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# PROJECTS AND INFRASTRUCTURE

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**MATTERS**

2 JUNE 2014

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## ALLPAY V CEO OF SASSA: DEALING WITH ALLEGED IRREGULARITIES IN AWARDING TENDERS

On 29 November 2013, the Constitutional Court (CC) delivered a landmark judgment in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (AllPay 1). In this case, the CC declared that the award of the tender to Cash Paymaster (successful bidder) to provide services for the payment of social grants over a period of five years for all nine provinces was constitutionally invalid. The CC suspended the declaration of invalidity pending the determination of a just and equitable remedy. Consequently the CC handed down a further judgement on 17 April 2014 (AllPay 2), which set out the remedy, based on the findings in AllPay 1.

The AllPay decision (being AllPay 1 and AllPay 2) is significant as it involves a review by the CC of one of the largest government tendered contracts awarded in South Africa and consequently has significant implications for future government tenders.

This article is the first in a three-part series which considers the implications of the AllPay judgments on public and private bodies participating in public procurement contracts. In this article we consider the CC's reasoning in arriving at its conclusion that the award of the tendered contract was constitutionally invalid. In article 2 - Allpay v CEO of SASSA: Greater scrutiny of economic empowerment in government tenders? - we consider the CC's findings in respect of black economic empowerment and whether the CC has confirmed that a more pro-active approach is required by public bodies in scrutinising bidders' empowerment credentials. In article 3 - Allpay v CEO of SASSA: the use of structural interdicts to remedy unlawful tender awards - we examine the CC's remedy of setting aside the tender award and how the court dealt with the potentially disastrous consequences for both the innocent bidder and grant recipients by crafting a far-reaching structural interdict.

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The dispute in AllPay 1 turned on whether the award of a tender by the South African Social Security Agency (SASSA) to the successful bidder for the countrywide payment of social grants to beneficiaries was constitutionally valid. AllPay Consolidated Investments (unsuccessful bidder) relied on a number of alleged irregularities in the tender process to challenge the award of the tender to the successful bidder.

The alleged irregularities centred on the following:

- a) the requirement for separate bids for the nine provinces;
- b) the composition of the bid evaluation committee;
- c) the attendance of members when the bid adjudication committee made its final decision;
- d) the assessment of functionality of the black economic empowerment component of the successful bidder; and
- e) the nature and effect of bidder's notice 2.

### Approach and findings of the Supreme Court of Appeal (SCA)<sup>1</sup>

Central to the SCA's approach to procedural irregularities in the procurement process was the court's view that the public interest does not require minor and inconsequential flaws to invalidate a procurement process. For the SCA, a fair process does not mean a perfect process, absent of minor flaws. Thus, the SCA held that "it would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities".<sup>2</sup> For the SCA, the facts pointed to the inescapable conclusion that SASSA considered the technical solution offered by the successful bidder to be materially superior to what was offered by the unsuccessful bidder.<sup>3</sup> On the SCA's approach, even if the procurement process was flawed, the procedural irregularity is not a ground for setting the contract aside if the irregularity is minor and does not have a bearing on the ultimate award of the tender. The SCA accordingly found that there were no unlawful irregularities.

In its appeal to the CC, the unsuccessful bidder submitted that the approach adopted by the SCA was flawed. According to the unsuccessful bidder, the SCA erred in considering whether the alleged irregularity had an impact on the final decision to award a tender in order to determine whether the irregularity was fatal to the procurement process.

### The approach adopted by the CC

The CC differed with the SCA on the proper legal approach to the existence and legal effect of proven irregularities in the procurement process. As a starting point, the CC held that the suggestion that 'inconsequential irregularities' are of no significance conflates the test for irregularities and their import. According to the CC, an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA). It is therefore only at the remedy stage in terms of s8 of PAJA that appropriate consideration be given to the public interest and the consequences of setting the procurement process aside.

The CC expressly rejected the notion that the public interest, in the context of procurement cases, requires greater caution in establishing grounds for judicial review in a particular instance. According to the CC, if proven irregularities exist, the inevitability of a certain outcome is not a factor that should be considered in assessing the validity of administrative action. The decision of the CC differs from that of the SCA in a fundamental way – for the CC procedural requirements must be considered on their merits and not by first assessing whether the irregularity had a bearing on the final outcome as a means to classifying the irregularity as consequential or inconsequential. According to the CC, determining the significance of the irregularity by considering its impact on the final outcome is flawed because if the process leading to the election of the successful bidder was compromised, it cannot be known with certainty what course the process might have taken had the procedural requirements been properly observed.

The CC makes it clear that once a ground for review has been established, s172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of invalidity must then be dealt with in a just and equitable order in terms of s172(1)(b) of the Constitution, read with s8 of PAJA.

<sup>1</sup> *AllPay Consolidated Investment Holdings & others v Chief Executive Officer of the South African Social Security Agency & Others* 2013 (4) SA 557 (SCA).

<sup>2</sup> *Id* at paras 21 and 96.

<sup>3</sup> *Id* at para 46.

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According to the CC, compliance with the requirements for a valid tender process as set out in the applicable constitutional and legislative procurement framework is legally required. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. In circumstances where administrators depart from legally binding procedures, the basis for doing so must be reasonable, justifiable and the process of change must be procedurally fair. The CC makes it clear that PAJA is the basis on which administrative action is scrutinised to establish whether alleged irregularities give rise to a ground for review under PAJA.

### *Lessons from AllPay 1*

AllPay 1 clarifies that the proper approach to evaluate the validity of a tender process is first to establish, on the facts, whether an irregularity occurred. The next step is to consider the merits of the irregularity to determine whether it is material, and therefore amounts to a ground for review under PAJA. It is not correct to first consider whether the irregularity is of any consequence by considering whether it had any bearing on the final decision taken by an administrator. If a court finds that there are valid grounds for review, and declares an award invalid, it is obliged to enter into the further enquiry of what is a just and equitable remedy in the circumstances. It is only at the remedy stage where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.

*Lyle Horsley*

## **ALLPAY V CEO OF SASSA: GREATER SCRUTINY OF ECONOMIC EMPOWERMENT IN GOVERNMENT TENDERS?**

This is the second article in a three-part series which considers the implications for public and private parties in concluding procurement contracts following the landmark judgment delivered by the Constitutional Court (CC) in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (AllPay 1).

On the facts in AllPay 1, the request for proposals emphasised the substantive participation by historically disadvantaged people in the management and control of the successful tenderer. The request for proposals provided that preference points for historically disadvantaged persons would be calculated on their percentage shareholding in a business, provided that they were actively involved in and exercised control over the enterprise. Equity ownership was defined as the percentage of ownership and control exercised by individuals in an enterprise.

In AllPay 1 the unsuccessful bidder challenged the tender process on numerous grounds, including that the South African Social Security Agency (SASSA), as the procuring entity, failed to assess the ability of the successful bidder's black economic partners to perform the tender. The bid of the successful bidder reflected that three black empowerment companies were to manage and execute approximately 75% of the contract value. The unsuccessful bidder argued that the capacity of the black economic companies to perform ought to have been assessed before awarding the contract.

### **The SCA approach to scrutinising black economic empowerment credentials of bidders**

The Supreme Court of Appeal (SCA) held that SASSA was not required by law to assess the ability of the empowerment companies that formed part of the successful bidder's bid response. The SCA further held that there was no basis for the proposition that the failure to assess the black empowerment companies impacted so unfairly on the unsuccessful bidder as to taint the fairness of the process. According to the SCA, SASSA would have been aware of the risk of non-performance by the three associated empowerment companies and SASSA could manage such risk by imposing appropriate contractual consequences upon the successful bidder to meet its empowerment obligations. In the SCA's view, the evaluation of bid responses was the prerogative of the procuring entity. In the circumstances, it was not appropriate for a court to interfere. Accordingly the SCA held that the procurement process did not require SASSA to investigate whether the assertion made by the successful bidder, that its black economic empowerment partners would

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manage approximately 75% of the projects, was correct. The SCA dismissed the complaint by the unsuccessful bidder as having no merit.

### The Constitutional Court (CC) and substantive empowerment

The CC differed with the SCA on the approach to evaluating black economic empowerment in the context of procurement. As a starting point, the CC reiterated that substantive empowerment and not formal compliance is what matters, and, accordingly, black economic empowerment generally requires substantive participation in the management and running of any enterprise. According to the CC, there was an obligation on SASSA to ensure that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made. Importantly, the CC clarified that an investigation into the propriety of empowerment credentials does not become necessary only after a complaint has been lodged.

The CC noted that the successful bidder did not substantiate its claim that its equity partners would manage approximately 75% of the tender. The successful bidder merely provided particulars of the management capabilities of its workforce, which included previously disadvantaged people. On the face of the information provided by the successful bidder, it was not possible for SASSA to determine whether the claimed empowerment credentials were up to scratch. The CC held that in light of the central and fundamental importance of substantive empowerment under the Constitution,

the preferential procurement legislation and the empowerment legislation, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed was a fatal flaw to the process. Accordingly, the failure to make such an objective determination fell foul of s6(2)(b) of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA) (non-compliance with a mandatory and material condition) and s6(2)(e)(iii) of PAJA (failure to consider a relevant consideration).

### Where to from AllPay?

The CC's approach and reasoning in AllPay 1 endorses a more interventionist role by courts and public procuring entities to achieve substantive transformation as opposed to formal compliance with the requirements in the tender documents. AllPay is consistent with a previous judgment delivered by the CC<sup>4</sup> which concerned allegations of fraudulent misrepresentations by a bidder in relation to historically disadvantaged individuals, where the CC held that the verification of the correct shareholding in the company register is irrelevant and that an investigation into what happens behind the scenes is critical when the shareholding is said to be a façade. In order to achieve substantive empowerment, it may not be sufficient to confirm formal compliance with the requirements of the tender and it may be necessary to confirm the accuracy of a tenderer's claimed empowerment credentials.

Lyle Horsley



<sup>4</sup> *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC).

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## ALLPAY V CEO OF SASSA: THE USE OF STRUCTURAL INTERDICTS TO REMEDY UNLAWFUL TENDER AWARDS

On 29 November 2013, the Constitutional Court (CC) delivered a landmark judgment in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (AllPay 1). In this case, the CC declared that the award of a tender to Cash Paymaster Services (CPS) to provide services for the payment of social grants over a period of five years for all nine provinces was constitutionally invalid. The CC suspended the declaration of invalidity pending the determination of a just and equitable remedy. The CC ordered parties to furnish it with up-to-date factual information on affidavit before a further hearing was held, for the purposes of determining the appropriate remedy. The CC handed down a further judgment on 17 April 2014 (AllPay 2), which set out the remedy to follow on its findings in AllPay 1. This article is the third article in a three-part series of articles which considers the implications of the AllPay judgment on government procurement contracts.

The CC's order in AllPay 2 breaks new ground in its crafting of an appropriate remedy following an invalid award of a tendered contract. The factual circumstances of the AllPay judgments created difficult conditions for laying down a just and equitable remedy, and the CC had to balance the interests of all affected parties, including the public interest, in a creative and effective manner by relying on its wide remedial powers in terms of s172(1)(b) of the Constitution. The CC's order creates a precedent for crafting a remedy to deal with the consequences of an invalid administrative action, within the confines of the separation of powers doctrine, and in circumstances where the public has an interest in the continued smooth running of the tendered contract.

In reaching its order, Froneman J writing for a unanimous CC reiterated the 'corrective principle' as the default position in administrative law. This meant that the consequences of invalid administrative action should be corrected or reversed where they can no longer be prevented. This approach is in accordance with the rule of law and the principle of legality. However, the CC submitted that other factors are also required to be taken into account when crafting an appropriate remedy.<sup>5</sup>

In considering whether the existing contract should be set aside, the CC found that the South African Social Security Agency (SASSA), and more importantly CPS, were organs of state in terms of s239 of the Constitution, in carrying out the obligations under the impugned contract. In fulfilling its contract with SASSA, CPS had been exercising a public power and performing a public function on behalf of SASSA in terms of the South African Social Security Agency Act, No. 9 of 2004. The CC's finding that CPS became accountable to the

public in performing its functions under the contract with SASSA had a bearing on whether the contract should be set aside. Thus, notwithstanding the CC's finding that the award of the contract to CPS was invalid, CPS could not be permitted to simply walk away from the contract. The CC thus suspended its declaration of invalidity and ordered CPS to continue to discharge its obligations under its contract with SASSA pending the outcome of a new tender process by SASSA. In addition, CPS had no right to benefit from an unlawful contract and its commercial activities which were dependant on this power were therefore subject to public scrutiny. The CC therefore deemed it appropriate for CPS to be publicly accountable for the losses and gains in terms of the impugned contract.

In setting out its order, the CC declared the contract concluded between SASSA and CPS invalid, and suspended this order of invalidity pending "the decision of SASSA to award a new tender" after the re-running of the tender process. In the circumstances, the CC considered it appropriate to impose a structural interdict, requiring parties to report to it at crucial stages of the new tender process as follows:

- SASSA was ordered to initiate a new tender process within 30 days of the order in AllPay 2;
- New bids would be required to include measures for ensuring no loss of lawful existing grants, no interruption of lawful existing grant payments, and personal data remaining private (save for its use in paying social grants);
- The new tender would be for a period of five years to allow the tenderer to recoup its capital costs;

<sup>5</sup> "[T]he public interest in procurement and social-security matters must ... be taken into account when the rights, responsibilities, and obligations of all affect persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range." (Paragraph 33)

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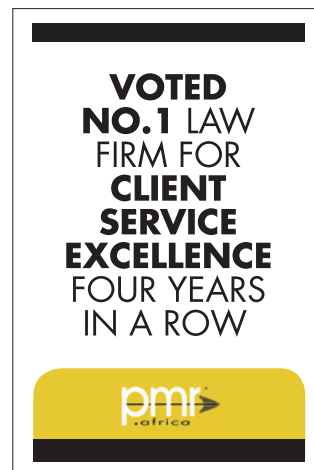
- A new Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) would need to be constituted in order to evaluate and adjudicate the tender;
- The evaluations and adjudications of the BEC and BAC respectively would be required to be filed with the CC quarterly until the tender process was completed;
- At the end of the new tender process, SASSA would have a choice to either award the tender, or not award it;
- Should SASSA decide against awarding it, the declaration of invalidity would continue until completion of the five-year period of the original contract between SASSA and CPS;
- Within 14 days of the decision not to award the tender, SASSA would be required to lodge a report with the CC, discussing whether and when it would be ready to assume the duty to pay the social grants itself;
- Within 60 days of the completion of the five year period of the original tender, CPS would be required to file an audited statement of the expenses incurred, the income received and the net profit earned by it under the completed contract; and
- Within 60 days of the filing of these statements, SASSA would be required to file with the CC audited verification of the financial details provided by CPS.

The order in AllPay 2 broadly has two possible outcomes: either the tender is re-awarded to a new bidder (in which case the contract runs afresh for another five year period), or the tender is not awarded to a new bidder (in which case CPS continues to provide the service – essentially to completion of the original contract, before SASSA takes over grant provision and reporting requirements kick in).

This order appears to be a balancing of a number of factual and legal interests: the need to apply the corrective principle and remedy the flawed tender process; the increased expense of running a tender of this magnitude for a period of time shorter than five years; the CC's aim to allow SASSA to take over grant-provision after five years as originally planned; the importance of uninterrupted social security grants; and the CC's intention to avoid imposing a final solution on SASSA.

The CC has taken significant steps in setting a precedent for far-reaching structural interdicts to remedy invalid administrative actions. How the CC's precedent will be applied to other administrative actions, and in lower courts facing large case loads, remains to be seen.

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