REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
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2010 -06- 25
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 20067/2010

DATE: 25/6/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓

24/6/2010 — DATE

SIGNATURE

IN THE MATTER BETWEEN

CASH PAYMASTER SERVICES (PTY) LTD	APPLICANT
AND	
THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	1ST RESPONDENT
THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	2ND RESPONDENT
THE MINISTER OF SOCIAL DEVELOPMENT	3RD RESPONDENT
FIRST NATIONAL BANK	4TH RESPONDENT
STANDARD BANK GROUP LIMITED	5TH RESPONDENT
NEDBANK LIMITED	6TH RESPONDENT
ABSA BANK LIMITED	7TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an application for urgent interdictory relief as well as an application to review and set aside certain decisions taken by the second respondent.

[2] The application was first enrolled for urgent interim relief ("the part A proceedings") on 29 April 2010. On that occasion, by agreement and with the consent of the Deputy Judge President, the application was postponed for the hearing of the final relief ("the part B proceedings") on an expedited basis. This is the application which came before me.

[3] Mr Gauntlett SC, assisted by Mr Pelser, appeared for the applicant and Mr Notshe SC, assisted by Ms Baloyi, appeared for the first, second and third respondents. The fourth, fifth, sixth and seventh respondents did not oppose the application.

Brief synopsis and background

[4] The second respondent is the South African Social Security Agency ("SASSA"). SASSA is a juristic person established under section 2(1) of the South African Social Security Agency Act no 9 of 2004 ("the SASSA Act"). In terms of the SASSA Act the second respondent must administer the provision of social assistance throughout South Africa. Its duties include administering social security payments (also known as "grants") and rendering such services as may be

required to ensure effective and lawful payments to social welfare beneficiaries. Until 2005 these and other functions were performed by the relevant Member of the Executive Council ("MEC") tasked with administering social assistance in each province.

[5] Social grants are paid to literally millions of beneficiaries throughout the Republic on a monthly basis. Figures listed in the founding affidavit, which are uncontested, suggest that some 9.6 million beneficiaries, in all the provinces, get paid on this basis. In the Eastern Cape alone, where the present dispute arose, some 1.6 million beneficiaries are paid.

[6] Before 2005, when SASSA took over the national obligation to pay the beneficiaries, the Tender Board established for each province would typically call for tenders to procure payment services relating to the administration of social assistance grants. Accordingly, payment services would be provided by different service providers, depending on the province concerned. For example, the applicant, following due and valid tender processes, is currently responsible for providing payment services in respect of social grants in five provinces, namely Kwa-Zulu Natal, Limpopo, Northern Cape, North-West and the Eastern Cape. 0ther entities are responsible for providing payment services in the rest of the country. In 2009, the applicant also entered into a Service Level Agreement with SASSA, confirming the applicant's appointment to render the grant payment services in the five provinces mentioned. The term of this agreement has been

extended to 30 June 2010, and negotiations are underway to extend it further, because there is no alternative process in place. It is not anticipated that a further tender process will be formalised and put into place before 2011. Indeed, SASSA initiated such a tender process in February 2007, under Tender No 19/06/BS, but, in the end, decided not to award any tender and terminated the entire procurement process. A replacement process has not yet got underway.

[7] Currently the enrolment and payment system for grant beneficiaries, at least in the provinces allocated to the applicant, essentially operates as follows: successful applicants for social grants are registered and listed on the national government's computerised Social Assistance Grant System ("SOCPEN"). Beneficiaries thereafter undergo an enrolment process. This entails the capturing of beneficiaries' fingerprints and photo images, where applicable and required in terms of the Service Agreement. After successful enrolment, Smart Cards (which in appearance are similar to bank cards) are issued to beneficiaries. This enables beneficiaries to upload their grants and withdraw cash (at any fixed or mobile pay-point or at any merchant participating in the merchant acquiring system referred to below), at any time after the commencement of a payment cycle. This is done through a biometric identification process involving fingerprint recognition.

[8] The merchant acquiring system was already introduced during 2004. This system enables merchants and beneficiaries *inter alia* to transact with each other using

the applicant's Smart Card technology. Participating merchants are prohibited from charging a beneficiary a fee to upload their grants, transact or withdraw cash. Beneficiaries receive these benefits free of any charge, regardless of the number of transactions they conclude. A further benefit of the merchant acquiring system is the security it provides. Under it, fraud is virtually non-existent. The merchant acquiring system has also contributed significantly to enhance grant beneficiaries' dignity and the accessibility of grant payments. Many merchants – including big chains like Shoprite Checkers and Pick-n-Pay, as well as numerous smaller merchants in rural areas, participate in the merchant acquiring system.

[9] The applicant is also able to dispense grant moneys through the formal banking infrastructure (automated teller machines, as they are commonly known) although the applicant is not at present using this method of payment.

[10] The events which gave rise to the dispute between the parties can be summarised as follows: some beneficiaries also receive grants via bank accounts held with certain retail banks. This is authorised in terms of the regulations ("the Social Assistance Regulations") relating to the application for and payment of social assistance. These regulations were published in terms of section 32 of the Social Assistance Act, no 13 of 2004, in 2008. The regulations provide that grants may be paid not only manually at a designated place but also through electronic transfers into an account of the beneficiary or institution where the beneficiary resides (but subject to written authorisation by the beneficiary).

This method of payment of grants into bank accounts is not included in the applicant's payment activities, as presently conducted by the applicant, and as provided for in the applicant's service level agreement, *supra*.

[11] It appears that during or about 2003, SASSA's predecessor in the Eastern Cape, the then provincial government in the person of the then MEC, identified the "problem" that the banks receiving these direct grant payments on behalf of the beneficiary which had authorised this method, charged banking fees to the beneficiary so that the latter did not receive the full amount of the grant. In order to overcome this difficulty, the MEC held unspecified informal talks with some banks (not all identified) and entered into oral agreements with the fourth and the fifth respondents only, in terms of which the provincial government would subsidise the beneficiary by paying the bank charges on behalf of him or her.

[12] To this end, so the applicant strongly argues, no proper procurement process was followed as intended by the provisions of section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and a host of other statutory provisions, to which I will briefly refer hereunder. It is convenient to quote the provisions of section 217(1) of the Constitution:

> "Procurement. – (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."

[13] When SASSA stepped into the shoes of the Eastern Cape provincial government, it simply perpetuated these two informal oral agreements, which have now been in place for some seven years.

[14] The mechanics of these two "contracts" are described as follows by the respondents in one of their opposing affidavits:

> "The amount of money that is paid to the Fourth and Fifth Respondents is an amount which is equivalent to the bank charges that the Fourth and Fifth Respondents would have charged the beneficiaries. That system enables the beneficiaries receiving the social assistance through electronic transfers to receive the full amount of the social assistance awarded to them."

As to the details of the payments, the respondents state the following in one of their opposing affidavits:

> "At present SASSA pays Standard Bank and First National Bank an amount of R15.50 and R13.68 respectively per beneficiary ...
> I vehemently deny that the conduct of SASSA is unlawful. At present SASSA pays the two banks combined an approximate amount of R5.2 million per month."

[15] In my view it is noteworthy that the fourth and the fifth respondents, who appear to be doing quite well in terms of this arrangement, are not opposing this application.

[16] The applicant contends that it is suffering ongoing prejudice while these "contracts" are in place and also that the beneficiaries, or some of them, are suffering prejudice in the result. In the founding affidavit the applicant also makes the following submission:

> "The applicant does not object to the payment of grants into bank accounts nominated by beneficiaries by virtue of this application. This application is directed at the manifestly unlawful and unfair relationship between SASSA and certain banks, in terms of which SASSA procures the services of these banks at a fee, but without having afforded the applicant the opportunity to offer a competitive alternative and without having complied with the constitutional and statutory duty to follow proper procurement processes."

[17] In concluding this brief summary of the background of the case, I add that the respondents allege that these arrangements with the two commercial banks are confined to the Eastern Cape and that no other banks are involved. The applicant was not able to rebut this evidence.

[18] The relief sought by the applicant in part B of the notice of motion is the reviewing and setting aside of the decision in terms of which SASSA subsidises bank accounts by paying commercial banks to provide payment and/or banking services to social welfare beneficiaries pursuant to these "subsidisation agreements". The applicant then also applies to interdict the second respondent from continuing to give effect to the subsidisation agreements referred to.

The events leading up to the launching of the application

[19] The deponent to the founding affidavit, which is the General Manager of the applicant, alleges that the existence of these subsidisation agreements only came to the applicant's knowledge after 5 February 2010. At about that date the applicant received information that SASSA was paying certain banks a service fee to render banking and/or payment services to grant beneficiaries. This information specifically concerned the fourth and the fifth respondents.

[20] At that stage the information was largely unconfirmed. In order to confirm the information, the applicant instructed its attorneys on 5 February 2010 to write a letter to SASSA.

Part of this letter reads as follows:

> "We therefore ask that you clarify the following in an effort to allay our clients' concerns in this regard:

1. Is our client's understanding correct that SASSA has contracted with Standard Bank and First National Bank and is paying them a fee to render banking or payment services to social grant beneficiaries?
2. Is SASSA contracting with all banks in this way or only First National Bank and Standard Bank? If the latter, on what basis and via what process were these banks selected?
3. Was the required consent of the Minister of Social Development obtained for these contracts and, if so, when?
4. Does the payment of grants via the banks concerned apply to existing beneficiaries, new beneficiaries or both?
5. Does SASSA intend to persist with these contracts in light of the recent judgment in the matter of *CPS v SASSA and SAPO*?"

The latter is a reference to a recent, as yet unreported, judgment by DU TOIT, AJ, in this division, under case no 53753/09, to which I will refer later.

[21] Although this letter was already sent by e-mail to SASSA on 5 February 2010, the reply of SASSA was only telefaxed to the applicant's attorney on 23 February 2010. Part of this reply reads as follows:

"2. SASSA has arrangements with various banks nationally for the electronic payment of social grants to qualifying beneficiaries. However, <u>there are no written contracts</u> because when SASSA took over the payment, management and administration of social grants from the Provincial Departments of Social Development during 2006, it was apparent that there were no formal (written) contracts between the banks and government. Therefore the alleged payment of service fees to the effect that banks in the Eastern Cape region was/is effected on the basis of verbal agreements. It must be noted that before the payment of grants became a national competency, each province determined the standards as well as all the aspects relating to the rendering of such services and this led to inequitable services provision and resultant fees.

3. It should be noted that beneficiaries have the right to receive payment of their social grants through the banks (via ACB) and the Post bank. SASSA has a responsibility to make beneficiaries aware of the current methods of payments (cash through CPC's like CPS and electronic) to enable them to make the choice of which payment method they prefer (my note: CPS is a reference to the applicant).

4. SASSA undertakes to publish a new tender (Request for Proposals and/or Request for Expression of Interest) for the provision of cash and electronic social grant payment services on or before 31 March 2010. An open tender process will be in place subsequent to that date. This will standardise not only the services provided by the

successful bidders, but also the resultant fees to be paid by SASSA with respect to the services rendered." (Emphasis added.)

The letter was signed by the Acting Chief Executive 0fficer of SASSA.

[illegible] 0n 4 March 2010, the applicant's attorney wrote back, pointing out that the letter under reply did not answer the questions raised on 5 February 2010. The attorney also writes the following:

> "Please advise which banks you have 'arrangements' with for the electronic payment of social grants to qualifying beneficiaries. Please note that we require only the names of those banks offering subsidised (by yourselves) accounts to beneficiaries, alternatively who are being paid a fee by yourselves to render the said service."

There was no answer to this letter and on 24 March 2010 the applicant's attorney wrote another letter part of which reads as follows:

> "It occurred to us that your failure to respond may be attributed to the agreement reached between our client and yourselves, as recorded in our client's letter dated 5 March 2010, to hold over legal action herein for a period of seven working days, pending attempts to settle the issue amicably.
>
> Seven working days from 5 March 2010 expired on 16 March 2010.

You have made no attempts to remedy the situation, notwithstanding our client's adherence to your request to hold over legal action.

In fact, our client held over legal action for an extended period, in the hope that the issue might be addressed at the scheduled meeting on 18 March 2010. It was not.

Our client is unfortunately left with no alternative other than to approach the High Court to intervene, and we request that you urgently respond to our telefax dated 4 March 2010 in order that we may cite all interested parties."

[23] There was no response from SASSA, neither was the new tender, promised in the letter of 23 February, published by 31 March 2010 or at all.

[24] The application was launched on 9 April 2010, well within the 180 day period prescribed by section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[25] I took the trouble to analyse the chronological sequence of events leading up to the launch of the application in some detail, because, in their answering affidavit, the respondents offer a bare denial of the allegation that the applicant only became

aware of the subsidisation agreements on 5 February 2010. They make the bald allegation that the applicant knew about this as early as 2003. No evidence in support of this allegation is offered. The allegation is again disputed by the applicant in reply. It was argued on behalf of the applicant that it was inherently improbable that the applicant would sit idly by for a number of years without intervening where it contends that it was suffering ongoing prejudice because of the existence of these agreements. In this regard, counsel for the applicant also referred me to the case of *Wightman t/a J W Construction v Headfour (Pty) Ltd & Another* 2008 3 SA 371 (SCA) at 375G-I where the learned Judge of Appeal said the following:

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact set to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

I deal with this aspect at some length, because it was argued on behalf of the respondents that there was an undue delay on the part of the applicant to launch these proceedings, because the applicant knew of the existence of these subsidisation arrangements since 2003. To that extent, it was also argued, if I understood counsel correctly, that a proper case for urgency had not been made out.

[26] For the reasons mentioned, I see no basis for rejecting the emphatic evidence offered on behalf of the applicant that it only became aware of this state of affairs on 5 February 2010. This conclusion is also supported by the manner in which correspondence was conducted with SASSA after 5 February 2010 and the general probabilities to which I have referred. In any event, it is, in my view, also inherently urgent to investigate a complaint of illegality in the form of contracts of this nature being perpetuated in contravention of the provisions of section 217 of the Constitution and other statutory provisions to which I will refer.

[27] In these circumstances, I have come to the conclusion that there is no merit in the contention that there was undue delay on the part of the applicant in pursuing this application, and I also find that a proper case for urgency has been made out.

Was there a proper procurement process, as intended by the provisions of section 217 of the Constitution, when the services of the banks were obtained?

[28] In response to the applicant's allegations that no such procurement process took place, the respondents offered the following explanation:

"9. In about 2003 the Provincial Department of Social Development of the Province of the Eastern Cape commenced the program of cash payment by the service providers. The services were rendered by the applicant in predominantly rural areas and by a company by the name of All Pay in respect of urban areas. As a result of the fact that there was a new system there was a lot of anxiety and uncertainty amongst the beneficiaries. Some even feared that the service providers, being non-government entities, might run out of cash. This led to massive overcrowding at the social grant pay-points. This resulted in immense hardship to the beneficiaries. Some people slept over at the pay-points. In one or two instances the beneficiaries died.

10. As a result thereof the Member of the Executive Council responsible for Social Development in that province invited banks to assist. The problem however was that the beneficiaries who were receiving their moneys through the bank would not receive the whole amount of the grant. The banks deducted their bank charges.

11. As a result thereof it was decided that the banks who were prepared to assist would then be paid the amount which is equivalent to the bank charges that they would have charged the

beneficiaries. That system then enabled the beneficiaries receiving money through the banks to receive the full amount of the grant awarded to them.

12. Only the Fourth and Fifth Respondents responded to the invitation from the Member of the Executive Council. As a result thereof they were the only banks that participated in the system. The Seventh Respondent (Absa) found itself unable to participate because of its close links with All Pay.

13. At the time of the agreement between the two banks in the Eastern Cape Provincial Department the contracts for payment of grants with the service providers was expiring in 2006. It was envisaged that upon expiry of the contracts that have been concluded with the provincial departments SASSA would then enter into a national contract with the service providers. The contracts with the service providers have been extended from time to time until 31 March 2010. At present those contracts have been extended for a further period of three months to complete the negotiations for a longer extension of twelve months. It is envisaged that a new contract would be in place by 31 March 2011 when the extension is hoped to expire.

14. The new contract that is envisaged is a contract for both the electronic and the cash payment of grants to the beneficiaries.

As stated above the new contract will then normalise and standardise the payment of grants in all provinces."

[29] Counsel for the respondents informed me that the respondents recognise that this procurement process was subject to the provisions of section 217 of the Constitution. What is quoted above, is the high-water mark of the respondents' case to show that a proper procurement process took place.

[30] Not a single document was produced to illustrate the lines along which the procurement was brought about. It appears that everything was done verbally. All the MEC did was to "invite banks". There was no verifying affidavit from the MEC. There was no explanation as to why the MEC could not be approached for a verifying affidavit. There were no verifying affidavits from any other witnesses who may have been personally involved in the process. The deponent to the opposing affidavit could not have arrived on the scene before 2005 when SASSA took over. This would have been some two years after the event. The evidence of this deponent amounts to nothing more than hearsay.

[31] There is nothing whatsoever to show that the procurement process was fair, equitable, transparent, competitive and cost-effective as intended by the provisions of section 217 of the Constitution and other statutory provisions to which brief reference will be made.

[32] In his letter of 23 February 2010, which I quoted, the acting CEO of SASSA states that "it was apparent that there were no formal (written) contracts between the banks and government". He acknowledges that "therefore the alleged payment of service fees to the affected banks in the Eastern Cape region was/is effected on the basis of verbal agreements".

[33] The mere fact that the CEO undertook, in the same letter, to publish a new tender "for the provision of cash and electronic social grant services" on or before 31 March 2010 appears to be an acknowledgement that the present process, based on the verbal arrangements, is not up to standard.

[34] SASSA's own Evaluation Committee, designated for the aborted Tender 19/06/BS to which I have referred, presented its Evaluation Committee Report, under the SASSA logo, and under the heading "Confidential: Restricted Distribution". Under the subheading "Subsidised Bank Accounts" it states the following:

> "The issue of subsidised bank accounts, where banking institutions are paid a negotiated service fee to provide a banking option to beneficiaries, at no cost to the beneficiaries, must be phased out within six months of the implementation of the new contracts. <u>These arrangements were made without following a tender process</u>, and do not meet the requirements for cash payments, in that payments are PIN driven, not biometric. Beneficiaries currently paid through this channel should be given the option to convert to bank payments. Failure to address this will perpetuate

the differences in services, and compromise the strategic intent of this tender, namely to standardise services." (Emphasis added.)

[35] In its replying affidavit, the applicant, when dealing with the problems at the pay-points referred to by the respondents, *supra*, states that they were caused by the department registering beneficiaries at incorrect pay-points. The problems have been addressed. These problems did not necessitate the subsidisation agreements or justify the unlawful process embarked upon to conclude them.

[36] In all the circumstances I have come to the conclusion that the procurement process followed by the MEC, such as it was, flew in the face of the constitutional imperative to which I have referred. It was unlawful in the sense that a power was exercised and/or a function was performed beyond that conferred upon the MEC by law. In that sense, it also flew in the face of the constitutionally recognised principle of legality – see *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC) at 400D-F.

Relevant statutory and other provisions

[37] I have quoted the wording of section 217 of the Constitution which requires an organ of State, when contracting for goods and services, to "do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

[38] Section 51(1)(a)(iii) of the Public Finance Management Act, 1 of 1999 ("the PFMA") obliges the accounting authority for the applicable organ of State to ensure that it has and maintains "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

[39] To this section 76(4)(c) of the PFMA gives effect. It provides that the National Treasury may make regulations or issue instructions for the determination of a framework for an appropriate procurement and provisioning system. To this end, Treasury adopted the following regulations:

> Treasury Regulation 16A.3.1 which requires the accounting officer or accounting authority of a public entity to develop and implement an effective and efficient supply chain management system for the acquisition of goods and services.
>
> Treasury Regulation 16A.3.2 which states that "a supply chain management system referred to in paragraph 16A.3.1 must be fair, equitable, transparent, competitive and cost effective".

[40] SASSA's own Supply Chain Management Policy was attached to the founding papers. Under the heading "Guiding Principles" the following is stated in this policy:

> "Section 217(1) of the Constitution of the Republic of South Africa stipulates that when an organ of State in the national, provincial or local

sphere of government, or any other institution identified in the 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.

In the light of this provision, SASSA as an institution identified in the national legislation, undertakes all of its procurement and tendering in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[41] For the reasons mentioned earlier, it is clear that the actions of the MEC, when procuring the services of the two banks, flew in the face of all these provisions as well as the Supply Chain Management Policy of SASSA itself. Moreover, SASSA's own Evaluation Committee, *supra*, condemned the actions of the MEC.

[42] The principle of legality, *supra*, entails that no public power may be exercised and no function performed beyond that conferred by law. This, in my view, is exactly what the MEC did. See also *Competition Commission of South Africa v Telkom SA Ltd & Another* [2010] 2 All SA 433 (SCA) at 441a-b and *Masetlha v President of the Republic of South Africa & Another* 2008 1 SA 566 (CA) at 594 para [80].

[43] In *Municipal Manager: Qaukeni v F V General Trading* 2010 1 SA 356 (SCA) the question of legality also came into play.

Without inviting any other persons to tender for such a contract, the Municipal Council resolved to appoint the respondent as the second appellant's refuse collector against payment of a monthly sum of some R351 000,00. This was a re-appointment after an earlier oral agreement with the same respondent as waste collector was approaching the end of its term. The re-appointment was followed up with a written contract. A new municipal manager decided to inform the respondent that the contract would not be put into effect when the oral agreement came to an end, because proper tenders had to be called for. The respondent sought to enforce the contract, and succeeded in the High Court. 0n appeal, the following was said at 360C-H:

> "[11] In considering the validity or otherwise of the written contract ZEV2, it is necessary to recall that section 217(1) of the Constitution, couched in peremptory terms, provides *inter alia* that an organ of State in the local sphere (such as a municipality) which contracts for goods and services '*must* do so in accordance with a system which is fair, equitable, competitive and cost effective' (my emphasis). This constitutional imperative is echoed in both the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003 (the Financial Management Act), as will become apparent from what is set out below ..."

The learned judge then goes on to analyse these two Acts applicable to finance management in local authorities. The provisions correspond with those of the Public Finance Management Act, *supra*, which is aimed at regulating financial management in the national and provincial governments. There are also provisions to the effect that in the event of a municipality deciding to procure the services of an external service provider beyond a certain amount, there must be a process which complies with the Supply Chain Management Policy of the municipality, including a competitive bidding process which allows all prospective service providers to have equal access to information relevant to the bidding process and which minimises the possibility of fraud and corruption. The process by which an external service provider is selected must be "fair, equitable, transparent, cost-effective and competitive". There must be a "competitive bidding process". In the present case, the municipality (second appellant) appears to have ignored its obligation to have and implement a supply chain management policy, let alone its obligation to secure the services of the external service provider through a proper competitive process.

[44] In this regard, the learned judge said the following at 361E-H:

> "But the second appellant's failure to implement a supply chain management policy cannot relieve it of its statutory obligation to act in a manner as summarised above, and it would be untenable to suggest that the second appellant was therefore not obliged to act openly, transparently and without following a fair, equitable, competitive and cost-effective

process when contracting with an external service supplier to render a municipal service.

It was suggested by the respondent both in the court below and in the heads of argument filed in this court that a failure to comply with these statutory precepts did not automatically visit the contract with an external service supplier with nullity, and that the court had a discretion to enforce such a contract if the supplier would otherwise be prejudiced. However counsel who appeared for the respondent ... was unable to advance this argument with any enthusiasm. His diffidence is understandable. It is not a question of a court being entitled to exercise a discretion having regard to issues of fairness and prejudice. Rather, the question is one of legality."

[45] The learned Judge of Appeal then deals with a number of decisions where the Supreme Court of Appeal had held contracts concluded in similar circumstances without complying with prescribed competitive processes to be invalid. In *Premier, Free State & Others v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) the Supreme Court of Appeal set aside a contract concluded in secret in breach of provincial procurement procedures holding that such a contract was "entirely subversive of a credible tender procedure" and that it would "deprive the public of the benefit of an open competitive process".

[45] The learned Judge of Appeal, at 362B-F, then deals with the judgment in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) which concerned the validity of two leases of immovable property concluded between the respondent and a provincial department without the provincial Tender Board having arranged the hiring of the premises as was required by statute. The Supreme Court of Appeal concluded that the leases were invalid. MARAIS, JA said the following at paragraphs [8] and [9]:

> "As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the Tender Board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.
>
> As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the Tender Board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the

consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernable in the particular case."

[47] The learned Judge of Appeal then, at 362G, concluded that the procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced.

[48] This approach adopted by the Supreme Court of Appeal also appears to put paid to another argument advanced on behalf of the respondents, namely that I have a discretion to allow the actions of the MEC, if found to be invalid, to stand, in the particular circumstances of this case. In this regard Mr Notshe referred me to the, as yet unreported, case of *Moseme Road Construction CC & Others v King Civil Engineering Contractors (Pty) Ltd & Another* (385/2009) [2010] ZASCA 13 delivered on 15 March 2010.

This appears to be the latest in a, by now well-known, line of cases where it was held that flawed administrative action can be allowed to stand where the setting aside thereof will result in undue hardship and harsh consequences which may outweigh the results flowing from a setting aside of the flawed administrative action. Another such case, also referred to in *Moseme*, is that of *Chairperson:*

Standing Tender Committee & Others v J F E Sapela Electronics (Pty) Ltd & Others 2008 2 SA 638 (SCA) where the learned Judge of Appeal said the following in para [29]:

> "In my view, the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court *a quo* correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards."

The learned Judge of Appeal held that "considerations of pragmatism and practicality" were relevant in the exercise of the discretion (para [28]). See also *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 6 SA 222 (SCA) and *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & Others* 2008 2 SA 481 (SCA).

In these cases, generally speaking, there were full blown tender procedures resulting in the successful tenderer getting on with the execution of the contract and a disgruntled unsuccessful tenderer launching procedures to have the flawed tender award set aside. By the time the matter came before the Court of Appeal, it was held, in most of these cases, that the results flowing from setting aside of the unlawful administrative action would be unduly harsh and lead to impractical consequences.

In the present case, however, there was no tender process or procurement process within the meaning of section 217 of the Constitution and other statutory provisions at all. The MEC purported to exercise a public power and perform a function beyond that conferred by law. The principle of legality was contravened. In the words of MARAIS, JA in *Contractprops 25, supra*, the consequences of visiting invalidity upon such non-compliance cannot be taken into account to avoid the setting aside of the unlawful actions.

<u>Some other arguments advanced on behalf of the respondents</u>

[49] It was argued that the procedure followed by the MEC was, after all, fair, equitable, transparent, competitive and cost-effective. This argument is based on the reasoning that there were over-crowding problems at the pay-points, banks were invited to assist and the beneficiaries would be prejudiced if they had to pay the bank charges. It was only a temporary measure.

[50] I cannot see how these arguments can assist the respondents to avoid the consequences of the unlawful acts of the MEC. Where these actions flew in the face of the principle of legality, I fail to understand how it can be argued that they were fair, equitable, transparent, etc in compliance with section 217 of the Constitution.

[31] In this regard, it is also useful to refer to a recent, as yet unreported, judgment handed down in this division by DU TOIT, AJ. It was the case of *Cash Paymaster Services (Pty) Ltd (also the present applicant) v The Chief Executive Officer of the South African Social Security Agency NO & 3 Others* under case no 53753/09. In that case it was also common cause that the agency did not follow any form of competitive procurement process before entering into an agreement with the South African Post Office Ltd. The contract involved the rendering of banking or payment services by the Post Office, relating to grant beneficiaries. In a well-reasoned judgment, with which I find myself in respectful agreement, the learned judge also set aside the decision of the agency to enter into the agreement with the Post Office and interdicted the former from contracting with the latter to render such banking or payment services relating to grant beneficiaries.

[32] It was also argued that the applicant's reliance on the fact that SASSA's own bid Evaluation Committee condemned the actions of the MEC, *supra*, was misplaced. It was argued that the Evaluation Committee did not realise that the respondents were entitled, by regulation, to effect payments other than cash, such as electronic payments. I fail to see how this fact can assist the respondents to dispense with the peremptory requirement that procurement must be preceded by a tender or procurement process in the spirit of section 217 and other statutory provisions.

[53] It was also argued on behalf of the respondents that the applicant does not have standing to institute these proceedings. The applicant is instituting it in its own interest. The conduct of the respondent is not in breach of the contract concluded between the parties. The services that have been procured from the banks are banking services. The applicant is not a bank and cannot render such services. It has no direct, substantial and sufficient interest in the matter.

[54] In reply, the applicant argued that it suffers substantial prejudice as a result of the operation of the unlawful contracts entered into between the respondents and the banks. If the fourth and fifth respondents are paid R5.2 million per month, as stated by the respondents, at an average cost of R14.59 per beneficiary, it amounts to approximately 356 408 beneficiaries. Many of these beneficiaries would otherwise have been paid by the applicant, at an extra income. The applicant also derives an additional income from each and every new beneficiary paid by it through its merchant acquiring system, *supra*, and by providing financial services to beneficiaries on that basis. The applicant charges merchants a negotiated fee (generally 0,75%) of the transaction value in respect of every transaction processed by the merchant acquiring system. The merchant acquiring system is applied nationally by the applicant (also in the Eastern Cape). It has been used with great success over six years. The losses suffered by the applicant as a result of beneficiaries currently paid through the subsidisation scheme and future losses, should they be allowed to continue enrolling further beneficiaries, are impossible to quantify. It is for this reason too, so the applicant argues, coupled with the

evident inability in law of the applicant to recover from the respondents such losses, that the need for the present relief is both urgent and compelling. The applicant submits that it is evident that losses are being suffered and will in future be suffered if the present state of affairs were to be allowed to continue and such losses are bound to be substantial.

[55] As to the argument advanced on behalf of the respondents that the applicant is not a bank and cannot render banking services, the applicant submitted that all interested parties, including the applicant and commercial banks, which are able to render payment or a banking service, should have been afforded an opportunity to participate in a fair and competitive procurement process. Had SASSA or its predecessors complied with this obligation, the applicant would have tendered for the contract – either alone or together with a registered bank (as it is still prepared to do). The illegality thus clearly excluded the applicant from participating in the process, and operated to its prejudice, and continues to do so.

[56] Against this background, I am satisfied that the applicant has the necessary standing to launch these proceedings and has a direct, substantial and sufficient interest in the matter.

[57] For all the reasons mentioned, it is also clear that the applicant has made out a proper case for a final interdict. It has a clear right to challenge the perpetuation

of the unlawful contractual relationship, it is suffering prejudice on an ongoing basis and it does not have a proper alternative remedy at its disposal.

PAJA and the principle of legality

[58] The applicant crafted its application in such a way that it relies on PAJA alternatively on the principle of legality for the required relief.

[59] The main thrust of the argument, as presented to me, was based on the principle of legality. For the reasons mentioned, I have come to the conclusion that a proper case has been made out in that regard.

[60] As to the application of PAJA, I have also come to the conclusion that a proper case has been made out for the setting aside of the decisions in terms of which SASSA is subsidising the bank accounts. At the very least, the administrative action leading to these decisions flies in the face of the provisions of section 6(f)(i) of PAJA, in that it amounts to a contravention of the law and was not authorised by the empowering provisions. The actions also fall fowl of other provisions of PAJA, which I do not consider necessary to deal with.

The order

[61] The order which I am about to make is contained in a draft handed up to me by counsel for the applicant after consultation with counsel for the respondent. The

latter indicated that if I were to find in favour of the applicant, the provisions contained in the draft would be appropriate in the circumstances.

[62] I therefore make the following order:

1. The decisions in terms of which the second respondent subsidises bank accounts to provide payment and/or banking services to social welfare beneficiaries pursuant to subsidisation agreements are reviewed and set aside.
2. The second respondent is interdicted from paying social welfare grants into bank accounts opened after the date of this order and pursuant to the agreements referred to in paragraph 1 above.
3. The first and second respondents are ordered to pay the applicant's costs (including the costs flowing from the employment of two counsel) jointly and severally, including the costs of the part A proceedings.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

20067-2010

HEARD ON: 9 JUNE 2010
FOR THE APPELLANT: J J GAUNTLETT SC ASSISTED BY F B PELSER
INSTRUCTED BY: SMIT SEWGOOLAM INC
FOR THE RESPONDENT: V S NOTSHE SC ASSISTED BY M C BALOYI
INSTRUCTED BY: STATE ATTORNEY, PTA