

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others
(CCT 48/13) [2013] ZACC 42

Date of Hearing: 10 September 2013

Date of Judgment: 29 November 2013

This matter dealt with whether the award of a tender by the South African Social Security Agency (SASSA) to Cash Paymaster Services (Pty) Ltd (CPS) for the countrywide payment of social grants, was constitutionally valid. AllPay Consolidated Investment Holdings (Pty) Ltd (AllPay), an unsuccessful bidder, contended that the tender was constitutionally invalid, calling for the judicial review of the decision to award CPS the tender on the basis of several alleged irregularities in the procurement process.

The review application was initially heard in the North Gauteng High Court in Pretoria. The High Court declared the tender process invalid, but declined to set the award aside because of the upheaval this would have involved. AllPay appealed to the Supreme Court of Appeal (SCA) who subsequently dismissed the appeal, finding that there were no unlawful irregularities in the procurement process that were fatal to the contract entered into by SASSA and CPS.

On appeal, AllPay asked the Constitutional Court to determine the following issues:

1. Whether AllPay ought to be granted leave to appeal the decision of the SCA;
2. The proper legal approach that ought to be followed in determining whether a procurement process ought to be nullified; and
3. How the alleged irregularities in the procurement process fared against the abovementioned proper legal process.

In terms of the first issue, the Constitutional Court granted AllPay leave to appeal the decision of the Supreme Court of Appeal. The Court reasoned that leave ought to be granted based on the matter being one of national importance and public interest since it implicated the socio-economic rights of some of the most vulnerable South Africans.

Regarding the proper legal approach that ought to have been followed by the SCA in adjudicating the matter, the Constitutional Court held that fairness and lawfulness (i.e. whether the process falls within the ambit of any of the grounds of review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA)) of the procurement process must be treated independently from the outcome of the tender process.

In order to determine the fairness and lawfulness of the procurement process, the alleged irregularities would have had to be material in nature. Whether an irregularity is material or not depends on the extent to which the

purpose of the requirement that was not complied with is attained. The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding. The fairness and lawfulness of a procurement process must be assessed in terms of PAJA.

If an irregularity is material, it will fall within the ambits of one or more of the grounds for review in PAJA. Once a decision or conduct is reviewed in terms of PAJA for material irregularities, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful.

Having regard to the above, the Court held that there were two irregularities in the procurement process that were material enough to fall into the one or more of the grounds for review in PAJA:

- (1) The first was SASSA's failure to ensure that the black economic empowerment credentials claimed by CPS were confirmed. The Court held that given the fundamental importance of redistributive policies to South Africa's constitutional democracy, SASSA's failure to ensure that CPS's claimed black economic empowerment credentials were objectively confirmed was fatally defective.

Accordingly, the failure to make that objective determination fell afoul of section 6(2)(b) PAJA (non-compliance with a mandatory and material condition) and section 6(2)(c)(iii) PAJA (failure to consider a relevant consideration).

- (2) The second material irregularity was the Bidders Notice 2 issued by CPS, which failed to clearly specify what was required of bidders in relation to biometric verification. This had the consequence of only CPS proceeding to the second stage of the procurement process – rendering the process uncompetitive.

Moreover, the Bidder's Notice 2 also changed the weight given to bids that were able to provide biometric verification during the payment of social grants from a 'preferential requirement' to a 'mandatory requirement'. Thus, the requirements of section 3(2)(b) PAJA (adequate notice of the nature and purpose of the proposed administrative action) were also not met. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair and transparent. Because of the uncertainty caused by the wording of the Request for Proposals and Bidders Notice 2, that purpose was not achieved.

For these reasons, the Court set aside the order of the SCA and declared that the award of the tender to CPS as constitutionally invalid

Despite the above, the Court held that it would be inappropriate to make a decision on a just and equitable remedy in the absence of further information and argument on these issues. It thus suspended the declaration of invalidity pending the parties making oral representations on 11 February 2014.

In its judgment, the Constitutional Court made the important point that for many people in South Africa, the payment of social grants by the state provides the only hope of living in conditions that the Constitutional values of dignity, freedom and equality promise. At the time, around 15 million people depended on these grants. These represent a group of vulnerable people, living at the margins of affluence in our society.

The outcome of this case was found to be a matter of national importance and public interest because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner.