

OPINION

for

SOUTH AFRICAN SOCIAL SECURITY AGENCY

on

CONTRACT FOR THE PAYMENT OF SOCIAL GRANTS

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INTRODUCTION

1. The South African Social Security Agency (SASSA) has a contract with Cash Paymaster Services (Pty) Limited (CPS) for the payment of social grants on its behalf. The Constitutional Court declared the contract invalid but suspended the declaration of invalidity for the duration of the contract until 31 March 2017.
2. SASSA wants to take over the payment function but will not be ready to do so when the CPS contract expires on 31 March 2017. It needs more time to equip itself to take over the payment function. It proposes to enter into an interim arrangement with CPS to continue paying the social grants on the same or similar basis as before to allow SASSA sufficient time to design and implement a new system for the payment of social grants.
3. SASSA seeks advice on the question whether it may lawfully enter into such an interim arrangement with CPS and, if not, how it should address the problem.

THE FACTS

4. SASSA awarded a five year contract to CPS for the payment of social grants nationwide from 1 April 2012 to 31 March 2017.
5. Some of the unsuccessful bidders for the contract challenged its validity because, they said, the process by which it had been awarded had been flawed. After protracted

litigation, the Constitutional Court upheld the challenge.¹ It declared the contract invalid but suspended its declaration of invalidity on the following terms:

- 5.1. It ordered SASSA to run a new tender process for the payment of social grants for five years. SASSA was obliged, for the duration of the process, to file quarterly progress reports with the court.
 - 5.2. The court suspended its declaration of invalidity of the CPS contract until SASSA awarded the new contract.
 - 5.3. If SASSA did not award a new contract, the court's declaration of invalidity was further suspended until the expiry of the contract's original five year term on 31 March 2017. Within fourteen days of its decision not to award the contract, SASSA was obliged to lodge a report with the court setting out all the relevant information on whether and when it will be ready to assume the duty to pay the social grants itself.
6. SASSA ran a new competitive tender process but did not receive any compliant bids. It decided on 15 October 2015 not to award a new contract.

¹ Allpay Consolidated Investment Holdings v CEO, SASSA 2014 (4) SA 179 (CC)

7. SASSA reported to the Constitutional Court on its decision on 5 November 2015. It said that it had decided to take over the payment function itself. It set out the steps by which it proposed to do so in time to take over from CPS on expiry of its contract on 31 March 2017.
8. The Constitutional Court was satisfied with SASSA's report and on 25 November 2015 discharged SASSA from its supervisory jurisdiction.
9. It has since then become apparent to SASSA that it will not be ready in time to take over the payment function from CPS on the expiry of its contract at the end of March next year. It needs more time --- years rather than months --- to design a new scheme for the payment of social grants, to budget for it, to put in place the necessary infrastructure and to implement it.
10. We do not have clarity on the reasons for SASSA's inability to make the deadline. It seems prudent to assume, however, that SASSA has been remiss, either because its decision of October 2015 to go it alone after March 2017 was over-optimistic in the first place or because it has since then not been sufficiently vigorous in the implementation of its decision.
11. We accordingly assume that SASSA has been remiss. This assumption underpins the remainder of our opinion. If it is not correct, our advice based upon it must also be reconsidered.

12. We are told that SASSA does not have any choice but to enter into an interim arrangement with CPS. There is in the first place not enough time to run a competitive bidding process for the appointment of a new contractor in time to take over after March 2017. There is in the second place nobody else who has the necessary infrastructure in place to perform the payments function or the core components of it by March 2017. It would also not be feasible for anybody else to create their own infrastructure without a long term contract to recover its cost.

13. CPS is apparently willing to agree to an interim arrangement. We do not know, however, what the terms are on which it is prepared to make such an arrangement.

WILL THE INTERIM ARRANGEMENT BE LAWFUL?

14. When SASSA contracts for goods or services, it is generally obliged to do so by a competitive bidding process under the following provisions:
 - 14.1. Section 217(1) of the Constitution provides that, when an organ of state contracts for goods or services, *“it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”*.

 - 14.2. SASSA is a public entity listed in Schedule 3A of the Public Finance Management Act 1 of 1999. Its board is its *“accounting authority”* in terms of

s 49(2)(a). The board is obliged, in terms of s 51(1)(a)(iii), to ensure that SASSA has and maintains a procurement system “*which is fair, equitable, transparent, competitive and cost-effective*”.

- 14.3. As a public entity, SASSA is also subject to the Treasury Regulations promulgated under the PFMA. Regulation 16A regulates supply chain management. Regulation 16A3.2(a) echoes the constitutional and statutory requirement that SASSA’s supply chain management system must be “*fair, equitable, transparent, competitive and cost-effective*”.
15. Regulation 16A6.4 allows public bodies to depart from the general requirement of a competitive bidding process in exceptional cases:
- “If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the ... accounting authority”.*
16. In the SASSA case, the Supreme Court of Appeal described the basis for this exception to the general rule as follows:
- “The regulation permits an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions ... First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are*

concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of reg 33.”²

17. In the RAF case, Plasket J reviewed the general rule and this exception to it and concluded as follows:

“What emerges from the instruments that I have discussed is that, generally speaking, when the value of the tender exceeds R500 000 a competitive, open procurement process must be followed. It is only in exceptional circumstances that deviation from this norm will be justified. Those circumstances are urgent cases and cases of emergency. Poor planning cannot make a case an urgent one or an emergency.”³

18. SASSA’s own procurement policy reflects the same understanding in paragraph 4.3.5:

*“An emergency/urgent case is whereby immediate action is necessary in order to avoid a dangerous or risky situation, misery or want ...
However a lack of proper planning should not be used as a reason for urgent of emergency case.”*

² CEO, SASSA v Cash Paymaster Services 2012 (1) SA 216 (SCA) para 21

³ Joubert Galpin Searle Inc v Road Accident Fund 2014 (4) SA 148 (ECP) para 79

19. The exception under regulation 16A6.4 is accordingly not open to SASSA in this case. Its inability to run a competitive bidding process is not due to emergency or unforeseen urgency. It is due instead to SASSA's own failure to get its ducks in a row in time.

20. We considered whether SASSA might be able to overcome the problem by agreeing with CPS merely to extend their existing contract rather than to enter into a new contract. Such an agreement will however not solve the problem for the following reasons:
 - 20.1. The Constitutional Court has already held that the original procurement was unlawful and invalid. SASSA's contract with CPS has thus far survived only under the Constitutional Court's suspension of its declaration of invalidity. But the suspension expires on 31 March 2017. There will then be nothing left to renew.

 - 20.2. SASSA is in any event required to employ a competitive bidding process whenever it contracts for the procurement of goods and services. It will contract with CPS for the procurement of its services even if they agree only to extend their existing contract. The extension will accordingly again be subject to the requirement of a competitive bidding process.

21. We conclude that SASSA's proposed interim agreement with CPS will not be lawful.

HOW TO ADDRESS THE PROBLEM

The framework of the problem

22. We have concluded that SASSA's proposed arrangement with CPS will be unlawful. We are told, however, that SASSA does not have any other option. It cannot take over the payment function from CPS and cannot appoint another contractor to do so after March 2017. To interrupt the payment of social grants is not an option. SASSA accordingly has no other option but to enter into an interim arrangement with CPS.
23. The reality that SASSA may have to enter into an unlawful arrangement with CPS stands in stark contrast with its duties and those of its board. SASSA obviously has a duty to act lawfully at all times. Section 50(1)(b) of the PFMA obliges its board to act at all times "*with fidelity, honesty, integrity and in the best interests*" of SASSA in managing its financial affairs.
24. The Constitutional Court again emphasized the duty of organs of state to act in exemplary fashion in a judgment handed down days ago:

"This court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help'. What is more, in Khumalo, this court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty

*'to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power'. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it'. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public.'*⁴

25. The question is thus how SASSA should square the reality that it has to enter into an unlawful arrangement with CPS, on the one hand, with its duties to act lawfully in exemplary fashion at all times, on the other.

Find a rapid solution

26. We are of the view that SASSA should, as a first step, minimise the extent to which it might be necessary to enter into an unlawful arrangement with CPS, both in duration and scope. It should find an acceptable way of legalising the payment of social grants on a satisfactory basis as soon as possible.
27. We do not know what the most satisfactory rapid solution to the problem might be. We can merely say that it seems to us unreasonable for SASSA to cling to its decision to go it alone by paying social grants itself if it will cause undue delay in putting the payment of social grants on a lawful footing. For instance, if SASSA can run a competitive bidding

⁴ Merafong City Local Municipality v AngloGold Ashanti [2016] ZACC 35 (24 October 2016) para 61

process and have a new contractor in place in, say, one year from now, then it would in our view be unreasonable to continue with the unlawful arrangement with CPS for two or three years only because SASSA requires that time to equip itself to go it alone.

28. SASSA is in our view obliged, within reason, to minimise the duration of its unlawful arrangement with CPS, if needs be by running a competitive bidding process and appointing a new contractor without delay.

Apply for Treasury approval

29. SASSA should apply for National Treasury approval in terms of paragraph 8.5 of National Treasury Instruction 3 of 2016 / 2017. It requires prior National Treasury approval for deviations from normal bidding processes based on grounds other than emergency or sole supplier status. This instruction is binding in terms of section 76(4)(c) of the PFMA. It says that Treasury will only allow such deviations in exceptional cases.

Speak to CPS

30. SASSA should speak to CPS to find out whether it is prepared to agree to an interim arrangement that it continues to pay the social grants on the same terms as before or similar terms that limit the scope of CPS's function. If it is not willing to do so, or only at an excessive price, SASSA would have to reconsider the interim arrangement altogether.

Make full disclosure upfront

31. SASSA should also, without delay, report to the National Treasury and the Auditor-General in terms of paragraph 4.3.5 of its procurement policy that it intends to enter into the interim arrangement with CPS without a competitive bidding process.
32. SASSA should, in our view, make the same report to the Constitutional Court. It is no longer under any formal duty to do so but, in our view, its radical departure from the plan placed before the court by its report of 5 November 2015 requires that SASSA disclose to the Constitutional Court that it proposes to enter into a further arrangement with CPS. SASSA should deliver the report, not only to the court itself, but also to all the parties to the Allpay litigation.
33. We suggest that SASSA make these disclosures without delay so that those to whom the disclosures are made, have an opportunity to object and propose alternatives, if they have any, before SASSA commits itself to the interim arrangement with CPS. It should say in its reports to Treasury, the Auditor-General and the Constitutional Court that it proposes to enter into the temporary arrangement with CPS by a stipulated date to allow for objections and alternative suggestions before it commits itself to CPS.

Make the interim arrangement with CPS

34. If credible objections are raised and viable alternative solutions proposed, SASSA should obviously consider them. We suspect, however, that there will be none. In that event, it should enter into the proposed interim arrangement with CPS. Their agreement should be carefully tailored to allow SASSA sufficient time to put an alternative solution in place but not run any longer than that.

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