



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 90/10

In the matter between:

**THE CHIEF EXECUTIVE OFFICER OF THE SOUTH
AFRICAN SOCIAL SECURITY AGENCY N.O.**

1st Appellant

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY

2nd Appellant

THE SOUTH AFRICAN POST OFFICE LIMITED

3rd Appellant

and

CASH PAYMASTER SERVICES (PTY) LTD

Respondent

Neutral citation: *The Chief Executive Officer of the South African Social Security Agency N.O. v Cash Paymaster Services (Pty) Ltd (90/10) [2011] ZASCA 13 (11 March 2011)*

Coram: HARMS DP, PONNAN, SNYDERS, TSHIQI JJA AND BERTELSMANN AJA

Heard: **16 November 2010**

Delivered: **11 March 2011**

Summary: S 217(1) of Constitution – Procurement of goods or services – Competitive process – Non-compliance – Public Finance Management Act 1 of 1999 and the Treasury Regulations applicable once a system is in place – Accounting officer permitted to deviate – Reasons for deviation – Non – compliance not fatal

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Du Toit AJ sitting as court of first instance):

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and substituted with an order dismissing the application with costs, including the costs of two counsel.

JUDGMENT

TSHIQI JA (concurring)

INTRODUCTION

[1] This appeal relates to the validity of the decision by the South African Social Security Agency (SASSA) to enter into a Letter Agreement with the South African Post Office Ltd (SAPO) for the provision of basic banking services to eligible members of the South African public in order to facilitate the payment of social grants to them. The agreement was an interim agreement and foreshadowed the conclusion of a final agreement. The first appellant is the Chief Executive Officer of SASSA, the second appellant is SASSA and the third appellant is SAPO.

[2] The present respondent, Cash Paymaster Services (Pty) Ltd (Paymaster), launched an application in the high court in which it sought to review the decision taken by SASSA to enter into the Letter Agreement, and interdict SASSA from entering into the proposed final agreement with SAPO to render banking or payment services, relating to social security beneficiaries, without having followed a procurement process which complies with s 217(1) of the Constitution, s 51(1)(a)(iii) of the Public Finance Management Act 1 of 1999 (the PFM Act) and the Treasury Regulations made thereunder, or with SASSA's own supply chain management policy. It is common cause that SASSA did not follow a competitive process and the question that arose was whether it was obliged to do so.

[3] The court below (per F J du Toit AJ) upheld the application by setting aside the decision to enter into the agreement and interdicted SASSA from contracting with SAPO to render banking or payment services without having followed a procurement process which complies with s 217 of the Constitution, the PFM Act and the Treasury Regulations. The court did, however, order that accounts of beneficiaries should not be closed pending the envisaged procurement process. It granted the appellants leave to appeal subject to an order that his main order would remain operative and effective during the appeal process.

SASSA

[4] SASSA is a statutory juristic person established in terms of the South African Social Security Agency Act 9 of 2004 (the SASSA Act). It is an organ

of state in terms of s 239(b)(ii) of the Constitution and a national public entity within the meaning of the PFM Act. Its objects are to (a) act, eventually, as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance; (b) serve as an agent for the prospective administration and payment of social security; and (c) render services relating to such payments (s 3 of the SASSA Act). And its functions include the administering of social assistance in terms of Chapter 3 of the Social Assistance Act 13 of 2004, and performing any function delegated to it under that Act; and to collect, collate, maintain and administer such information as is necessary for the payment of social security, as well as for the central reconciliation and management of payment of transfer funds in a national data base of all applicants for and beneficiaries of social assistance (s 4(1)(a) and (b) of the SASSA Act).

[5] Section 14(3)(a) of the Social Assistance Act, which forms part of Chapter 3, provides that if an applicant qualifies for social assistance under that Act, SASSA must render the relevant assistance which means in general terms that it has to pay the beneficiary that to which the beneficiary is entitled. SASSA may, in terms of reg 24(1), use any of the following methods for the payment of grants, namely (a) electronic transfers into an account of the beneficiary held at a financial institution or that of a procurator; (b) manual payments at a designated pay-point; or (c) any other method approved by the Minister.¹

¹ Regulations in terms of the Social Assistance Act 13 of 2004, GN R162, GG 27316, 22 February 2005.

SAPO AND POSTBANK

[6] SAPO is, pursuant to a 1991 amendment to the Post Office Act 44 of 1958, a public company incorporated in terms of the Companies Act 61 of 1973, and is owned by the state. Section 51 of the Postal Services Act 124 of 1998 regulates the operation and control of Postbank. Postbank is a division of SAPO. It is not registered under the Banks Act of 1990 but undertakes 'such activities as are customary for a financial institution carrying on the business of accepting bank deposits' (s 51(2) of the Postal Services Act). It offers simple affordable banking services, specifically to the low income groups, through the SAPO network throughout the country. Its services extend into isolated rural areas where other financial institutions do not maintain a viable commercial presence.

[7] SAPO (including Postbank) remains a business enterprise of the national government despite its status as a public company and separate juristic personality. It is a 'major public entity' listed in Schedule 2 to the PFM Act. SAPO is substantially self-funding but the state may grant it annual subsidies. The assets of the state serve as security for repayment of deposits with Postbank. The Postbank pays interest on money deposited with it. Its profits are reinvested in its operations for the public benefit.

THE LETTER AGREEMENT

[8] Prior to the establishment of SASSA, payment services in respect of social grants were effected by cash payment contractors, including Paymaster. The

contractors had different service level agreements with the various provinces for cash payments of social grants to beneficiaries residing in the respective provinces. From 1 April 2006, SASSA 'inherited' these contracts through cession and delegation. Paymaster, for instance, provided services to approximately 3,6m beneficiaries in five provinces. Its contracts were due to expire in March 2009. On 25 March 2009, SASSA and Paymaster extended their contract for another year until March 2010 and agreed that they would in future enter into negotiations in good faith in an attempt to enter into a new consolidated service agreement in relation to cash payments. The contractors, including Paymaster, were the repositories of the data and the enrolment payment system. Thus, the contractors were and are in control of the process of taking the biometric data of the beneficiaries including verifying the beneficiaries' details up to the payment stage. All this data remained with the contractors.

[9] In July 2009, during the subsistence of the extended agreement with Paymaster, SASSA concluded the Letter Agreement with SAPO. The agreement was implemented with effect from 5 January 2009. The effect of the agreement was that when new beneficiaries applied to SASSA for a grant, they would be asked if they had an existing bank account, and if not, whether they would like to open a Postbank account. If they did, SASSA would on behalf of the beneficiary open a Postbank account if the particular SASSA office was online or it would refer the beneficiary to any post office to do so.

[10] SAPO in summary undertook to provide the following services: the design, development and implementation of a web-based bank account solution that simplifies the bank account application process for applicants; registration of beneficiaries that is the opening, allocation and activation of Postbank accounts for each potential grant recipient before SASSA approves the relevant grant; the issue of a Postbank card; the single deposit of grant funds per month, per beneficiary and one free mini statement per month; and one of a number of additional services such as two free ATM cash withdrawals per month.

[11] SASSA contributed an amount of R928 235.50 towards SAPO's start-up costs of the project. It undertook to pay SAPO a once-off fee of R13.68 for every beneficiary account opened and thereafter a monthly fee of R14.59 per beneficiary.

[12] One of the advantages of the system as far as SASSA was concerned was that whereas in the past the beneficiary's details would remain in the contractor's system the beneficiary's account details would now be captured in the SASSA system. SAPO would issue the beneficiary with a Mzansi bank card which he or she would then use to withdraw cash from any ATM or post office or to make any purchases at any retailer who accepts VISA branded bank cards.²

²In 2002, all major banks in South Africa and SAPO agreed to co-operate to provide a standard, low cost bank account, known as the Mzansi account, to lower income groups. The account may be opened at any of the major banks and at the Postbank on standard terms relating to the nature of the banking services at the same low banking fees.

[13] The financial benefit for SASSA is substantial because the average handling charge of contractors amounts to R32.11 per transaction, more than double the SAPO fee, which means that the cash payment system costs, for 9 million recipients, an estimated R3.6 billion. Within some eight months, 460 377 beneficiaries had opened Postbank accounts under the scheme.

[14] Cash payments to the beneficiaries were not affected and contractors consequently retained the sole right to process cash payments. Nevertheless, Paymaster as contractor is dissatisfied because SASSA did not follow a competitive process before entering into the Letter Agreement.

SECTION 217(1) OF THE CONSTITUTION

[15] Section 217(1) of the Constitution prescribes the manner in which organs of state should procure goods and services.³ In particular, organs of state must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This implies that a 'system' with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of s 217(1), the question whether any procurement is

³ S 217 of the Constitution provides: '(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.'

'valid' must be answered with reference to the mentioned legislation or regulation.⁴

[16] The question debated at length in the court below and before us, was whether s 217(1) applies if an organ of state wishes to procure goods or services from another organ of state consequently appears to me to be beside the point. The first inquiry ought to be to determine the meaning of the consequent legislation.

[17] The main object of the PMF Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies (s 2). SASSA and SAPO, as mentioned, are such entities more particularly because they are both funded, fully or substantially, from the National Revenue Fund or by way of tax, levy or other money imposed in terms of national legislation, and they are accountable to Parliament (s 1). The PFM Act, read with the Treasury Regulations, is such legislation. It should be noted that it was not the respondent's case that the PFM Act or the Treasury Regulations were unconstitutional, only that SASSA did not comply with their provisions.

[18] Section 51(1)(a) of the PFM Act states that an accounting authority for a public entity must (inter alia) ensure that the particular public entity has and

⁴*Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para 65. Compare *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* [2006 \(2\) SA 311 \(CC\)](#); 2006 (1) BCLR 1 para 96 (Chaskalson CJ) and 434 - 437 (Ngcobo J); *SA National Defence Union v Minister of Defence & others* [2007 \(5\) SA 400 \(CC\)](#) para 51; *NAPTOSA & others v Minister of Education, Western Cape, & others* [2001 \(2\) SA 112 \(C\)](#) at 123I – J; 2001 (4) BCLR 388 at 396I – J; *MEC for Education, KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC) para 40.

maintains an appropriate procurement and provisioning system which, echoing the words of the Constitution, is fair, equitable, transparent, competitive and cost-effective. The National Treasury may in terms of the PFM Act make regulations or issue instructions applicable to all institutions to which the Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (s 76(4)(c)).

[19] The relevant Treasury Regulations provide as follows:⁵

- (a) The accounting officer or accounting authority of a public entity must 'develop and implement an effective and efficient supply chain management system in his or her institution for the acquisition of goods and services' (reg 16A3.1(a)).
- (b) The supply chain management system must be 'fair, equitable, transparent, competitive and cost-effective' (reg 16A3.2(a));
- (c) 'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority' (reg 16A6.4).

⁵ Treasury Regulations, GN R225, GG 27388, 15 March 2005; as amended by GN R146, GG 29644, 20 February 2007.

[20] SASSA has, in terms of reg 16A3.2, a supply chain management policy that requires that procurement and tendering should be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[21] SASSA is not obliged to comply with its supply policy in the circumstances set out in reg 16A6.4 and it is accordingly unnecessary to consider the terms of the policy any further. The regulation permits an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions. As mentioned it is not contended that a 'system' may not provide for such deviations. First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement.⁶ The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of reg 33.

[22] The factual inquiry is whether there was compliance with the provisions of reg 16A6.4. Although the chief executive officer of SASSA did not pen his reasons for entering into the Letter Agreement with these regulations in mind, it appears from the Letter Agreement itself, signed by him, that the agreement

⁶The third requirement, namely approval by the chief executive officer, is not an issue in the case because the Letter Agreement was entered into by him.

was entered into in terms of the Intergovernmental Relations Framework Act 13 of 2005, and that the object of the agreement was to provide for collaboration between two government entities by working together and to integrate their services. The intention, too, was to improve grant enrolment and payment services on a cost effective basis.

[23] It might in this context be noted that the provisions of s 238(b) of the Constitution permit an executive organ of state to exercise any power or perform any function for any other executive organ of state on an agency or delegation basis. Although the rendering or procuring of banking services for beneficiaries is not a function of SASSA, its function is payment of grants, not only manually but also electronically into their banking accounts. This is exactly the function that SASSA has delegated to SAPO. This function could not be delegated in isolation and the fact that SASSA was able to procure additional and ancillary advantages for beneficiaries from SAPO, which strictly speaking fall outside of SASSA's functions, does not mean that the agency or delegation is not covered by s 238(b).

[24] This fits in with the evidence of SASSA in the answering affidavit where it was stated that its transaction with SAPO was not a purely economic transaction; its object, instead, was to achieve the constitutional goal of providing social assistance to the needy. It further stated that it chose SAPO as another government entity because SASSA was experiencing financial difficulties.

[25] Although not stated in the Letter Agreement it is clear on the evidence that another important reason for the agreement was that no other entity is able to provide the same or similar accessible services to the poor and those living in remote areas. As was stated in the answering affidavit:

'The beneficiaries who have accounts at Postbank have greater accessibility than that provided by the commercial bank. SAPO has more branches throughout the country than any of the commercial banks, and also has branches in rural areas where none of the commercial banks has a branch.'

[26] One is, unfortunately, left with a lingering impression that Paymaster's motive in wanting to have the Letter Agreement set aside is to perpetuate the expensive cash payment system and not because it is concerned about the costs to SASSA of the payment systems or because it is a possible bona fide competitor of Postbank. Paymaster is not a registered financial institution or financial services provider or bank and it cannot on its own provide the services which Postbank offers. Paymaster, admittedly, alleged that it could possibly submit a tender to provide the same services in conjunction with some or other bank and although the allegation was not denied it remains nothing more than an allegation, especially since the facts set out in the preceding paragraph cannot be gainsaid.

[27] Paymaster, in the light of the aforesaid, had to show that the reasons for the decision were irrational. Because of the way the case was conducted it did not address this issue pertinently. And the reasons are, in my judgment, entirely reasonable. It was not enough for Paymaster to show that the reasons were 'wrong' by, for instance, stating that the viability of SAPO was not tested because other service providers were not granted an opportunity (through a

competitive bidding system) to show whether they could offer more attractive options. Such generalized allegations do not address the question whether or not the mentioned reasons were rational.

[28] The next issue to decide is whether the requirement that the full recording of all the reasons for a decision under reg 16A6.4 is a 'mandatory and material procedure or condition prescribed by an empowering provision' (in the wording of s 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000). I think not. As was recently said by this court:⁷

'It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality (see in general *Nkisimane v Santam Insurance Co Ltd* [1978 \(2\) SA 430](#) (A) 433H-434E).'

As mentioned, the regulations deal in detail with the consequences of non-compliance. These are dealt with at an administrative level. There is no indication that the regulations contemplate that the requirement of recording was mandatory or material or was introduced for the sake of the public and not only for the sake of good financial government, or that collateral attacks on rational decisions bona fide taken were contemplated as a possible remedy. In one word, I do not find any 'nietigheidsbedoeling' lurking somewhere in the regulation.

⁷*Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* (518/09) [2010] ZASCA 128 (30 September 2010) para 14.

[29] In any event this court in *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another*⁸ held that '[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction' (para 21). Considerations of public interest⁹, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not.¹⁰

[30] This means that the appeal must be upheld and the following order is consequently made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and substituted with an order dismissing the application with costs, including the costs of two counsel.

Z L L Tshiqi

Judge of Appeal

⁸ 2010 (4) SA 359 (SCA)

⁹ *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA); [2004] 4 ALL SA 133) para 46.

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 36.

APPEARANCES

- 1ST & 2ND APPELLANTS: S M Lebala SC (with him Z Makhubela)
Instructed by The State Attorney,
Pretoria;
The State Attorney, Bloemfontein.
- 3RD APPELLANT: W Trengove SC (with him M A Wesley)
Instructed by Read Hope Phillips Thomas &
Cadman Inc,
Johannesburg;
Webbers, Bloemfontein.
- RESPONDENT: J J Gauntlett SC (with him S Budlender)
Instructed by Smit Sewgoolam Inc,
Johannesburg;
McIntyre & Van Der Post, Bloemfontein.