup> (Footnotes omitted.)

[66] Where an entity has performed a constitutional function for a significant period already, as Cash Paymaster has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on Cash Paymaster fulfilling its constitutional obligations. For this reason, Cash Paymaster cannot simply walk away: it has the constitutional

<sup>45</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (*Juma Masjid*) at para 58.




obligation to ensure that a workable payment system remains in place until a new one is operational.<sup>46</sup>

[67] It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.<sup>47</sup> And any benefit that it may derive should not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in Cash Paymaster's hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract. As noted earlier, the disclosure of this information does not require disclosure of information relating to Cash Paymaster's other private commercial interests. But its assumption of public power and functions in the execution of the contract means that, in respect of its gains and losses under that contract, Cash Paymaster ought to be publicly accountable.

<sup>46</sup> Compare Liebenberg "The Application of Socio-Economic Rights to Private Law" (2008) 3 *TSAR* 464 at 467-9 and Pieterse "Indirect Horizontal Application of the Right to Have Access to Health Care Services" (2007) 23 *SAJHR* 157 at 162-3.

<sup>47</sup> The dissolution of a contract creates reciprocal obligations seeking to ensure that neither contracting party unduly benefits from what has already been performed under a contract that no longer exists. This is evidenced in cases of rescission or cancellation of a contract where a party claiming restitution must usually tender the return of what she received during the contract's existence or, if return is not possible, explain the reasons for impossibility. See *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* [1998] ZASCA 67; 1999 (2) SA 719 (SCA) at 731D-732D and Van der Merwe et al above n 14 at 116-8. It also underlies the enrichment claim available to a party in the case of an invalid or illegal contract where the other party seeks to retain benefits from a contract that no longer has legal justification. See Visser above n 15 at 442. These diverse applications of restitutionary principles are not rigid or inflexible. See *Jajbhay v Cassim* 1939 AD 537 at 588 and, in particular, at 544 where the Court held that "public policy should properly take into account the doing of simple justice between man and man." See further *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 420A-C, 421A and 427.



*Accountability concerns*

[68] It is apparent from the merits judgment that the Bid Evaluation Committee and Bid Adjudication Committee were not always sure of the requirements set out in Bidders Notice 2. They cannot necessarily be blamed for that, but their involvement in the first bid may make it difficult for them to bring an independent assessment to bear on a new tender process. That is sufficient reason, based on existing principles, for new members to be appointed to those committees, under independent supervision.

[69] It is not entirely clear to what extent confidential information of beneficiaries gathered in the payment process is protected, and to what extent the information gathered may create the potential for future commercial gain for Cash Paymaster or any other successful tenderer. This must be addressed in the requirements for a new tender.

[70] Unless the tender is awarded to a different contractor, Cash Paymaster will benefit from an unlawful contract. In that event the public is entitled to know the extent to which it has so benefited.

[71] Apart from these aspects, further disciplined accountability is needed in the initiation and execution of the new tender process. This needs to be monitored. This Court has wide remedial powers to ensure effective relief for a breach of a constitutional right. In light of the importance of the right to social security and the impact on and potential prejudice to a large number of beneficiaries, the public clearly

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has an interest in ensuring that the tender is re-run properly. In these circumstances, it is appropriate to impose a structural interdict requiring SASSA to report back to the Court at each of the crucial stages of the new tender process.<sup>48</sup>

*Further relief*

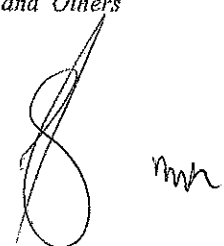
[72] It was suggested that AllPay is entitled to compensation in some form under section 8(1)(c)(ii)(bb) of PAJA in these proceedings. Compensation under this provision of PAJA is not a private-law remedy. But AllPay's interest in the correction of the administrative wrong is at this stage co-extensive with the public interest. What AllPay lost was a chance to compete in a lawful and fair tender process. Similarly, in *Millennium Waste* the Supreme Court of Appeal held that "[t]he loss to the appellant from the unfair act was no more than the loss of the opportunity to have its tender considered."<sup>49</sup> Redress will be adequately met by the order we make. To the extent that Allpay is entitled to further relief it can pursue that in separate proceedings.

*SASSA's conduct*

[73] Before concluding, it is necessary to say something about SASSA's conduct. SASSA is an organ of state. It is bound to the basic values and principles governing public administration set out in section 195 of the Constitution. As is evident from this judgment, and the merits judgment, SASSA's irregular conduct has been the sole

<sup>48</sup> See *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 113.

<sup>49</sup> *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) (*Millennium Waste*) at para 25.





cause for the declaration of invalidity and for the setting aside of the contract between it and Cash Paymaster.

[74] This Court sought further submissions from the parties to assist in the difficult task of determining appropriate relief. The importance of this is obvious, not only because of the vast sums of money involved but more importantly, because of the enormous consequences of irregularities where the interests of beneficiaries, particularly children, play a pivotal role in assessing the appropriate remedy.

[75] Yet, contrary to the obligations it carries under section 195, SASSA has adopted an unhelpful and almost obstructionist stance. It failed to furnish crucial information to AllPay regarding the implementation of the tender<sup>50</sup> and to Corruption Watch in respect of steps it took to investigate irregularities in the bid and decision-making processes.<sup>51</sup> Its conduct must be deprecated, particularly in view of the important role it plays as guardian of the right to social security and as controller of beneficiaries' access to social assistance.<sup>52</sup>

### *Costs*

[76] SASSA and Cash Paymaster contended that we mistakenly failed to make a costs order in their favour in relation to AllPay's failed application to lead further

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<sup>50</sup> See above n 7 and n 8.

<sup>51</sup> See [23].

<sup>52</sup> See [48] and *Van der Merwe and Another v Taylor NO and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) at paras 71-2.

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evidence in the merits application.<sup>53</sup> They are correct. It is a minor matter, but it must be rectified.

[77] As far as the costs of the proceedings relating to the just and equitable remedy are concerned, all the parties were asked to place information before us in order to provide the proper context for the determination of the appropriate remedy. There are no real winners or losers in the ordinary litigation sense. If there is to be any winner, one hopes it will be the general public who will gain from adherence to the rule of law and greater transparency and accountability in relation to the payment of social grants. It is just to make no order as to costs. Each party will bear its own costs.


#### *Order*

[78] The following order is made:

1. The Contract for the Payment of Social Grants between the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Ltd (Cash Paymaster) dated 3 February 2012 is declared invalid.
2. This declaration is suspended pending the decision of SASSA to award a new tender after completion of the tender process ordered in paragraph 3 below.
3. SASSA must initiate a new tender process for the payment of social grants within 30 days of this order:

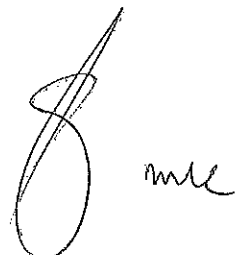
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<sup>53</sup> Merits judgment above n 1 at para 98.



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- 3.1 The request for proposals for the new tender must, in addition to any other requirements that SASSA is entitled to prescribe, contain adequate safeguards to ensure that—
- (a) if any re-registration process is required, no loss of lawful existing social grants occurs;
  - (b) the payment of lawful existing grants is not interrupted; and
  - (c) personal data obtained in the payment process remains private and may not be used in any manner for any purpose other than payment of the grants or any other purpose sanctioned by the Minister in terms of section 20(3) and (4) of the Social Assistance Act 13 of 2004.
- 3.2 The new tender must be for a period of five years.
- 3.3 A new and independent Bid Evaluation Committee and Bid Adjudication Committee must be appointed to evaluate and adjudicate the new tender process. Their evaluation and adjudication must be made public by filing with the Registrar of this Court a status report on the first Monday of every quarter of the year until completion of the process.
4. If the tender is not awarded, the declaration of invalidity of the contract in paragraph 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded:

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- 4.1 Within 14 days of the decision not to award the tender SASSA must lodge a report with the Registrar of this Court setting out all the relevant information on whether and when it will be ready to assume the duty to pay grants itself.
- 4.2 Within 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.
- 4.3 SASSA must within 60 days thereafter obtain an independent audited verification of the details provided by Cash Paymaster under paragraph 4.2 and file the audited verification with this Court.
5. The applicants must pay SASSA and Cash Paymaster's costs in relation to the application, brought in the main application on the merits, to lead further evidence.
6. There is no further costs order.

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For the Applicants:

Advocate G Marcus SC, Advocate D Unterhalter SC, Advocate M du Plessis, Advocate C Steinberg and Advocate A Coutsoudis instructed by Nortons Inc.

For the First and Second Respondents:

Advocate S Cilliers SC and Advocate M Mostert instructed by the State Attorney.

For the Third Respondent:

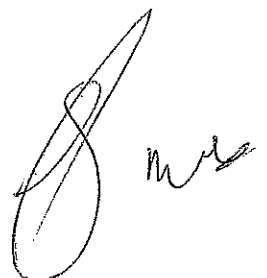
Advocate T Beckerling SC, Advocate R Strydom SC, Advocate N Ferreira and Advocate J Bleazard instructed by Smit Sewgoolam Inc.

For the First Amicus Curiae:

Advocate S Budlender, Advocate M Townsend and Advocate L Kelly instructed by Van Hulsteyns Attorneys.

For the Second Amicus Curiae:

Advocate T Ngcukaitobi and Advocate M Bishop instructed by the Legal Resources Centre.

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For the Applicants:

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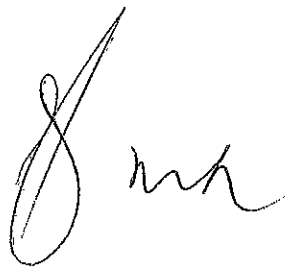
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For the Second Amicus Curiae:

Advocate T Ngcukaitobi and Advocate M Bishop instructed by the Legal Resources Centre.

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