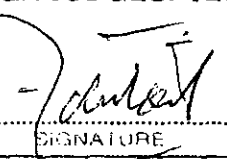


IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES NO	
(2) OF INTEREST TO OTHER JUDGES: YES NO	
(3) REVISED: ✓	
10/12/2009	
DATE	SIGNATURE

CASE NUMBER: 53753/09

In matter between:

CASH PAYMASTER SERVICES (PTY) LTD

Applicant

and

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

First Respondent

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY

Second Respondent

THE SOUTH AFRICAN POST OFFICE LIMITED

Third Respondent

THE MINISTER OF SOCIAL DEVELOPMENT

Fourth Respondent

JUDGMENT

F DU TOIT AJ

- [1] This matter originated as an urgent application to be heard in the urgent court on 6 October 2009. After papers had been exchanged the parties agreed to approach the Deputy Judge President to seek a special allocation in view of the length of the papers and the considerable importance of the matter. The Deputy Judge President obliged and

allowed the matter to be set down for 9 November 2009 as a special motion. Hence, the matter was removed from the urgent roll for 6 October 2009 by agreement.

[2] The Applicant is CASH PAYMASTER SERVICES (PTY) LTD ("*Paymaster*"), a privately owned company. The First Respondent is THE CHIEF EXECUTIVE OFFICER of the SOUTH AFRICAN SOCIAL SECURITY AGENCY, the Second Respondent ("*the Agency*"), a juristic person established in terms of sec. 2(1) of the South African Social Security Agency Act No. 9 of 2004 ("*the SASSA Act*"). The Third Respondent is THE SOUTH AFRICAN POST OFFICE LIMITED, ("*the Post Office*"), a public company incorporated in terms of the Companies Act No. 61 of 1973, pursuant to sec. 3(1) of the Post Office Act No. 44 of 1958. THE MINISTER OF SOCIAL DEVELOPMENT ("*the Minister*") was joined as the Fourth Respondent. The relief sought by Paymaster is directed only against the Agency and the Post Office. It is common cause, correctly so, that both the Agency and the Post Office are organs of state as defined in sec. 239 of the Constitution.

[3] In Part A of the Notice of Motion Paymaster applies for interim relief pending the finalisation of Part B of the Notice of Motion, interdicting and/or restraining the Agency and the Post Office from executing and/or fulfilling and/or giving effect to the Letter Agreement purportedly concluded between the Agency and the Post Office on 1 July 2009 and any further agreement which amends and/or supersedes the Letter

Agreement. The terminology of the Letter Agreement will be explained further down below in this judgment. In prayer 1 of Part B of the Notice of Motion Paymaster applies for the reviewing and setting aside of the decision of the Agency taken on or about 1 July 2009, to enter into the Letter Agreement with the Post Office. In prayers 2 and 3 of Part B application is made for two interdicts. However, I only need to concern myself with the first of these interdicts, namely to interdict the Agency from contracting the Post Office to render banking or payment services, relating to grant beneficiaries, without having followed a procurement process which complies with sec. 217(1) of the Constitution, sec. 51(1)(a)(iii) of the Public Finance Management Act No. 1 of 1999 and the Agency's Supply Chain Management Policy.

- [4] When I was seized with the matter only Part A of the Notice of Motion was on the table for adjudication. However, by that time the papers were complete and even the record had been filed in terms of Rule 53(1)(b) under Part B of the Notice of Motion. Having read the papers and perusing counsels' most helpful heads of argument, for which I am grateful, I thought it appropriate that Part B should be argued. It would serve no purpose to hear argument only on Part A which necessarily would have to include considering, though maybe on a different basis, also Part B, and then to make an order on Part A only. Such a procedure would necessarily lead thereto that, whatever my decision on Part A, Part B would again have to be set down per special allocation for a repetition of all the arguments before another Judge. Hence, I

directed that counsel had to be prepared and ready to argue Part B. This met with the approval and consent of the three legal teams involved, though the Agency's counsel reserved the right to address me also on Part A. This judgment will therefore finally dispose, for present purposes in any event, of Part B of the Notice of Motion.

[5] The matter is obviously urgent. The main issue is, however, not that easy to resolve. I would have done an injustice to the parties if I had given judgment forthwith. Unfortunately I did not have sufficient days to spare during that last week when I was called to assist the overloaded Bench in this Division. My apologies to the parties, especially Paymaster, that the judgment could not be delivered earlier but, understandably, so I hope, it could only receive my attention on my return after I had attended to the urgent briefs in my own private practice. I would have preferred to deal more extensively with the interesting and persuasive arguments presented by counsel. However, the urgency of the matter dictates otherwise.

[6] In terms of secs. 3 and 4 (1) of the SASSA Act, the objects and functions of the Agency are *inter alia* to act as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance in terms of Chapter 3 of the Social Assistance Act No. 13 of 2004 and to perform any function delegated to it under that Act. Sec. 4(2)(a) of the SASSA Act further provides that the Agency may, with the concurrence of the Minister, enter into an

agreement with any person to ensure effective payments to beneficiaries.

- [7] The facts are largely common cause. Prior to the establishment of the Agency, payment services in respect of social grant benefits were done by different cash payment contractors, including Paymaster. These cash payment contractors had different service level agreements with the various provinces with a view to render the service of payment of social grants to social beneficiaries residing in such provinces. During those years the tender board, established for each province, would typically call for tenders to attend to the payment services relating to the administration of social assistance payments. After its establishment the Agency inherited the different service level agreements entered into between the cash payment contractors and the said provinces. On 25 March 2009 Paymaster and the Agency concluded a service agreement in terms whereof Paymaster was appointed to render grant payment services in various provinces in accordance with the various service level agreements in force in the different provinces. These existing agreements were clearly entered into between Paymaster's subsidiaries and the various provinces under the previous regime prior to the establishment of the Agency. This agreement of 25 March 2009 would serve as an interim agreement binding between the parties thereto up until such time as they sign a consolidated agreement in respect of the various provinces. It further stipulates that the parties

agreed to negotiate in good faith and endeavour to conclude the consolidated agreement by not later than 30 April 2009.

[8] On 23 February 2007 the Agency published a Request for Proposals ("*RFP*") under tender number 19/06/BS. The RFP requested proposals for the provision of a social assistance grants payment service in one or more of the provinces of South Africa. Paymaster duly submitted a tender in terms of the RFP in respect of all 9 provinces. After having requested the bidders to extend the validity of their bids no less than three times, on 31 October 2009 the Agency notified bidders of its decision to cancel the tender. In its reasons given for the cancellation of the tender process the Agency contended that the tender process had been flawed in a series of respects.

[9] In the meantime, on 23 May 2007, the Agency and the Post Office entered into a Memorandum of Understanding ("*MOU*"). The main object of the MOU was to enable the Agency to enter into a contractual relationship with the Post Office with the ultimate goal of the Post Office becoming the connector of the Agency's data and enrolment system of distributing payment of social grants to social grants beneficiaries.

[10] Pursuant to the MOU the Agency and the Post Office entered into an interim agreement by means of a letter signed on behalf of both parties on 1 July 2009. This letter would serve as a binding interim agreement until such time as a final agreement is signed by these two parties.

This explains the terminology of the Letter Agreement. It only came to Paymaster's attention on or about 1 August 2009. In clause 2 of the Letter Agreement it is recorded that the MOU outlines the intent of the Agency and the Post Office to collaborate to optimise and improve grant enrolment and payment services on a cost-effective basis. Clause 3 records that the Agency has engaged the Post Office for the provision of banking services in all South African provinces. To fulfil its obligations, the Post Office shall also utilise the banking infrastructure and services of the Postbank. (The Postbank is a division of the Post Office in terms of sec. 51 of the Postal Services Act No. 124 of 1998). In clause 5 it is recorded that the parties have embarked on a programme to implement the Post Office's registration and payment processes for beneficiaries referred to the Post Office by the Agency. In the same clause the Post Office undertakes to provide *inter alia* the following services:

- [a] design, development and implementation of a web-based bank account solution that simplifies the bank account application process for applicants;
- [b] registration of beneficiaries, i.e. opening, allocation and activation of Postbank accounts for each potential grant recipient before the Agency approves the relevant grant;
- [c] the issue of a Postbank card;

[d] the single deposit of grant funds per month per beneficiary.

Clauses 14 and 15 deal with the service fees and the start-up costs respectively of the Post Office.

[11] In its Founding Affidavit Paymaster contends that the decision of the Agency to enter into the Letter Agreement with the Post Office constitutes administrative action in terms of the provisions of The Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA"). According to Paymaster particularly secs. 6(2)(d), 6(2)(f)(i) and 6(2)(i) thereof make it clear that an unlawful administrative decision falls to be reviewed and set aside. The question of the reviewability as such of the decision to enter into the Letter Agreement was not an issue before me. I need therefore not consider the provisions of PAJA relied on by Paymaster. Although a number of grounds of review are relied upon in the founding papers of Paymaster, only two of those were addressed in counsels' heads of argument and in their addresses before me. Firstly, that the Agency failed to follow any form of competitive procurement process. Secondly, that the Agency failed to obtain the concurrence of the Minister to enter into the Letter Agreement as is required by sec. 4(2)(a) of the SASSA Act. In my view I only need to consider this second ground of review argued should I find on the first ground of review against Paymaster.

- [12] It is common cause that the Agency did not follow any form of competitive procurement process. According to Paymaster that is the end of the matter. Counsel who appeared for it even contended that he could not understand that there was any opposition to the application. I would not go that far because, say the Agency and the Post Office defiantly, we are both organs of state contracting with each other and therefore sec. 217(1) of the Constitution does not apply.
- [13] Sec. 217 of the Constitution provides for the procurement of goods and services by an organ of state. It reads:

"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."

It may now be regarded as settled law that whenever an organ of state contracts with an external supplier of goods or services, adherence to a system which is fair, equitable, transparent, competitive and cost-effective, as required by sec. 217(1), is peremptory. The Court is not possessed of a discretion to decide that in a particular instance issues such as fairness or prejudice may dictate that such a process need not have been followed. In Eastern Cape Provincial Government & Others v Contractprops 25 (Pty) Ltd 2001(4) SA 142 (SCA) Marais JA articulated the unanimous decision of the Court as follows in par. [9] at 148A/B – C/D:

“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 discernible in the particular case.”

This view was again endorsed in a recent as yet unreported judgment of the Supreme Court of Appeal. In **Qaukeni Local Municipality v FV General Trading** (324/08) [2009] ZASCA 66 (29 May 2009) paragraphs [14] and [15]:

“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 a 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 in the appeal ... 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 the issues of fairness and prejudice. Rather, the question is one of legality.

Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid. In Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000(4) SA 413 (SCA) this court 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'."

- [14] Can the position be different where the State contracts with an internal supplier and not with an external supplier? Counsel were unable to refer me to any decided cases on this point. According to them guidance can also not be sought in foreign case law. The reason therefore is that it is only in South Africa that procurement by the State has been elevated to a constitutional issue by sec. 217 of our Constitution. This assurance coming from such eminent senior counsel as those who appeared before me, I accept their assurance without hesitation. Hence, I did not research the validity of their assurance myself.

- [15] In her book The Law of Government Procurement in South Africa the learned author **Bolton** mentions three ways in which a government may acquire goods and services to function. At 1 she says:

"All governments need goods and services in order to function. Goods and services may range from office equipment (such as paper-clips, office furniture and paper products) to

computer systems, advertising and construction services, to mention a few. These needs can be met in a number of ways. Firstly, a government can set up its own internal supply chain, for example factories to provide it with office equipment or computer needs. A government can also have its own internal team of advertising or construction specialists to see to its advertising and construction needs. This method of meeting government needs is commonly referred to as 'in-house' provision. Secondly, a government can decide to obtain goods and services from an outside entity. This method is commonly referred to as 'private sector' provision, 'contracting out' or 'out-sourcing'. It is, in other words, the opposite of 'in-house' provision; the entity providing the goods or services needed does not form part of the organisation of the government. Contracts entered into between the government and outside entities are generally referred to as contracts of procurement or more accurately, public sector procurement contracts. Procurement, in turn, is generally described as the function of purchasing goods and services from an outside body. Thirdly, a government can, usually only in exceptional circumstances, use its legislative powers to expropriate goods from private entities."

And at 3:

"The South African government uses all the methods outlined above for meeting its needs, i.e. by having its own internal supply chain, in exceptional circumstances using its powers of expropriation, and making use of outside (private) entities to meet its needs. It is the third method, however, that is primarily employed by the government, in other words, private sector provision."

[16] Counsel for the Post Office relied on this passage from **Bolton** for his submission that it would place an enormous administrative and financial burden on departments and organs of state at the expense of the taxpayer if they were required to follow a public tender process where the State, through a government department or an organ of state, can itself provide the goods or services required. In their opposing papers the Agency and the Post Office advanced the reasons why the Agency eventually decided to contract the Post Office to undertake the payment of grants through the provision of its banking services. According to them cash payments of grants are not affected and will in future still be done by the cash payment contractors like Paymaster. That is why the existing contract with Paymaster will in all probability be extended to allow for a proper tender process for cash payments to be put in place. According to them it is therefore important to distinguish between cash payments and payments via the banking system provided by the Post Office through its Postbank division.

[17] According to the Agency it entered into the MOU with the Post Office on 23 May 2007 with the main objective to enable the Agency to enter into a contractual relationship with the Post Office with the ultimate goal of the Post Office becoming the connector of the Agency's data and enrolment system of distributing payment of social grants to social grant beneficiaries. It envisaged that the data would now remain with the Agency and the cash payment contractors would only effectuate the payment of social grants to social grant beneficiaries. When the tender

was cancelled on 31 October 2008 on the basis that it was flawed it coincided with the fact that during that period the Agency was also experiencing financial difficulties. It had also come to the Agency's realisation that the average handling costs paid to the cash payment contractors were exorbitant. According to the deponent to the Agency's Answering Affidavit, the cancellation of the tender brought a gust of fresh approach as the ultimate process of addressing the MOU between the Agency and the Post Office warranted the provisioning and hosting of a back end payment system solution to be provided by the Post Office. It is further contended that the Agency is obliged to seek the assistance of the Post Office as an organ of state having regard to the provisions of sec. 195 of the Constitution. The contention is that this configures with the provisions of sec. 217 of the Constitution as conflated with the Supply Chain Management Policy of the Agency. The main object of the Agency contracting the Post Office to provide the banking services for the payment of grants to beneficiaries must therefore be seen as to promote an efficient, economic and effective use of resources.

- [18] Needless to say, much of what is advanced by the Agency and the Post Office to justify their actions, is disputed by Paymaster. However, no matter how noble and honest the motives of the Agency might have been for entering into the MOU and the Letter Agreement with the Post Office, if they fall foul of the provisions of sec. 217(1) of the Constitution they are irrelevant considerations.

[19] Reliance was also placed on two further provisions of the Constitution. Chapter 3 thereof deals with co-operative government. In this regard reliance was placed on the relevant part of Section 41(1)(h) which reads:

"All spheres of government and all organs of state within each sphere must –

....

(h) co-operate with one another in mutual trust and good faith by –

(i)

(ii) assisting and supporting one another;

(iii)

(iv) co-ordinating their actions and legislation with one another;

(v)

(vi)"

The second provision is in Chapter 10 dealing with public administration. The relevant part of sec. 195 in this Chapter provides the following:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a)

(b) Efficient, economic and effective use of resources must be promoted.

....

(2) The above principles apply to –

(a) administration in every sphere of government;

- (b) *organs of state; and*
- (c) *public enterprises."*

The argument is that no organ of state is separate from the State. The State, through its organs, at all times functions as a unit. Thus, so the argument proceeds, when one organ of state contracts with another organ of state for the delivery of a service, the service will still be provided by the State. It is the State dealing with itself. The argument concludes that there is accordingly no need for the application of the principles in sec. 217(1) of the Constitution. On the view I hold, these provisions cannot impliedly override the unqualified provisions of sec. 217(1) requiring that contracts of this nature must be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. (Compare Rennie N.O. v Gordon and Another N.N.O. 1988(1) SA 1 (A) at 22 E-H).

- [20] I am strengthened in my view when scrutinising secs. 195 and 41 more carefully. The introductory sentence in sec. 195(1) states it as peremptory that "*(p)ublic administration must be governed by the democratic values and principles enshrined in the Constitution*". The principles set out in paragraphs (a) to (i) of sub-sec. (1) apply specifically only to public administration conducted by the entities of governance listed in sub-sec. (2). The other democratic values and principles enshrined in the Constitution remain binding in relation to public administration. Those values and principles include sec. 217(1). Paragraph (d) of sub-sec. (1) provides that services must be provided

impartially, fairly, equitably and without bias. Paragraph (e) requires that people's needs must be responded to, and the public must be encouraged to participate in policy-making. Paragraph (g) provides that transparency must be fostered by providing the public with timely, accessible and accurate information. These three principles configure to sec. 217(1). This reasoning may also be applied when regard is had to the provisions of paragraphs (c), (d) and (e) of sub-sec. (1) of sec. 41.

[21] In support for his argument that, despite the Agency and the Post Office being separate juristic persons, it remains the State contracting with itself and that sec. 217(1) can therefore not apply, counsel for the Post Office referred to Transnet Ltd v Goodman Brothers (Pty) Ltd 2001(1) SA 853 (SCA) paragraph [8] at 870 F - G where the following is said:

"I do not think that anything can be made of the fact that Transnet is now a limited company. The government still owns all the shares in it and thus has ultimate control. It still provides a general service to the public, even though it is now competition – and profit – orientated. It still has a near - monopoly over rail and transport."

In my view this passage does not support counsel's argument. It is nothing new that disunity may arise within the State itself between two different public authorities. (See Baxter Administrative Law (1984 and 1989) at 95 and 649 – 650). This reality of governance is

recognised in secs. 41(1)(h)(vi), (2)(b), (3) and (4) of the Constitution. Therein the framework for domestic rules is provided to promote unity in the household of the State, to resolve disunity which has arisen but leaving it open that resolution may eventually only be achieved in a Court of law. No matter that the Agency and the Post Office are both organs of state, the fact remains that they are two separate juristic persons each created by its own statute. As such their minds met and they decided to enter into a contractual relationship in terms whereof the Post Office is supplying services to the Agency at agreed fees and costs. It can further not be overlooked that the Post Office, through its division of the Postbank, is competing in the open market with other financial institutions. In terms of sec. 51(2) of the Postal Services Act, 1998 the Post Office *"must undertake such activities as are customary for a financial institution carrying on the business of accepting deposits"*. I have already alluded to the stance adopted by the Agency and the Post Office that they were merely striving to achieve cost-effectiveness by entering into the MOU and the Letter Agreement. However, cost-effectiveness is not the only requirement of Section 217(1). The process or system must further also be transparent and competitive. In relation to transparency of government procurement Bolton op. cit. says the following at 54:

"In the government procurement context, a transparent system can be said to refer to a system that is 'open'. As provided for in section 187(2) of the 1993 Constitution, it must be 'public'. This means, inter alia, that when an organ of state 'contracts',

whether with a private entity or another organ of state, this should not be done behind closed doors."

And on competition in government procurement at 42:

"In the government procurement context a 'competitive' system would refer to a system that involves the process of 'shopping around' for the best possible deal. The word 'competitive' in section 217(1) of the Constitution therefore means that government contracts should be awarded only after a number of entities (the number will depend on the circumstances of each case) have been afforded an opportunity to compete for a particular contract."

The facts of the present matter show that the Agency and the Post Office were virtually deciding behind closed doors on the best way forward for the Agency. No process whatsoever was followed to allow other entities to put a better deal on the table or to make any alternative suggestions which could prove to be more cost-effective. The course adopted by the Agency clearly therefore disregarded the peremptory requirements of sec. 217(1) of the Constitution.

- [22] I must also briefly deal with the relevant provisions of the Public Finance Management Act No. 1 of 1999 (the "PFMA"). The Agency is listed as a national public entity in Part A of Schedule 3 to the PFMA. In terms of sec. 46 the provisions of Chapter 6, which applies to public entities, are applicable to it. As far as procurement is concerned the PFMA echoes the requirements of sec. 217(1) of the Constitution. In sec. 51(1)(a)(iii) it provides that the accounting authority for the Agency

is obliged to ensure that it has and maintains *“an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.”* In terms of sec. 76(4)(c) the National Treasury must make regulations or issue instructions concerning *“the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.”* The Treasury regulations were published under Government Notice R225 in Government Gazette 27388 of 15 March 2005 as amended by Government Notice R146 in Government Gazette 29644 of 20 February 2007. Treasury regulation 16A 3.1 requires the accounting officer or accounting authority of a public entity to *“develop and implement an effective and efficient supply chain management system in his/her institution for the acquisition of goods and services”*. Regulation 16A 3.2 states that: *“A supply chain management system referred to in paragraph 16A 3.1 must be fair, equitable, transparent, competitive and cost effective.”* It is therefore clear that the PFMA and the Treasury regulations made thereunder follow the wording of sec. 217(1) of the Constitution.

- [23] If we turn to the Supply Chain Management Policy of the Agency issued under Treasury regulation 16A 3.1, the position is not different. This is already made clear in the Preamble thereto. Paragraph 1.1 of the Guiding Principles specifically refers to sec. 217(1) of the Constitution and then follows the wording of that section repetitively. In paragraph 2 thereof the Code of Conduct states inter alia to *“(e)nsure*

that value for money is obtained by promoting fair, open and accessible competition when seeking or renewing contracts and ensuring continuous and effective contract management."

[24] Counsel appearing for the Post Office sought to find support in paragraph 4.3 of the Agency's Supply Chain Management Policy dealing with methods of acquisitions. It *inter alia* states that acquisition of goods and services should not be from outside sources only, but that all possible methods of fulfilling the requirements should be investigated. It further states that these methods may include, but are not limited to, *inter alia*, other government institutions and transversal term contracts. However, one of the methods mentioned is also inviting competitive bids. Further, the selfsame paragraph again specifically refers to sec. 217(1) of the Constitution and then echoes the wording of that provision. The part of this paragraph relied on by counsel therefore cannot override sec. 217(1) of the Constitution. What it clearly means is that other government institutions and transversal term contracts should not necessarily be excluded. If they can provide a better solution than an outside source, then surely the better equipped government institution must be selected. That, however, cannot occur to the exclusion of outside sources participating in the investigation process, as happened in the present instance.

[25] A further argument advanced on behalf of the Post Office was that it could never have been the intention of the legislature by enacting sec.

217(1) of the Constitution and the PFMA that state departments and organs of state have to follow a public tender process in cases where the required goods or services can be provided by another state department or organ of state. If this was so, the argument proceeds, it would mean that a public tender process would have to be followed in e.g: (a) the transporting by the South African Airways (SAA) of government employees across the country; (b) the provision of legal services by the Department of Justice (State Attorney) to other government departments; (c) the provision and maintenance by the Department of Transport (Government Garage) of motor vehicles to Ministers, Judges and other officials of government departments; (d) the provision of accommodation and of maintenance services by the Department of Public Works to other government departments; (e) the supply by Denel (Pty) Ltd, a statutory company of which the government is the sole shareholder, of military equipment to the South African Defence Force; and (f) the provision of scientific research services by the CSIR, an organ of state, to the public sector. I do not agree. These examples relate to cases where, as Bolton op. cit. at 1 puts it, the government has “*set up its own internal supply chain*”, already referred to and quoted in paragraph 15 above. The Post Office through its Postbank division does not form part of the government's internal supply chain. It is providing banking services like any other private banking institution to the public at large. As far as the SAA is concerned, I believe that as a rule, government officials are openly booked on those flights on a spontaneous basis as those services are

required. In any event, this is a thought out ingenious argument of counsel not based on any evidence placed before the Court. My remarks above are based on my own general knowledge of such services. I therefore do not consider it necessary to expound further on my general knowledge. Suffice to say, counsel's examples clearly fall in categories with which we are not cornered here.

[26] A further argument advanced on behalf of both the Agency and the Post Office was that Paymaster does not provide banking services whereas the Letter Agreement deals only with such services. It was submitted that Paymaster therefore does not have *locus standi* to lodge the review application. However, the fact remains that Paymaster does have an existing contractual relationship with the Agency pertaining to the payment of social grants to beneficiaries. If there was indeed "a *gust of fresh approach*" to a new methodology as alleged by the Agency, then surely Paymaster was entitled to be apprised thereof and to put its proposals on the table. In fact, Paymaster says in paragraph 53 of its Founding Affidavit that if the Agency has issued a tender in respect of the services that are the subject-matter of the Letter Agreement with the Post Office, it would certainly have made a tender in that regard, either alone or together with a registered bank.

[27] Counsel for the Agency referred me to a number of decided cases, mainly in the Constitutional Court, expounding the principle that a Court cannot interfere with a decision simply because it disagrees with it.

These cases, e.g. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004(4) SA 490 (CC), are not relevant here. This is not a case of a disgruntled tenderer asking the Court to replace a rational decision of the administrative body with its own. I reiterate that, no matter how noble, honest and rational the Agency's decision might have been by entering into the Letter Agreement with the Post Office, the fact remains that in doing so it failed to follow the peremptory procurement system required by sec. 217(1) of the Constitution, the PFMA and the Treasury regulations promulgated thereunder. On that score alone the Agency's decision to enter into the Letter Agreement stands to be reviewed and set aside.

[28] Having arrived at this conclusion it is unnecessary to deal with the second ground of review argued before me, namely that the Agency failed to obtain the concurrence of the Minister when entering into the Letter Agreement. I therefore express no opinion on this ground.

[29] That brings me to the final argument advanced on behalf of the Post Office. That is that the Letter Agreement, though only signed on 1 July 2009, has been implemented since 5 January 2009 and that the implementation thereof cannot be reversed.

[30] The argument is that the horse has gone too far along the line to return it now to the stable. In this regard I was referred to Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics

(Pty) Ltd and Others 2008(2) SA 639 (SCA) par. 28 at 649J to 650E.

As in the present matter, in that matter there was also no culpable delay on the part of the party instituting the review proceedings. With reference to the facts of that matter Scott JA says the following in paragraphs [27] and [28] as 649H to 650B:

“However, the appellants’ stance on the impracticability of attempting to start a tender process over again for the completion of the remaining work strikes me as correct. As observed by Erasmus J, the repair and maintenance components of the contracts are interrelated. The order of the court a quo, if implemented, is likely not only to be disruptive but also to give rise to a host of problems not only in relation to a new tender process but also in relation to the work to be performed.

In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in Oudekraal Estates (Pty) Ltd v City of Cape Town 2004(6) SA 222 (SCA) para. 36 at 246D:

It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.”

The facts of the present matter do not persuade me to exercise this discretion in favour of the Agency and the Post Office. In par. 55 of its Answering Affidavit the Post Office complains that it has, as at 31 August 2009, enrolled 460 377 new beneficiaries since inception of the

Letter Agreement and that it is continuing to enrol new beneficiaries. It says that if the interim order sought by Paymaster were to be granted, it would have to close the Postbank accounts of those beneficiaries. This, it says, will obviously be to the great prejudice of those beneficiaries, each of whom will have to make new arrangements to be able to receive their grants. In a further affidavit filed on behalf of the Post Office, particulars are given regarding an improved massive infrastructure running into millions of Rand and which is presently in various stages of being installed and to be completed over the next three years. All of this, so the Post Office says, is aimed at serving the entire South African population, including beneficiaries. The Post Office is therefore not upgrading its infrastructure only to meet the requirements of the Agency, but to promote its general role as a financial institution as envisaged by sec. 51(2) of the Postal Services Act, 1998. These costs will therefore not be wasted. In my view no insurmountable problems will arise if the horse is returned to the stable where it may be judged on a fair, equitable, transparent, competitive and cost-effective basis with any other willing and able horses prepared to run the course for the Agency.

- [31] In any event, to cater for any inconvenience or prejudice which may be caused to a beneficiary already enrolled by the Post Office, counsel for Paymaster consented that a rider be added to a review and setting aside order that it shall not affect an affected beneficiary for a period of six months to enable any necessary transfer or transitional

arrangements to be made. I agree with counsel's objection for the Agency, namely that it will leave uncertainty as to what will happen after expiry of the six months. However, that problem can be addressed by making it dependant on the outcome of the interdict which Paymaster also seeks and to which I will now turn.

- [32] Paymaster also seeks an order interdicting the Agency from contracting the Post Office to render banking or payment services without having followed a procurement process which complies with sec. 217(1) of the Constitution, sec. 51(1)(a)(ii) of the PFMA and the Agency's Supply Chain Management Policy. The reason therefore is that, pursuant to the Letter Agreement, the Agency and the Post Office are on the verge of signing a final agreement. I am satisfied that if the Letter Agreement is set aside such an interdict must be granted. I agree with Paymaster's counsel that it is not necessary that a definitive guide of a tender process be stipulated in such an order. Sec. 217(1) of the Constitution, the PFMA and the regulations promulgated thereunder require a system and not specifically that a tender process must be followed on each occasion. A tender process is only required by the Agency's Supply Chain Management Policy. In this regard I believe that Bolton op. cit. is correct where the following is stated at 42 and 43:

"Based on the wording of section 217, however, competition can take a variety of forms – no specific reference is made to 'tendering' as a procurement method. In other words,

competition can take the form of, inter alia, the solicitation or calling for tenders, getting quotations, competitive negotiation or other types of competition. This change is to be welcomed since tendering is clearly not the only way in which an organ of state can ensure compliance with the principle of competitiveness. There can, however, only be competition or rather, genuine competition, if, as noted above, all interested parties are afforded an opportunity to participate. Competition should, in other words, be sufficiently wide: a sufficient or adequate number of contractors should be allowed to participate.

The use of competitive procedures for the procurement of goods and services is not without exception. Often, the principle of 'cost-effectiveness' may limit or qualify the use of competitive procedures."

I therefore do not propose to include reference to the Agency's Supply Chain Management Policy in the order I am going to make.

- [33] The question of costs does not pose any problem. All the parties were in agreement that the employment of two counsel was justified. Same counsel represented both the Agency and its Chief Executive Officer (the First Respondent). In relation to the question whether the Letter Agreement had been entered into with the concurrence of the Minister, the Director General of the Department filed a belated affidavit to inform the Court that the Minister was not in the country to confirm such concurrence personally in an affidavit. On her return the Minister filed an affidavit to this effect shortly before the date of hearing. A separate

senior counsel was then instructed by the State Attorney to represent the Minister and the Director General. Although I allowed counsel to address the Court briefly, he actually only held a "*watching brief*". I did not decide this issue but I wish to express my appreciation to the Minister for the courtesy she had shown to the Court. The order will only be directed against the Agency and the Post Office. Paymaster only seeks costs against the Agency and the Post Office. The other Respondents will therefore not be included in the costs order.

[34] I make the following order:

1. The decision of the Second Respondent taken on or about 1 July 2009 to enter into the Letter Agreement with the Third Respondent is reviewed and set aside, save that the accounts of any affected beneficiary shall not be closed pending finalisation of the procurement process referred to in paragraph 2 hereunder, to enable any necessary transfer or transitional arrangements to be made.
2. The Second Respondent is interdicted from contracting with the Third Respondent to render banking or payment services relating to grant beneficiaries, without having followed a procurement process which complies with sec. 217 of the Constitution, sec. 51(1)(a)(iii) of the Public Finance Management Act No. 1 of 1999 and the Treasury regulations promulgated thereunder.

3. The Second and Third Respondents are ordered to pay the Applicant's costs, jointly and severally, such costs to include the costs of two counsel.

F DU TOIT AJ

Acting Judge of the North Gauteng High Court, Pretoria

Date of hearing: 9 November 2009

For the Applicant: J. J. Gauntlett SC
S. Bultander

Instructed by: Smit Sewgoolam Inc.
c/o Vezi & De Beer Inc.

For the First and Second Respondents: S. M. Lebala SC
T. A. N. Makhubele

Instructed by: The State Attorney

For the Third Respondent: J. W. Louw SC
H. F. Jacobs

Instructed by: Mahlangu Inc.

For the Fourth Respondent: S. P. Mothle SC

Instructed by: The State Attorney