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In-house provisioning and South African public procurement law

1. Introduction

Public procurement is a highly regulated aspect of state administration and an area in which litigation is frequent in South Africa. As Nugent JA noted in *South African Post Office v De Lacy*:¹ “Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency.” It is thus surprising that the question of in-house provisioning was only pertinently raised in South African courts in the matter of *Cash Paymaster Services (Pty) Ltd v The Chief Executive Officer of The South African Social Security Agency*,² which commenced in the High Court towards the end of 2009, winding its way through the judicial system to a Constitutional Court order in mid-2011. However, more surprising and somewhat disappointing, none of these courts used this opportunity to squarely deal with the question so that it still remains largely an unresolved one in South African law. In this contribution, I assess the judgments in the *Cash Paymaster Services* case and discuss some of the pertinent issues that will have to be addressed when the next opportunity arises to deal with in-house provisioning.

2. In-house provisioning versus public procurement

In-house provisioning refers to the situation where the state provides itself with the goods or services it needs to fulfil its public functions. Government may, for example, produce the goods itself or have its own staff to render the required services. This method of acquiring the necessary goods or services stands in contrast to public procurement, which involves an external supplier providing a public entity with the goods or services it needs. In the regulation of public procurement, it is thus important to distinguish cases of in-house provisioning from procurement, since only the latter will be subject to public procurement law. While distinguishing between these two methods may seem a simple matter, experience in public procurement regulation elsewhere, particularly in Europe with its multiple layers of public procurement regulation under EU and domestic laws, has shown that it may be a particularly difficult issue.³ This is especially the case where different public entities are involved, the one

1 *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA): par. 1.

2 *Cash Paymaster Services (Pty) Ltd v The Chief Executive Officer of The South African Social Security Agency* 2010 JDR 1254 (GNP).

3 See generally Comba & Treumer 2010.

providing the other. In this context, it is not always immediately apparent whether the particular transaction should be treated as a case of in-house provisioning or public procurement.

The case of transport services provides a good example of the difficulty in distinguishing between in-house provisioning and public procurement. It seems fairly clear that when a government department, say the department of health, uses vehicles from the government fleet, managed by the government garage,⁴ for land transport, it is a case of in-house provisioning. However, when the department of health relies on South African Airways (hereafter, SAA)⁵ for air transport, it is far less clear whether that amounts to in-house provisioning or procurement. In both cases, the department of health relies on an entity external to itself to render transport services and, in both cases, that external entity is state-owned. However, the nature of the relationship between the department of health and the government garage, on the one hand, and between the department and SAA, on the other, seems significantly different. This puts into question whether the case of air transport should be viewed as in-house provisioning. From a commercial perspective, the question is often whether competitors should be given the opportunity to compete with SAA in providing the state with air transport, which will be the premise of treating air transport in the example as a procurement rather than in-house provisioning. But, if one argues that there should be competition in the case of air transport, why should the situation be different in the case of land transport? Should private car rental firms not also be given the opportunity to compete for government land transport services? The main question is: What is the principled difference, if any, between these two examples that justifies a distinction in legal treatment.

From a constitutional perspective, one can ask whether there is any relevant difference between the two examples that justifies an obligation to provide everyone with the opportunity to benefit from state business in the one case, but not the other. Fairness in access to the “government market” can be viewed as an important policy dimension to the regulation of public procurement.⁶ In South Africa, in particular, this can be viewed as part of the obligation under section 217(1) of the *Constitution* on organs of state to contract for goods or services in terms of a fair and equitable system.⁷

The matter of *Cash Paymaster Services (Pty) Ltd v The Chief Executive Officer of The South African Social Security Agency*⁸ provided South African courts with an opportunity to engage with all these questions. Unfortunately, the courts largely failed to do so.

4 For argument’s sake, the government garage can simply be viewed as a unit within the relevant department of transport.

5 South African Airways is a company incorporated under the *Companies Act 71/2008* in terms of the *South African Airways Act 5/2007*, with the South African government as the sole shareholder.

6 See Quinot 2009:163.

7 *Constitution of the Republic of South Africa*, 1996.

8 *Cash Paymaster v CEO, SASSA 2010 JDR 1254 (GNP)*.

3. Cash Paymaster v CEO, SASSA

3.1 Facts and arguments

As a point of departure in assessing the case, it is important to have clarity on the *dramatis personae*. The public entities involved were the South African Social Security Agency (hereafter, SASSA, the second respondent) and the South African Post Office Ltd (hereafter, SAPO, the third respondent). SASSA was created in terms of the *South African Social Security Agency Act* 9 of 2004. Section 2(1) of that *Act* clothes SASSA with legal personality. SAPO is a public company incorporated under the *Companies Act* in terms of section 3(1) of the *Post Office Act* 44 of 1958. The state is the sole shareholder of SAPO. SAPO has several divisions, one of which is the Postbank, which, among others, renders a host of traditional banking services to members of the public.⁹ This is done pursuant to section 51(2) of the *Postal Services Act* 124 of 1998, which mandates SAPO via the Postbank to “undertake such activities as are customary for a financial institution carrying on the business of accepting deposits”.¹⁰ Both SASSA and SAPO are organs of state, as contemplated in section 239 of the *Constitution*.¹¹ The applicant is a private company that has provided social grant payment services in various provinces to SASSA and its provincial predecessors on public tender over an extended period of time.

In February 2007, SASSA published a request for proposals for the rendering of grant payment services in one or more of the provinces. The applicant submitted a tender in respect of all nine provinces. However, in October 2009, SASSA cancelled the call for tenders, citing irregularities in the process as reason. In the meanwhile, SASSA entered into an agreement with SAPO in terms of which SAPO would, *inter alia*, render grant payment services through its Postbank division to SASSA. This agreement was entered into without any public tender process being followed. SASSA and SAPO simply engaged in direct and private negotiations leading to the agreement.

The applicant subsequently challenged SASSA’s decision to enter into this agreement with SAPO on the basis that it did not comply with section 217 of the *Constitution*, in particular by failing to follow a competitive

9 It should be noted that, subsequent to this case, the *South African Postbank Limited Act* 9/2010 came into operation in terms of section 3 of which the Postbank is to be incorporated as a separate company with SAPO as the sole shareholder. This *Act* also contemplates the Postbank’s registration as a full bank under the *Banks Act* 94/1990.

10 This description echoes the general definition of “the business of a bank” in section 1 of the *Banks Act*, which states in relevant part: “the business of a bank’ means— (a) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question”.

11 *Cash Paymaster v CEO, SASSA*:par. 2.

process in awarding the contract. The respondents argued that section 217 did not apply to the present case, because they are both organs of state and the agreement thus, in effect, amounted to in-house provisioning.

In support of their argument, the respondents pointed to sections in the *Constitution* calling on:

all spheres of government and all organs of state within each sphere [to] ... co-operate with one another in mutual trust and good faith by ... assisting and supporting one another and ... co-ordinating their actions ... with one another¹² [and that] public administration must be governed by the democratic values and principles enshrined in the *Constitution* including ... efficient, economic and effective use of resources.¹³

The respondents further argued that, despite the fact that SASSA and SAPO are separate juristic persons, no organ of state is separate from the state and that all organs of state act as a unit. The argument followed that, when different organs of state “contract” with one another, it is only the state dealing with itself. The gist of the respondents’ argument was thus that this was, in effect, a case of in-house provisioning in line with the constitutional provisions quoted above and that section 217, that is public procurement law, as a result did not apply.

3.2 The High Court judgement

The High Court rejected the respondents’ arguments and found in favour of the applicant. It granted an order reviewing SASSA’s decision to enter into an agreement with SAPO and setting that decision aside. The court also interdicted SASSA and SAPO from entering into a formal contract.

The court reached its conclusion on the basis that section 217 applied to the agreement between SASSA and SAPO, so that the complete lack of any competitive tendering procedure amounted to a reviewable irregularity. The court thus found that this was not a case of in-house provisioning, but rather of procurement. Procurement law had to be complied with. The main reason for the court’s conclusion that section 217 applied in this scenario was that SASSA and SAPO are separate juristic persons.¹⁴ Consequently, the court held that their actions amounted to a contract for services as understood in section 217. In the court’s view, it made no difference that SASSA and SAPO are also both organs of state. The constitutional provisions upon which the respondents relied in support of their argument that this was a case of in-house provisioning could not, according to the court, change the fact that section 217 obliged them to follow a competitive process in concluding contracts.¹⁵ The distinct legal

12 *Constitution*:section 41(1)(h).

13 *Constitution*:section 195(1).

14 *Cash Paymaster v CEO, SASSA*:par. 21.

15 *Cash Paymaster v CEO, SASSA*:paras. 19-20.

personality of the organs of state involved was clearly the defining feature in this case, leading the court to conclude that “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”.¹⁶

The court noted that its conclusion was supported by the fact that SAPO, through the Postbank, competes in the open market with other financial institutions.¹⁷

The court, unfortunately, did not squarely deal with the anomalous scenarios, such as the transport services example given earlier, that may flow from a simplistic characterisation of all acquisition of goods and services as procurement, regardless of the private or public identity of the supplier. The respondents raised a number of examples, in addition to the transport example given earlier, in this respect:

[T]he provisioning of legal services by the Department of Justice (State Attorney) to other government departments; ... (d) the provisioning 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 provisioning of scientific research services by the CSIR, an organ of state, to the public sector.¹⁸

The problem was that the respondents did not put adequate evidence before the court to enable it to deal with the issues that are raised by these examples. The court’s remarks about these examples are not, however, particularly convincing. It noted that these are all examples of the state creating its own supply chain, whereas the case of the Postbank cannot be viewed in similar vein.¹⁹ In the court’s view, these examples thus “fall in categories with which we are not cornered here”, thus implying that they may be examples of in-house provisioning.²⁰ Given the lack of evidence, the court was not prepared to expand on these remarks. However, even on this limited basis, it seems difficult to distinguish between the examples put forward by the respondents and the case of the Postbank. A number of the service providers in the examples, that the court seems inclined to view as in-house provisioning, are similar or even in competition with private services providers. They cannot on this basis thus be distinguished from the Postbank. It is also questionable whether the basis for distinction can be found in the history of the relevant service provider’s origins, that is as an element of internal state supply chain or not. It seems arguable that at least some of the entities in these examples, including SAPO and the Postbank, may have been created with a mandate to render services to the

16 *Cash Paymaster v CEO, SASSA*:par. 21.

17 *Cash Paymaster v CEO, SASSA*:par. 21.

18 *Cash Paymaster v CEO, SASSA*:par. 25.

19 *Cash Paymaster v CEO, SASSA*:par. 25.

20 *Cash Paymaster v CEO, SASSA*:par. 25.

state internally and members of the public externally in mind. SAA and the CSIR are good examples.

3.3. Legal personality as basis for the High Court judgement

The High Court's reasoning based on the separate legal personality of SASSA and SAPO is logical in a technical sense. Section 217 of the *Constitution* applies when organs of state *contract*. The technical question is thus rightly whether SASSA and SAPO, as organs of state, contracted. A key requirement for a legal relationship to be a contract is the separate legal personality of the parties to the relationship.²¹ From this technical perspective, the main difference between in-house provisioning and procurement contracting is thus the existence of separate legal personality between the organs of state involved. This approach renders a fairly simple way of distinguishing between in-house provisioning and procurement on easily ascertainable objective grounds.

Unfortunately, this simple solution to the in-house/procurement issue does not tell us anything about *why* one would want to subject some transactions between organs of state to procurement rules and others not. This approach thus does not reflect a particularly purposive interpretation of section 217 of the *Constitution* and procurement regulation more generally.²² From a policy perspective, this is accordingly not an ideal solution. It is not surprising that systems with more practical experience with the in-house provisioning/procurement distinction have also found this simple approach, based on legal personality alone, overly simplistic and inadequate.

In EU law, the European Court of Justice extended, in its *Teckal* judgement, the category of in-house provisioning by including transactions between a contracting authority and a supplier where the former exercises control over the latter "which is similar to that which it [the contracting authority] exercises over its own departments and, at the same time, that person [the supplier] carries out the essential part of its activities with the controlling [contracting authority]".²³ Thus, the distinct legal personality of the supplier in such a case would not automatically result in the transaction being a procurement contract. If the *Teckal* conditions are met, the transaction would be one of in-house provisioning *despite* the existence of distinct legal personality.²⁴ This approach essentially recognises that there are other factors than distinct legal personality that impact on whether the particular transaction should be subjected to procurement law or not. In the terminology of *Cash Paymaster v CEO*,

21 Van der Merwe *et al.* 2007:263.

22 On the need for and dominance of purposive interpretation of especially constitutional provisionings, see Du Plessis 2007:115, 248; De Ville 2000:45-46, 249-254; Currie & De Waal 2013:135-138.

23 Case C-107/98 *Teckal Srl v Comune di Viano* [1999] ECR I-8121:par. 50.

24 Treumer 2010:168.

SASSA, the *Teckal* approach recognises that the state can set up its own internal supply chain using entities with distinct legal personality. In subsequent EU case law, the notion of control as a factor in the *Teckal* approach has been refined. In the *Stadt Halle* case,²⁵ for example, advocate general Stix-Hackl reasoned that the legal form of the supplier (e.g., a distinct incorporated company) was not determinative of the control question.²⁶ The court in this case held that mixed private-public ownership of a supplier, even where the public contracting entity is the majority shareholder, would result in public control over the supplier that is *not* similar to that exercised over public departments, with the result that the *Teckal* test of control was not satisfied.²⁷ The transaction between the contracting authority and the private-public owned supplier thus did not qualify as in-house provisioning.²⁸ The reasoning behind this ruling was that treating a transaction between such a supplier and the contracting authority as in-house provisioning would result in the (minority) private shareholder in the supplier enjoying an unfair advantage compared with other private entities. Procurement rules consequently had to be applied to further the objective of equal treatment in government business. This reasoning is a good example of a purposive approach to the question of in-house provisioning versus public procurement and, in particular, to the question of why public procurement rules should be applied to the type of transaction at issue. An important policy objective of EU procurement law is equal treatment of suppliers in support of the overarching objective of opening up the internal European market.²⁹ The distinction between in-house provisioning and procurement is thus drawn in a manner that gives expression to these policy objectives. As Burgi effectively formulates the position: “The lack of influence on the free competition between private contestants is the main argument for the acceptance of ‘in-house’ providing.”³⁰ Burgi thus argues that it is the pursuit of the policy objective of free competition that should frame the interpretation and application of the rules on in-house provisioning versus procurement.

Returning to South African public procurement law, the question, judging from a policy perspective, is thus what factors other than separate legal

25 Case C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Termische Restabfall-und Energieverwertungsanlage* [2005] ECR I-1.

26 Caranta 2010:20.

27 *Stadt Halle*:paras. 49-51.

28 Conversely, in case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585, the ECJ held that full public ownership of the separate supplier did not automatically result in the control test being met, but that further factors such as the nature of the company type used, the objects of the company, its area of operation and the actual administrative control that the contracting authority wielded over the company impacted on the control assessment, resulting in a contract between the company and its sole shareholder, the contracting authority, not being in-house provision. Caranta 2010:24-25; Treumer 2010:169.

29 Caranta 2010:42; Arrowsmith 2005:121-125.

30 Burgi 2010:80.

personality should guide the distinction between in-house provisioning and public procurement law. As noted earlier, legal personality on its own tells us very little about the policy objectives. If we take fairness in access to government business and the pursuit of best value for money as two key objectives of public procurement regulation in South Africa,³¹ we can formulate more informed factors to guide the in-house/procurement distinction. The High Court hinted at one such factor in *Cash Paymaster v CEO, SASSA* when it noted that “the Post Office, through its division of the Postbank, is competing in the open market with other financial institutions”.³² The question as to whether a public entity competes in a market with other suppliers in providing certain goods or services is a potentially significant factor in the present context. The answer to that question can tell us whether the policy objectives underlying procurement regulation are implicated when a contracting authority contemplates acquiring such goods or services from that public entity. Applied to the facts in *Cash Paymaster v CEO, SASSA*, this factor provides a much more convincing basis for the court’s finding that the transaction between SASSA and SAPO amounted to procurement rather than in-house provisioning.

Market competition as a factor is, however, no silver bullet either. There is certainly merit in the respondents’ arguments in *Cash Paymaster v CEO, SASSA* that the state must be allowed to pursue the most efficient provisioning approach.³³ This is, for example, made plain by section 195(1)(b) of the *Constitution*, which obliges all organs of state (including public enterprises) to promote “efficient, economic and effective use of resources”. The difficulty in the in-house/procurement debate is, however, on what view efficient use of resources should be judged as a factor. On one view, typically the one that applicants such as Cash Paymaster in the present matter will favour, the efficiency analysis should be done within the context of the particular transaction at hand. The question will thus be whether obtaining the specific goods or services in-house is more efficient than obtaining it from the private market or *vice versa*. Such an approach is arguably relatively easy to implement: one could simply compare the price and quality of say the goods potentially provided in-house with that available in the private market. Another approach, typically favoured by organs of state in scenarios such as the present, would be to take a much broader view of efficiency within public administration. In this view, it is not only the particular transaction at issue that must be considered in optimising public resources, but also the complete operations of the two organs of state involved (and potentially other organs of state as well). For example, in the context of the present matter, the argument could be that, when SAPO provides payment services to SASSA, the state is optimising the existing infrastructure of SAPO that the state must maintain

31 See Bolton 2013:179.

32 *Cash Paymaster v CEO, SASSA*:par. 21.

33 *Cash Paymaster v CEO, SASSA*:paras. 16-17.

for other public purposes such as postal services.³⁴ Utilising this existing infrastructure in the transaction at hand could thus have a beneficial efficiency impact on other public services, resulting in a net efficiency gain for the state. The possibility that the state may pay more for in-house payment services in the current transaction compared to similar services available in the private market is not decisive in this approach. However, this second approach is much more difficult to implement. It is not easy to determine the exact efficiency gains across the entire operations of two or even more organs of state implicated when one entity relies on another for goods or services. There are difficult questions of causality and the scope at which the analysis should be done to answer in following this second view. This leads to the question as to whether the judgement on whether to use in-house provisioning or procurement is one that can really be resolved in legal terms. It may quite likely be that this is a (economic) policy decision to be taken by the administration, the substance of which is not justiciable. If one agrees with this view, it may be that all the other factors put forward to distinguish in law between in-house provisioning and procurement are simply smokescreens to hide the ultimate non-justiciability of the decision at hand. At best, a court could then only scrutinise the reasonableness of the administration's decision in this respect and then most likely only on the lighter rationality test for reasonableness.

3.4 The Supreme Court of Appeal judgement

When the matter came to the SCA,³⁵ that court sidestepped the question of in-house provisioning. Despite counsel for all parties dealing with the in-house/procurement division in detail in their heads of argument and in oral argument before the court as well as the benefit of the High Court decision in which the relevant issues are pertinently set out, the SCA failed to provide clarity in this area of law. The court upheld the appeal, thus dismissing Cash Paymaster's application for review of SASSA's decision to conclude a contract with SAPO.

In reaching this conclusion, the SCA held that the question of whether inter-organ of state contracting is subject to section 217 of the *Constitution* is "beside the point".³⁶ The real question, according to the court, was whether SASSA was entitled to deviate from open tendering procedures in the instant case based on the relevant provisions of the Treasury Regulations³⁷ under the *Public Finance Management Act* 1 of 1999

34 It is of interest to note in this regard that SAPO's (2013:12) loss-making financial results for the financial year ending March 2013 were blamed partly on the loss of the grant payment services. In reaction to these results, the Minister of Communications indicated that government needs to increase its support to SAPO by itself using SAPO's services rather than external providers. Prinsloo 2013:1.

35 *Chief Executive Officer, South African Social Security Agency, and Others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA).

36 *CEO, SASSA v Cash Paymaster*; par. 16.

37 GN R225 *Government Gazette* 2005 (27388).

(*PFMA*). In the court's words: "The first inquiry ought to be to determine the meaning of the consequent legislation."³⁸ On this approach, the court held that it simply had to determine whether SASSA met the requirements for deviation set in Treasury Regulation 16A6.4.³⁹ Consequently, the SCA found that SASSA did meet the requirements for deviation and was, on that basis, entitled to contract directly with SAPO without having to follow a competitive public tender process.

The SCA's approach is curious, in particular the reasoning that the question of whether section 217 applies to the current matter is "beside the point". It seems that one must resolve this question first, even if only by implication, before one can even reach an analysis of the supply chain management regulation, Regulation 16A, of the Treasury Regulations. The court itself recognised that the *PFMA* and the relevant Treasury Regulations echo section 217 of the *Constitution*⁴⁰ and thus ostensibly aim to implement that section. It follows that the application of the relevant provisions of the *PFMA* and Treasury Regulations imply the application of section 217. The court also seems to implicitly acknowledge this when it stated: "Once such a [public procurement] system is in place and the system complies with the constitutional demands of s 217(1), the question whether any procurement is 'valid' must be answered with reference to the mentioned legislation or regulation."⁴¹ While, in terms of the subsidiarity principle, it is thus appropriate not to adjudicate the matter directly in terms of section 217 when there are legislative provisions giving effect to the constitutional provision, it does not mean that the applicability of section 217 is not at issue.⁴² The more accurate way of depicting the analysis is thus to ask whether section 217 applies via the *PFMA* and its regulations. However, even if one only focuses on the relevant Treasury Regulations, namely Regulation 16A6, that provision clearly applies only to "Procurement of goods and services". As with the statement of the SCA quoted immediately above in relation to the validity of any procurement, it follows from the wording of Regulation 16A6 that all of these provisions in the *Constitution*, statute and regulation only become relevant when an organ of state engages in procurement. That is, according to section 217(1), when an organ of state "contracts for goods or services". It is thus hard to understand how the SCA could view the central question of the applicability of section 217 and the consequent in-house/procurement issue as "beside the point", when that question seems to be the basis upon

38 *CEO, SASSA v Cash Paymaster*:par. 16.

39 This regulation reads: "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 officer or accounting authority."

40 *CEO, SASSA v Cash Paymaster*:par. 18.

41 *CEO, SASSA v Cash Paymaster*:par. 15.

42 On this aspect of the subsidiarity principle, formulated most clearly in *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC), see Van der Walt 2008:100-103.

which the specific procurement rules become applicable. In more specific terms, it seems difficult to understand why Treasury Regulation 16A6 would even be relevant to the dispute, if SASSA and SAPO's agreement did not amount to a procurement, which it would not if the respondents are correct in their argument that this transaction must be viewed as an in-house provisioning of services rather than procurement.

It would seem that, despite the SCA's view that the application of section 217 is "beside the point", it did indeed decide that point by holding Treasury Regulation 16A6 applicable to the case. That would only be the case if the transaction between SASSA and SAPO amounted to procurement. Unfortunately, that result is reached by implication and no reasoning is provided as to why that is the case. In other words, the SCA did not provide any reasoning on how to distinguish between in-house provisioning and procurement. By overruling the High Court, albeit on different grounds, the approach of the lower court based on legal personality can also no longer be viewed as authoritative on this point. The result is that the question of distinguishing between in-house provisioning and procurement is left completely open. This is an important opportunity lost.

4. Constitutional Court order

The matter finally reached the Constitutional Court in 2011 when the applicant lodged an application to appeal the SCA judgment. In a single line, the Constitutional Court dismissed the application stating that "it is not in the interest of justice for this Court to hear the matter".⁴³ No further reasoning is provided for this conclusion. Again, this is an important opportunity lost. In my view, the matter raised an important question about the interpretation and scope of application of section 217(1) of the *Constitution* with significant practical implications for state administration across all levels of government. The issues have furthermore been properly vented in the two courts below with contrasting outcomes, resulting, as indicated earlier, in considerable uncertainty as to how the in-house/procurement distinction is to be dealt with in our law. To my mind, this is exactly the kind of matter on which one would want the Constitutional Court to provide guidance.

5. Next time?

In light of the three courts' failure to provide adequate guidance on the distinction between in-house provisioning and procurement in South Africa, the question remains as to how a dispute turning on this distinction is to be dealt with in future.

⁴³ *Cash Paymaster Services (Pty) Ltd v The Chief Executive Officer of the South African Social Security Agency NO and Others* case no: CCT27/11, 6 June 2011.

In the context of local government, section 110(2) of the *Local Government: Municipal Finance Management Act* 56 of 2003 (*MFMA*) states that procurement rules under that *Act* are not applicable to the provision of goods or services to a municipality by another organ of state. This would suggest that the distinction between in-house provisioning and procurement is less problematic at local government level, since procurement rules are expressly excluded from inter-organ of state contracting involving municipalities. However, the *MFMA* cannot override section 217(1) of the *Constitution*, which expressly also applies to local government. It follows that the exclusion in section 110(2) of the *MFMA* is of a very limited nature and only excludes procurement rules under the *MFMA* rather than all procurement law from applying to inter-organ of state transactions at local government level. Contracts between municipalities and organs of state for the provision of goods or services to the municipality may thus still have to comply with the principles of section 217(1), including the principle of competition, depending on whether such contracts are deemed procurements or in-house provisioning. The result is that the distinction between in-house provisioning and procurement is as relevant in the local government context as in all other levels of government, despite the provisions of the *MFMA*. In fact, the exclusion in section 110(2) of the *MFMA* only adds to the problem, because it exempts certain types of municipal supply contracts from the scope of specific local government procurement law, but not procurement law in general. The consequent question is what particular rules to apply to inter-organ of state contracting at local government level where such contracts are viewed as procurement and not in-house provisioning. An ostensible lacuna is thus created by the partial exemption in section 110(2) of the *MFMA*.

One way of dealing with inter-organ of state contracting in terms of our law and to resolve the in-house provisioning/procurement issue is to treat such transactions as implementation protocols under the *Intergovernmental Relations Framework Act* 13 of 2005. This *Act*, which aims to implement the principle of co-operative government set out in chapter 3 of the *Constitution*, provides in section 35 for implementation protocols, stating in subsection (1) that:

[w]here the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.

The remainder of section 35 sets out the requirements for an implementation protocol, which seem noticeably similar to a contract between organs of state. For example, such a protocol must “determine the required and available resources to implement the protocol and the resources to be contributed by each organ of state with respect to the roles and

responsibilities allocated to it”⁴⁴ and must be “in writing and signed by the parties”.⁴⁵ Should one organ of state thus opt to rely on goods or services provided by another organ of state in the exercise of a particular public function, it may be possible to do so in the form of an implementation protocol. Such an arrangement will consequently be judged against the provisions of the *Intergovernmental Relations Framework Act* and not public procurement law.

6. Conclusion

In the absence of reliance on implementation protocols, courts will in future have to assess a supply arrangement between two organs of state in light of general principles distinguishing in-house provisioning from public procurement. The question is: What are the factors that a court should bear in mind when conducting such an assessment.

In my view, exclusive or even primary reliance on distinct legal personality is not the answer. Experience elsewhere has shown that such an approach is not viable, and the practical examples set out earlier indicate that such an approach renders highly anomalous results. Drawing on the *obiter* remarks of the High Court in the present matter,⁴⁶ the existence of competition between the supplying organ of state and private suppliers should be a key consideration in determining whether a particular transaction should be viewed as one of procurement instead of in-house provisioning. This factor can tell us something about whether competition is feasible in the particular case, whether direct contracting with the supplying organ of state may result in unfairness towards private competitors, and whether reliance on the market can enhance cost-effective procurement. The control test of EU procurement law is another important factor to determine whether the relationship between the two organs of state is truly an in-house one. Focusing on the substance of the relationship between the contracting and supplying organs of state, within the broader framework of state administration, provides important guidance on whether the administration consciously attempted to set up an internal supply chain. The entire assessment must be done against the background of the constitutional principles of public procurement found in section 217(1) of the *Constitution*, which captures the core aims of South African public procurement regulation. In every instance, the question should be asked as to whether those objectives are advanced by subjecting or not subjecting the particular arrangement to public procurement regulation.

In the final instance, the most important issue for a court to grapple with in a future case dealing with the in-house provisioning/procurement distinction is the extent to which the administration’s choice between these two distinct methods of acquiring goods and services should be

44 Section 35(3)(f).

45 Section 35(4)(b).

46 *Cash Paymaster v CEO, SASSA*:par. 21.

subjected to judicial scrutiny and to what extent this is an area calling for a deferential judicial approach. Deference in this context is captured in the distinction between treating one transaction as one of procurement and another as in-house provisioning. The former involves much closer scrutiny than the latter.

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