

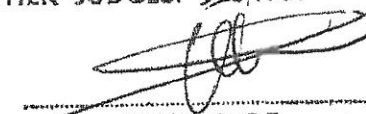
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH-GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

CASE NO: 7447/2012

DATE 28.08.2012


SIGNATURE

In the matter between:

**ALLPAY CONSOLIDATED INVESTMENT
HOLDINGS (PTY) LTD**

1st Applicant

ALLPAY FREE STATE (PTY) LTD

2nd Applicant

ALLPAY WESTERN CAPE (PTY) LTD

3rd Applicant

ALLPAY GAUTENG (PTY) LTD

4th Applicant

ALLPAY EASTERN CAPE (PTY) LTD

5th Applicant

ALLPAY KWAZULU NATAL (PTY) LTD

6th Applicant

ALLPAY MPUMALANGA (PTY) LTD

7th Applicant

ALLPAY LIMPOPO (PTY) LTD

8th Applicant

ALLPAY NORTH WEST (PTY) LTD

9th Applicant

ALLPAY NORTHERN CAPE (PTY) LTD

10th Applicant

MICAWBER 851 (PTY) LTD

11th Applicant

MICAWBER 852 (PTY) LTD	12 th Applicant
MICAWBER 853 (PTY) LTD	13 th Applicant
MICAWBER 854 (PTY) LTD	14 th Applicant
VS	
THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	1 st Respondent
THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	2 nd Respondent
CASH PAYMASTER SERVICES (PTY) LTD	3 rd Respondent
EZIDLUBHEDU INVESTMENT HOLDINGS (PTY) LTD	4 th Respondent
FLASH SAVINGS AND CREDIT COOPERATIVE	5 th Respondent
ENLIGHTENED SECURITY FORCE (PTY) LTD	6 th Respondent
MOBA COMM (PTY) LTD	7 th respondent
EMPILWENI PAYOUT SERVICES (PTY) LTD	8 th Respondent
PENSION MANAGEMENT (PTY) LTD	9 th Respondent
MASINGITA FINANCIAL SERVICES (PTY) LTD	10 th Respondent
THE SOUTH AFRICAN POST OFFICE	11 th Respondent

ROMAN PROTECTION SOLUTIONS CC	12 th Respondent
UBANK LIMITED	13 th Respondent
AFRICAN RENAISSANCE INVESTMENT MANAGEMENT (PTY) LTD	14 th Respondent
STANDARD BANK GROUP LIMITED	15 th Respondent
NEW SOLUTIONS (PTY) LTD	16 th Respondent
ITHALA LIMITED	17 th Respondent
KTS TECHNOLOGY SOLUTIONS CONSORTIUM	18 th Respondent
CENTRE FOR CHILD LAW	<i>Amicus Curiae</i>

JUDGMENT

MATOJANE J

INTRODUCTION

[1] The applicants initially brought this application in two parts, namely, Part A in which the applicants sought interim interdictory

relief to *inter alia* prevent SASSA from taking any steps to implement a tender and Part B being a review of the tender award.

[2] The relief sought in Part A of the notice of motion was not proceeded with and the applicants and the first to third respondents agreed that the review proceedings provided for in Part B of the notice of motion be determined by this court on an expedited basis.

[3] The applicants seeks an order correcting or setting aside the decision of the second respondent to appoint the third respondent as a service provider of the second respondent pursuant to a tender for the provision of payment services for social grants in the entire country ("the tender"). In addition the applicants also seeks the consequent setting aside of the service level agreement entered into between the second and third respondents.

[4] SASSA is established in terms of section 2(1) of the South African Social Security Agency Act, 2004 (Act No 9 of 2004). It is an organ of state in terms of section 239(b)(ii) of the Constitution and a national public entity within the meaning of the PFMA. Its function includes the administering of social assistance in terms of Chapter 3 of the Social Assistance Act, and performing any function delegated to it under the Act; and to collect, collate, maintain and administer

such information as is necessary for the payment of social security. See section 4 of the SASSA Act.

[5] The contract arising from the impugned tender is for a five-year period, it's worth approximately R10 billion, and involves the distribution of social grants worth nearly R500 billion.

[6] The tender concerns the provision of social grants to over 14.8 million people who are the poorest of the poor and the most vulnerable members of society, namely, older persons, war veterans, disabled persons, child support grants, grant-in-aid, child support, foster child grants and care dependency grants.

[7] For the sake of convenience, the applicants collectively are referred to as "applicants". First and second respondent as "SASSA", third respondent as "CPS", eighth respondent as "Empilweni" and The Centre for Child Law as "The Centre"

[8] Prior to the tender being awarded to CPS, grants were distributed in the nine Provinces of South Africa in the following way:

8.1 Applicants distributed grants in the Free State, Western Cape, Gauteng and Eastern Cape;

- 8.2 Empilweni distributed grants in Mpumalanga;
- 8.3 CPS distributed grants in North-West, KwaZulu-Natal, and part of the Eastern Cape, Limpopo and Northern Cape; and
- 8.4 in addition to applicants, CPS, and Empilweni, SASSA also had payment agreements with the South African Post Office, First National Bank and Standard Bank in the Eastern Cape; and beneficiaries who elected to be paid at banks of their choice.

[9] SASSA identified weaknesses in the methodology of payment which resulted in, among other deficiencies, duplicated payments, payments to persons who were not beneficiaries and other fraudulent conduct which had an adverse impact on the budget allocated by Parliament for social grants for persons who qualified.

[10] One of the mischief's SASSA attempted to address in the tender was that beneficiaries receiving payment at designated pay points could not be verified prior to payment. Recipients receiving monies at banks could not be authenticated as correct and this resulted in abuse. Legitimate recipients did not receive payment and

fraudsters received payment that they were not entitled to, resulting in substantial financial loss.

THE TENDER PROCESS

[11] On the 15 April 2011 SASSA published an invitation to bid ("RFP") calling upon bidders to present offers to provide the services in any one or more Provinces of the Republic of South Africa. A bid clarification meeting was held on the 12 May 2011. The closing date of the tender was as a result extended from 27 May 2011 to 10 June 2011. On the 20 May 2011 SASSA provided written responses to certain of the questions posed by bidders.

[12] SASSA issued a Bidders Notice No 1 on the 23 May 2011, to change the closing date for the tender to 15 June 2011.

[13] On the 10 June 2011 SASSA issued a document entitled "final clarification regarding frequently asked questions" referred to as Bidders Notice 2. Bidders Notice No 3 was issued on the 14 June 2011, extending the closing date to 27 June 2011.

[14] By closing date bids from 21 tenderers had been received by SASSA. The tender process was comprehensive and endured over a period of 9 months. Various special bid committees were established

to oversee the different stages of the bidding process in line with SASSA's Supply Management Policy and Treasury Regulations. The committees were constituted mainly of senior government employees who are employed in government departments unrelated to SASSA.

[15] The Request For Proposals ("RFP") required the bid process to be split into three stages. First, there would be an administrative evaluation (to ensure compliance with administrative requirements of the RFP). Secondly, the bids would then be evaluated on functionality. The RFP stated that the bids would be evaluated against the solution criteria to determine whether or not these comply with the specified solution requirements of the tender. Lastly bidders who scored a minimum of 70 percent would be considered for further evaluation for financial and preference points.

[16] The written bids were considered by the BEC, which consisted of four members, instead of five, none of whom was a supply chain management practitioner as required by SASSA's Supply Chain Management Policy.

[17] Applicants and CPS met the minimum threshold of 70 percent and were invited to make presentations on their proposals. Following the presentation meeting that was held on the 7 October 2011, applicants' functionality score were lowered to an overall score of 58

percent as it did not provide for biometric verification for all payments methods as required by Bidder's Notice 2.

[18] The tender was awarded to CPS on the 17 January 2012 and the service level agreement and contracts were signed on 3 February 2012.

[19] The process followed by the BEC and BAC was monitored by the Independent Process Monitor who compiled an independent report.

[20] Applicants contend that the tender process was fundamentally flawed at almost every level, from the terms of reference, to the procedure, to the ultimate evaluation and adjudication of the bids. Applicants advance the following contentions:

20.1 That the tender specifications were materially altered at the last minute. This had the consequence that:

20.1.1 Bidders did not know or were misled about the applicable criteria; and

20.1.2 the process lacked transparency and was inherently unfair.

20.2 After the last minute alteration of the specifications, SASSA conducted a form of "hearing" at which applicants and CPS were required to make presentations. But the process was fatally irregular because:

20.2.1 The purpose of the hearing and the issues to be addressed were not identified in advance;

20.2.2 the requirement to make a presentation was on less than 48 hours' notice; and

20.2.3 applicants' scores were thereafter altered to eliminate it from the bid but without inviting applicants to address SASSA on all of the topics in respect of which its scores were reduced.

20.3 The award of the tender to CPS is unsustainable, *inter alia*, because:

20.3.1 The bulk of the undertaking (74 percent) was to be performed by CPS's partners, yet no assessment of the capacity of those partners

to perform the relevant undertaking was made before the tender was awarded;

20.3.2 there was thus no proper consideration and assessment of CPS's bid as a whole. In as much as the nature, skills and abilities of entities that were to perform a significant component of the tender were never considered.

20.4 The tender process was beset by a series of fatal irregularities. More particularly:

20.4.1 The BEC was not properly constituted at material parts of the process;

20.4.2 the BAC took a material decision without a member being present;

20.4.3 there was a failure by a member of the BEC (who had unjustifiably lowered applicant's scores so as to eliminate it) to disclose a conflict of interest; and

20.4.4 CPS failed to comply with a material requirement of the RFP, that each bidder had to submit separate bids for each Province.

20.5 the decision to appoint CPS was vitiated by bias, bad faith and ulterior purpose. More particularly:

20.5.1 Despite allegations of a serious nature being levelled against CPS, SASSA failed to investigate those alleged acts of corruption. Nor did it take them into account; and

20.5.2 one of the members of the BEC who was involved in lowering applicant's scores to the extent of disqualification, had an undisclosed conflict of interest.

APPLICABLE LEGAL PRINCIPLES

[21] The RFP explained that various pieces of legislation and their regulations would apply to the adjudication of the bids. These were:

21.1 The Constitution;

21.2 The Preferential Procurement Policy Framework Act 5 of 2000;

21.3 The Social Assistance Act 13 of 2004; and

21.4 The Public Finance Management Act 1 of 1999.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

[22] Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996) ("the Constitution") provides that everyone has the right to have access to social security, including the right to appropriate social assistance if they are unable to support themselves and dependents.

[23] Section 27(2) of the Constitution provides that the State:

"Must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of each of these rights."

[24] Section 217 of the Constitution sets out the basic procedural and substantive requirements that must guide the State when it procures goods and services. The tender process, preceding the

award of the tender must be made in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

[25] Section 217(3) provides that national legislation must prescribe the framework for the implementation of any preferential policy. This is done by the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000).

[26] Section 28(1)(c) of the Constitution provides that every child has a right to basic nutrition, shelter, basic health care services and social services. Section 28(2) provides that a child's best interest is of paramount importance in every matter concerning the child.

PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT

[27] The purpose of the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000) ("PPPF Act") is to give effect to section 217(3) of the Constitution by providing a framework for the implementation policy contemplated in section 217(2) of the Constitution and for matters connected therewith.

[28] Section 1 defines an "acceptable tender" as "any tender which, in all respects complies with the specifications and conditions of tender as set out in the tender documents."

[29] Section 2(1)(f) provides that organs of state must determine their preferential procurement policy based on a points system unless objective criteria justify the award to another tender.

[30] Regulation 9 of the regulations promulgated under the PPPF Act provides that "despite regulations 3(4), 4(4), 5(4), 6(4) and 8(80), a contract may, on reasonable and justifiable grounds be awarded to a tender that did not score the highest number of points."

[31] An "acceptable tender" is defined in the PPPF Act as a tender that, in all respect complies with the specifications and conditions of tender as set out in the tender documents. It was held in **Chairperson: Standing Tender Committee & Others v JFE Sapela Electronics (Pty) Ltd and Others** as follows:

"The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217 (1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and effective'. In other words, whether the 'tender in all respects complies with the specifications and conditions of tender as set out in the contract documents' must be judged against these values."

PUBLIC FINANCE MANAGEMENT ACT

[32] SASSA is listed under Schedule 3A of the Public Finance Management Act, 1999 (Act No 1 1999) ("PFMA") as a National Public Entity.

[33] Section 51(1) of the PFMA provides that an accounting authority for a public entity must ensure that the public entity has and maintains:

- "(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective."

[34] Regulation 9.1.1 (Part 4) of the Treasury Regulations published under the PFMA provides as follows:

"The accounting officer of an institution must exercise all reasonable care to prevent and detect unauthorized, irregular, fruitless and wasteful expenditure, and must for this purpose implement effective, efficient and transparent processes of financial and risk management".

SOUTH AFRICAN SOCIAL SECURITY AGENCY ACT

[35] The preamble of the South African Social Security Act, 2004 (Act No 9 of 2004) ("Social Security Act") provides *inter alia* that:

"the effective provision of social security services requires uniform norms and standards, standardized delivery mechanisms and a national policy for the efficient, economic and effective use of limited resources available to the State for social security."

"a national social security economic policy is required to prevent the proliferation of laws and policies relating to social security from prejudicing the beneficiaries of social security, prejudicing the economic interest of the Republic or its provinces or impeding the implementation of such national social security economic policy."

THE GROUNDS OF REVIEW

Failure to answer questions

[36] The first ground of review relied upon by applicants is that the decision to appoint CPS was procedurally unfair. Applicants contend that SASSA failed to answer certain fundamentally important questions which were put to it by the applicants and others at the briefing session and in addition responded to several questions about the scope of the tender by saying "bidder to propose", this was argued, rendered the bidding process procedurally unfair and falls to be reviewed and set aside in terms of section 3(1) and 6(2)(c). It was further submitted that the response by SASSA to questions relating to the proof of life issue and other issues by stating that "bidder to propose" contradicts the requirement of the RFP as it invites a bidder to qualify the RFP with its own proposal.

[37] It is clear that the intent of the tender was to invite bidders to submit proposals on how to provide the service. Bidders had to provide a solution that falls within the general intend of the RFP. In my view, "bidders to propose" does not invite bidders to qualify the RFP but calls for a solution from bidders within the stipulated criteria. The reading of the record and the summary of answers provided to the applicants' questions show that all questions submitted by the applicants were answered except where they were invited to propose solutions.

[38] Applicants contend that failure to answer certain questions were prejudicial to their bid yet they were contend to submit their bid and participate in an unfair tender process without raising an objection nor interdicting it. See **SA Metal Machinery Co (PTY) v City of Cape Town** 2011 (1) SA 348. The conclusion is inescapable that applicants raise the issue of procedural unfairness at this stage because they were unsuccessful.

MATERIAL CHANGE TO THE RFP

[39] Applicants submit that SASSA materially changed the requirements of the bid at the very last minute, giving applicants only eight working days to make substantial changes to its tender. It is argued that the RFP did not; all along require biometric verification

at the time of payment. Applicants submit that Bidders Notice No 2 issued by SASSA on the 10 June 2010 which required that biometric verification be performed when a beneficiary receives his grant, regardless of the payment methodology elevated the need for biometric testing to an inflexible rule and made the RFP internally inconsistent and unclear and accordingly prevented applicants from responding meaningfully to it.

[40] Applicants interpreted the tender documents to mean that finger-print verification could be used where cash is dispensed with at pay-points but that where ATMs were employed this would not be required as according to the applicants, the RFP stated that the use of biometrics were "preferable" as opposed to compulsory. Applicants further submit that the requirements are internally inconsistent, as current technology does not permit of simultaneous fingerprint verification upon withdrawals at ATMs.

[41] Section A of the RFP sets out the background to and aim of the tender. Clause 2.1 describes the intent as follows:

"The bidders are required to submit a proposal for the provision of a Payment Service for Social Grants. Payment Service is defined as the Registration of Social Grant Recipients and thereafter, the payment of Social Grants to all registered Beneficiaries."

[42] Clause 2.4 describe the overall objective of the tender as a desire "to shift from the current largely cash-based payment model to more electronic-based payment model relying on the existing infrastructure available in the country and developing areas where there is a lack of access to payment facilities".

[43] The key business principles and minimum requirements to be addressed by the RFP include:

"3.1.4 reduce fraud, corruption and leakage at the point of payment."

[44] The RFP sought to eliminate the following problems in regard to electronic payments, *inter alia*:

"4.4.3 the lack of contact (emphasis added) with the beneficiary, depriving SASSA of the opportunity of periodically conducting the statutorily required life certification (i.e. testing to determine whether beneficiaries are still alive);

4.4.4 the inability of SASSA to recoup social-grant payments from dormant accounts (i.e. accounts where payments of grants have been effected but no withdrawals made for a period of three months; and

4.4.5 the failure of banks to verify beneficiary details and account numbers before effecting grant payments into the account.

3.1.9 Ensure proof of life of the beneficiaries as an integral part of the payment process.”

[45] It is clear from the wording of clause 3.1.9 and 4.4.5 that the solution sought by SASSA should incorporate proof of life verification before payment is made to a beneficiary, whether cash or electronic and biometric verification for this purpose was preferable. The solution proposed by bidders had to “increase the commonality of payment distribution platform, whether cash or electronic and exploit the possibility of utilising existing payment distribution channels and avoiding costly commercial payment infrastructures”.

[46] Section C of the RFP sets out the “scope of works” that clearly shows that biometric authentication must be conducted prior to each payment irrespective of the payment method used. It provides:

“3.1.3 The minimum acceptable requirement during bulk and on-going enrolments is that all the ten fingerprints of beneficiaries must be captured.

3.1.3. 1 The Biometric Data captured during enrolment will be used for matching and authenticating during payment process. The proposed solution must therefore allow or enable these business functions.

3.1.3.2 Biometric Data processing must allow 1 to many matching during enrolment and payment processing stages.

3.1.3.3 Biometric device, Data storage and transfer must conform to the following minimum specification:

- Scan at 500dpi;
- the Biometric images must be sent compressed in Aware WSQ format;
- image size must be 512 x 512, padded with white spaces if smaller; and
- only live prints accepted (thermal recognition).

3.1.4 The successful bidder/bidders must verify the identity of all beneficiaries before enrolling or giving out any information.

3.1.5 The enrolment Data will further be used to enable the life certification process and will become implicit during payments."

[47] Clause 3.1.3.3 sets out the minimum specification for the biometric device, the images must be sent compressed and only live prints would be accepted, this would exclude voice recognition.

[48] Clause 3.3 of the RPF deals with the payment solution, it states:

“3.3.1 Payment Services of Social Grants must be secured, preferably, Biometric based. The bidder’s proposal should provide detail on the measures that the bidder/s will put in place to ensure that the right person is paid the correct amount.

3.3.3 All payments will be effected upon authentic verification.”

[49] SASSA issued Bidders Notice 2 on 10 June 2011, five days before the initial deadline for the bid, to provide for clarifications on frequently or repeatedly asked questions. Bidders Notice 2 is headed “Proof of Life” and reads as follows:

“In order to ensure that the right beneficiary receives the right amount at the right time, Biometric verification must be performed when a beneficiary receives his grant regardless of the payment methodology”

[50] In my view, Bidders Notice 2 has the same effect with the wording of clauses 3.3.1. and 3.1.9 and does not introduce a new requirement, the preferred biometric verification for proof of life purposes, was always envisioned when payment of the grant is transferred to the nominated account of a beneficiary or when it is paid to him in cash at a payment point. Applicants correctly state that current technology does not permit of simultaneous verification upon withdrawals from ATMs, this shows that applicants misconstrued the terms of the RFP as biometric verification is not

required at the time of cash withdrawal at the ATM. In compliance with the RFP, CPS offered voice verification of the identity of the beneficiaries at each payment, whereas applicants offered annual life certification.

[51] I do not agree that Bidders Notice 2 had the effect of amending the terms of the bid materially as contended by the applicants. It is significant that applicants raise the issue of the alleged procedural irregularity in the tender process only because they were unsuccessful. It was open to the applicants to either interdict the continuance of the tender process or to apply for a further extension to amend their tender submission if they were of the view that the Bidders Notice introduced a new requirement to the RFP. In my view, this ground of review must fail.

UNFAIRNESS RELATING TO THE PRESENTATION OF THE 7 OCTOBER
2011

[52] The RFP also dealt with the issue of demonstrations and presentations, it provided that "bidders who submitted a proposal may be invited to give an oral presentation which may include but is not limited to an equipment/service demonstration of their proposed solution to SASSA".

[53] The RFP further states that "demonstrations shall be restricted to bidders that have obtained the minimum score of 70 percent of the technical/functional evaluation points during the technical evaluation phase." The document made it clear that SASSA would schedule a time and location for the presentations if it chose to have them, but that it was optional whether SASSA would conduct the oral hearings or not. The presentations and demonstrations were an opportunity to afford bidders a chance to clarify or elaborate on their proposals.

[54] The RFP document provided that "the final scores for those bidders who obtained the minimum score for the technical evaluation will be evaluated after the presentation/demonstrations. If there is a material difference in the presentation/demonstrations to that which the bidder specified in the bid documents, SASSA will request clarification in writing from the bidder." (Clause 7.1.4.5)

[55] Only Applicants and CPS were called upon to make oral presentations on less than 48 hours notice. No notification was given by SASSA of the issues to be addressed at the meeting. Two members of the BEC lowered the applicants' scores for certain topics which were not addressed at the meeting. The applicants's interim score was reduced from 70 percent to 58 percent in every category regardless of whether the relevant issue was discussed at the

meeting or not. Despite the fact that applicants had a financial backing from ABSA Bank Limited, which is a member of global Barclays group, points were deducted from applicants under the heading financial security for unexplained reasons. Scores were also lowered under the topics of Security Infrastructure and Transition period despite the fact that these topics were never addressed at the meeting and applicants were never given opportunity to make representations on the relevant issues before the lowering of scores.

[56] SASSA in its heads of argument and in court argued that no complaint was raised by applicants about the shortness of the notice at the time of the hearing and applicants have acquiesced in the process by participating in and must be taken to have waived their right to complain. It was further argued that the applicants and CPS were subjected to the same treatment. These submissions can be disposed of quickly; waiver is a question of fact, depending on the circumstances and can never be presumed unless it can be shown that applicants, with full knowledge of their rights, decided to abandon them. See **Abdie and Another v Minister of Home Affairs and others** 2011 (3) SA 7 (SCA) at par 32 and **Laws v Rutherford** 1924 AD 261 at 263. Secondly, applicants could not have complained earlier about the scores as the score sheets were produced later as part of the Rule 53 record. Lastly the fact that

both parties were treated equally unfairly does not detract from the fact that the process has to be objectively fair.

[57] The duty to act fairly requires in the circumstances of a particular case that an administrator bring to a person's attention the critical issue on which the decision is likely to turn so that the person may have an opportunity to deal with it. See **Joseph and others v City of Johannesburg** 2010 (3) BCLR 212 (CC) at par 42, **Chairman: State Tender Board v Supersonic Tours (Pty) Ltd** 2008 (6) SA 220 (SCA) at para 15 and Baxter Administrative Law (1994) 553.

[58] Section 3(2)(b) of PAJA enumerates a set of minimum requirements that an administrator "must" extend to any person entitled to procedural fairness under section 3(1). These requirements include "adequate notice of the nature and purpose of the proposed administrative action" and "a reasonable opportunity to make representations." In my view, the process followed by SASSA in reducing the applicants score was irrational, unfair and inconsistent with the requirements of section 217 of the Constitution, PFMA and PAJA.

BIAS ON THE PART OF MS NHLAPO

[59] The applicants argued that the cumulative effect of the fact that Ms Nhlapo, the Chairperson of the BEC, who lowered applicants score on issues not addressed at the meeting and the fact that she failed to disclose her conflict of interest gave rise to a reasonable apprehension of bias.

[60] Both Ms Nhlapo and Mr Yako, previously served on the board of another company, Reflective Learning Resources ("RLR") was not a tenderer nor associated with any tenderer. SASSA submitted that the relationship between Ms Nhlapo and Mr Yako does not amount to a business relationship as contended for by applicants as such relationship is too remote both in substance and in time. Mr Yako confirmed under oath that he only met Ms Nhlapo once, had not further contact with her and was not even aware that she served on the BEC.

[61] The test for disqualifying bias was restated by the Constitutional Court in **President of the Republic of South Africa and others v South Africa Rugby Football Union and Others** 1999 (4) SA 147 (CC) as follows at par 48.

"The question is whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions by counsel."

[62] It follows in my view, that the essential question in determining whether there is a reasonable apprehension of bias is whether there is a possibility (real and not remote) and not a probability that an administrator might not bring an impartial mind to the question to be determined.

[63] Applicants have failed to show a conflict of interest as Ms Nhlapo was not shown to have any interest – pecuniary or proprietary in any of the tenderers. Ms Nhlapo and Mr Yako did not know each other before they were appointed to the board of "RLR" in November 2007. They attended one meeting and they never spoke to each other since then. This meeting was before August 2009, the tenders were advertised in April 2011.

COMPOSITION OF THE BEC AND BAC

[64] In terms of SASSA's Supply Chain Management Circular No 10 of 2008. The BEC had to consist of 5 members one of whom must be a supply chain management practitioner. The BEC consisted of only 4 members. There is nothing in the circular to support SASSA's

contention that the Supply Chain Management Practitioner's role does not include the scoring of bids. It is clearly a requirement that one of the members must be a supply chain management practitioner. Failure to have a SCM practitioner as one of the BEC members is fundamental as each members vote is significant and the BEC is a specialist entity. It does not only go to the fairness of the process but also the expertise of adjudicators.

FAILURE TO ASSES BEE PARTNERS

[65] The bulk of the undertaking 74 percent of the work is to be performed by CPS's BEE partners, yet no assessment of the capacity of those partners to perform the relevant undertaking was made before the tender was awarded.. This decision is unlawful, taken for an ulterior purpose. See section 6(2)(a)(ii) of PAJA.

BIDDING BY PROVINCE

[66] In terms of the RFP, each bidder had to submit a separate bid in respect of each of the Provinces in respect of which it intended to bid. CPS submitted one technical proposal and one preferential proposal in respect of the nine Provinces. The CPS's technical and preferential proposal was the same for every Province. SASSA made it clear at a briefing session that it was a formal requirement of the

bid that each bidder must submit a separate bid for each Province. By failing to submit the bids by Province, CPS prevented the BEC from performing the comparative analysis of proposals per Province. CPS has accordingly failed to comply with a mandatory requirement of the RFP. An administrative body has no inherent power to condone non-compliance with a peremptory requirement unless it has been afforded a discretion to do so. See **Minister of Environmental affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd** 2004 (1) SA 308 SCA at para 31.

[67] The decision to overlook CPS failure to comply with the RFP is not rationally connected to the purpose of the tender as a whole, namely, to ensure proper comparative scrutiny of the bids across different Provinces. Accordingly, the decision falls to be reviewed in terms of section 6(2)(f)(ii)(aa) of PAJA.

[68] For all above irregularities taken cumulatively, the tender process does not comply, in my view, in all respect with the specifications and conditions of tender as set out in the tender documents. It is accordingly not an acceptable tender as defined. The procedurally unfair conduct of SASSA is inconsistent with the constitution and is invalid in terms of section 172 (1)(a) of the Constitution. See **Bengwenyama Minerals (Pty) Limited and**

Others v Genorah Resources (Pty) Limited and Others 2011 (4)
SA 113.

REMEDY

[69] In terms of 172(1)(b) and section 8 of PAJA the court is called upon to fashion a remedy which is just and equitable in the circumstances. The Supreme Court of Appeal held in **Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & others** that:

“This guideline involves a process of striking a balance between the applicant’s interests, on the one hand and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only.”

[70] The court stated that in exercising the discretion in terms of section 8 of PAJA, the court should strike a balance between the administrative bodies interests, the interest of the unsuccessful tenderer , the interest of the party that was awarded the tender and the adverse consequences for the public at large in whose interest the administrative body purports to act.

[71] A balance must be struck between legality and certainty. Froneman J in **Bengwenyama Minerals v Genorah Resources** 2011(4) SA113 stated :

“The rule of law must never be relinquished but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality, and if so, to what extent. The approach take will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case”.

[72] “Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitution precepts and at the broader level to entrench the rule of law” per Moseneke DCJ in **Stenkamp NO v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC). In the Millennium Waste Management case referred to above, the court further found as follows:

“... to set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for and innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those

of the disappointed tenderer if an order is to be made that is just and equitable.”

[73] The Child Law Centre, which was admitted as a *amicus curiae* highlight the material consequences the setting aside of the contract will inevitably have on social grants recipients. The Centre has pointed out that as at 29 February 2012, 10 789 595 children were receiving child support grants, 524 378 were receiving foster care grants and 114 007 were receiving care dependency grants. It follows that over 10 million children will be adversely affected by any interruption in the payments of grants. Therefore any order that the court grants must take into account that the best interest of children are of paramount importance in every matter concerning them.

[74] Applicants propose in their heads of argument and in court that as part of the courts just and equitable relief powers under section 172(1)(b) of the Constitution as read with section 8 of PAJA, the entire tender be remitted for reconsideration by SASSA and the court must provide for an interim position which might possibly include that in the interest of “interim” finality until such time as the tender is reconsidered, that CPS be allowed to continue with the current contract for a short period until the tender has been considered.

[75] The proposal by the applicants raises a number of problems of their own. It assumes that CPS will continue maintaining and upgrading a system which it has contracted to supply for five years temporarily in terms of a contract which has been declared invalid. SASSA must be obliged to accept the performance of CPS for a temporary period and go through a tender process afresh without been given an opportunity to show whether the proposal is practically achievable and what the adverse consequences will be.

[76] It is not clear how long it will take for a new tender to be commenced with as applicants argues that the present tender is fundamentally flawed at every level and new bid specifications and terms of references will have to be formulated. No evidence has been placed before court as to the practicality and mechanics of there proposals. According to CPS they now have ten million people in nine provinces in their system and have issued smartcards costing R190 million which will go to waste if a new tenderer takes over.

[77] Applicants rely on SASSA's version that the process of migration from Allpay to CPS can be reversed provided that it has a minimum of 60 days, this does not take into account that CPS, prior to implementation of the award, paid approximately 50 percent of the social grant beneficiaries in the country and it was therefore geared towards a takeover of all beneficiaries nationally in a

relatively short period of time. It is not clear whether applicants nor Empilweni has the infrastructure to do so.

[78] The remedy proposed by applicants is not just and equitable in the circumstances as it does not ensure that there will be no interruption in the payments of grants. Practicality and certainty in my view, does not require the setting aside of the agreement that SASSA has entered into with CPS.

[79] In the circumstances, applicants have succeeded in its challenge to SASSA's decision to award the tender to CPS. I agree that this matter is complex and of importance to both sides justifying the costs of three counsel.

[80] The following order is made:

80.1 The tender process is declared illegal and invalid.

80.2 The award of the tender to the third respondent is not set aside.

80.3 The first, second and third respondents are ordered to pay the costs which costs includes the costs of three counsel.

A handwritten signature in black ink, appearing to be 'K.E. Matojane', written over a horizontal line.

K E MATOJANE
JUDGE OF THE HIGH COURT