NEW YORK LAW SCHOOL WORKSHOP: TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM

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Reflections on AllPay and judicial review of tenders and accountability: of the fight against corruption, the long-arm of the law, and questions that remain unanswered (legally and factually)

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I. Introduction

That public procurement is a breeding ground for corruption is widely acknowledged,[3] and an international phenomenon.[4] It is therefore hardly surprising that it is in relation to matters of public procurement, and the corruption which it spawns, that South Africa's democratic and constitutional revolution has faced, and will continue to face, some of its biggest challenges. Starting with the Arms Deal (an arms procurement spending package in the late 1990s – sometimes, referred to as the democratic South

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[3] Note, for instance, that article 9 of the UN Convention against Corruption (UNCAC), to which South Africa is a party, specifically provides for requirements for "*Public procurement and management of public finances"* given the inherent risk of corruption therein; and section 13 of the South African Prevention and Combating of Corrupt Activities Act 2004 specifically provides for "*Offences in respect of corrupt activities relating to procuring and withdrawal of tenders".*

[4] For instance the OECD has recently summarised the scale of the problem as follows:

"The financial interests at stake, the volume of transactions at the international level and the close interactions between the public and private sectors make public procurement particularly vulnerable to waste. Public procurement is more subject to bribery by international firms than other government activities such as taxation or the judicial system according to a survey of the World Economic Forum. The European Commission estimates that EUR 120 billion are lost each year to corruption in the 27 EU member countries, which is the equivalent of the whole EU budget. **In public procurement, studies suggest that up to 20-25% of the public contracts' value may be lost to corruption**." (emphasis added)

OECD, *Implementing the OECD Principles for Integrity in Public Procurement* (November 2013), p. 22: www.oecd-ilibrary.org/govern- ance/implementing-the-oecd-principles-for-integrity-in-public-pro-curement/why-clean-public-procurement-matters_9789264201385- 3-en;jsessionid=95lfbj6h46u4a.x-oecd-live-01

Africa's original sin)[5] which still casts a long and lingering shadow,[6] and as of this writing including serious questions raised seemingly daily about some or other flawed or corrupt tender in relation to the public service, the Constitutional Court's recent warning could hardly be described as hyperbolic: "**corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order**."[7]

Although not necessarily, or even generally, as a consequence of corruption, tenders have become the sight of much legal contestation in the democratic South Africa; representing as they do the uneasy confluence of public and private interests and money.

It is against this background that one can best appreciate the significance of the opening lines of the Supreme Court of Appeal's ("SCA's") judgment in *AllPay*:[8] "**This is yet another case concerning a public tender**." Words possibly of judicial exasperation, fatigue, and quiet resignation in the face of ineffective administration of public processes and funds (or worse), and heralding – as we shall see – the Court's impatience with what it perceived to be the litigious nature of perceived unmeritorious losing bidders.

What those opening words do not convey, however, is the nature of the particular public tender in question. The AllPay tender, was a tender unlike almost any other that the South African courts had yet had occasion to consider. The tender was for the payment of social grants to the poorest of the poor across the whole country and was worth some R10 billion to the winning bidder. What is more, the case involved serious allegations of corruption and malfeasance in the tender before the SCA – to which we shall return.

Approximately 16 million South Africans receive and depend on social grants from the state, which means that this most vulnerable group of South Africans, many of whom rely on grants as their principle source of income, constitute a staggering 30% of our

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[5] See e.g: S Grootes, 'The NPS going down (in)fighting', *Daily Maverick*, 26 June 2014 (http://www.dailymaverick.co.za/article/2014-06-26-the-npa-going-down-infighting/#.VDOjYedf_yA; Staff Writers, 'The Editorial: Arms probe must deliver truth', *Mail & Guardian*, 23 Sept 2011 (http://mg.co.za/article/2011-09-23-the-editorial-arms-probe-must-deliver-truth; S Grootes, 'A ghost in the machine: o the Zuma Spy Tapes actually exist?', *Daily Maverick*, 22 Oct 2013 http://www.dailymaverick.co.za/article/2013-10-22-a-ghost-in-the-machine-do-the-zuma-spy-tapes-actually-exist/#.VDOj_udf_yB.

[6] See e.g. *S v Shaik* 2008 (5) SA354 (CC); *S v Shaik* 2007(1) SA 240 (SCA); *Terry Crawford-Browne v President of the Republic of South Africa and Another (South African Institute of Race Relations as amicus curiae) CCT 103/10* – an order made by the Court by consent required the establishment of a commission of inquiry (the current Seriti Commission of Inquiry into the Arms Deal); and *Zuma v Democratic Alliance and Others* (836/2013) [2014] ZASCA 101 (28 August 2014) in relation to proceedings instituted by the Democratic Alliance to obtain access to the "spy tapes", which are recordings of certain private conversations which formed part of the reason that corruption charges against President Zuma, inter alia, in relation to the arms deal, were withdrawn by the then Acting National Director of Public Prosecutions.

[7] *Glenister* at paragraph 166 (emphasis added).

[8] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2013 (4) SA 557 (SCA).

population. Given our Constitution's commitment to dignity,[9] to social assistance,[10] the rights of children[11] (who make up the large class of indirect grant beneficiaries),[12] and to procurement processes that are transparent, fair and competitive,[13] it was obviously critical that the process that makes social welfare possible is untainted and transparent, not least of all from insinuations of corruption or procedural irregularity. Relatedly, if evidence emerged to suggest corrupt practices occurred within the process, then it is imperative – not only for the rule of law, in the abstract, but also to ensure that the best services are obtained at the best price – that the allegations are investigated and that those who are implicated are held properly accountable.

Nevertheless, despite these considerations, and the specific evidence sought to be introduced before it about alleged corrupt practices at the heart of the tender, the SCA was unmoved. It found in *AllPay* that there was no reviewable irregularity (finding only what it termed "inconsequential" irregularities). By the SCA's lights, the case had been reduced to "*yet another*" tender matter.

It was not to end there, however. After an appeal to the Constitutional Court, the Court rendered two judgments in the matter of *AllPay Consolidated Investment Holdings (Pty) Ltd v SASSA and Cash Paymaster Services (Pty) Ltd (CPS).*[14] The AllPay merits judgment and AllPay remedy judgment (as we will refer to them) bring into sharp focus a variety of questions that implicate the judiciary, its relationship with the fight against corruption in South Africa, and the extent to which the efforts to hold corrupt individuals accountable might extend beyond South Africa to foreign jurisdictions with extra-territorial jurisdiction (and duties) in respect of corruption. *AllPay* also perhaps highlights the limits of certain types of procedures, such as administrative review, to deal effectively with allegations of corruption, and thus raises questions about how else these matters should be tackled if we are to avoid – in the words of the Constitutional Court in *Glenister* – corruption *felling at the knees virtually everything we hold dear and precious in our hard-won constitutional order.*

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[9] Section 10.

[10] Section 27.

[11] Section 28.

[12] In terms of the Social Assistance Act 13 of 2004, there are over 10 million grants made in respect of children, to their parents or guardians.

[13] Section 217.

[14] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (1) SA 604 (CC) ("**the merits judgment**"); *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (4) SA 179 (CC) ("**the remedy judgment**").

These questions will be considered in this paper and will form the basis of the presentation at the Workshop. We suggest that the *AllPay* matter provides, not only the leading case on matters of public procurement, but also a lens through which to understand the questions posed about the interplay between public and private interests and money in our constitutional democracy. Therefore, in order to situate those questions – and their answers – we begin by setting out briefly the relevant background to the AllPay matter.

II. The 10 billion Rand tender for social grant payments – a recipe for legal contestation (and corruption?)

The AllPay dispute revolved around a tender for the payment of social grants and the question of whether the award of a tender by the South African Social Security Agency (SASSA) to CPS, for the countrywide payment of social grants to beneficiaries, was constitutionally valid – perhaps the largest government tender since the infamous arms deal in South Africa.

The body that invited the tenders was SASSA, a government agency established under the South African Social Security Agency Act 9 of 2004. After a full tender process, the contract was awarded to CPS - one of the parties in the matter. AllPay Consolidated Investment Holdings (Pty) Ltd (together with a consortium of regional companies) – a subsidiary of the ABSA Group (now the Barclays Africa Group, a subsidiary of Barclays plc) – also tendered, but was unsuccessful.[15]

As one of the unsuccessful tenderers in the process, AllPay argued that the tender process followed was not constitutionally valid and brought a review application in the North Gauteng High Court to set it aside. The High Court declared the tender process invalid, but declined to set the award aside because of the practical upheaval which it feared may ensue,[16] since by the time of the hearing, and judgment, some three months later, CPS was already distributing grants across the country in terms of the tender.

Subsequently, AllPay appealed to the SCA against the refusal to set the award of the tender aside, while SASSA and CPS cross-appealed against the declaration of invalidity granted by the High Court. The SCA upheld the cross-appeal, and dismissed

[15] Prior to this tender, social grants had been distributed by CPS (in five provinces), AllPay (in four provinces), and a third company Empilweni (in one province).

[16] *Allpay Consolidated Investment Holdings (Pty) Ltd v The Chief Executive Officer of The South African Social Security Agency* 2012 JDR 1443 (GNP).

AllPay's appeal.

Aggrieved by this, AllPay sought leave to appeal to the Constitutional Court, which was granted. The matter was heard and the merits decided by the Constitutional Court in late 2013, and a remedy hearing and decision were scheduled and delivered in early 2014.

III. Of whiffs of corruption, and judicial nose-holding (and other acts of avoidance)

In the background during the dispute – and increasingly, through efforts by AllPay to move the allegations to the forefront of the litigation – was the whiff of corruption.

Both the Constitutional Court and the SCA have emphasised that corruption threatens the rule of law, good governance, democracy and fundamental rights.[17] In *S v Shaik* (the corruption prosecution of (now President) Jacob Zuma's former financial advisor, spawned by the arms deal), the SCA put the scope of the threat and the necessary judicial response in emphatic terms:

> "The **seriousness of the offence of corruption cannot be overemphasised**. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. **As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe**."[18]

It is also recognised in international conventions[19] that corruption undermines accountability, transparency and a government's ability to provide basic services. Our own domestic legislation, the Prevention and Combating of Corrupt Activities Act 2004 ("the Corruption Act") acknowledges that corruption undermines rights, the credibility of governments, democracy, morality, sustainable development and the rule of law.[20]

We have already highlighted that most recently, in *Glenister*,[21] both the majority

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[17] See e.g, *S v Shaik* 2008 (5) SA354 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001(1) SA 883 (CC); *S v Shaik* 2007(1) SA 240 (SCA); and *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

[18] *S v Shaik* (SCA) para 223 (our emphasis).

[19] United Nations Convention against Corruption adopted on 31 October 2003; African Union Convention adopted on 11 July 2003; Southern African Development Community Protocol Against Corruption adopted on 14 August 2001. South Africa is a party to, and bound by, all of these instruments.

[20] The Preamble to the Corruption Act.

[21] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

and the minority judgments of the Constitutional Court identified corruption as a scourge which poses a grave danger to democracy, accountability, the rule of law, and guaranteed human rights.

The minority judgment, by Ngcobo CJ,[22] held that "[c]orruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights**."**

The majority judgment, by Moseneke DCJ and Cameron J, confirmed these dangers.

When considering the more specific effects of corruption, the Constitutional Court held that:[23]

> "Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics [and] efficiency, and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services."

Given this judicial and legislative abhorrence for corruption and a clear-sighted acceptance of the real danger it poses to our constitutional democracy, allegations of corruption in one of the biggest public tenders ever awarded, that impacts upon millions of the most vulnerable in society, and engages the state's constitutional obligations to provide social assistance (under section 27), would naturally be highly relevant, and ought rightly to be brought to a court's and the state's attention, if only to force the state to investigate and place relevant evidence before the court.

Before the High Court there were suggestions in the media that the contract had been awarded to CPS on account of questionable practices. However, when the papers in the litigation were closed and served it became clear that the evidence was all contested and SASSA had furnished no evidence of any investigations it had undertaken (and therefore it was likely that evidence in this regard would constitute inadmissible hearsay). In order to avoid the real risk of delaying the hearing by side-disputes about admissibility of evidence,[24] in the hearing of the merits of the matter (which had to be decided urgently

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[22] *Glenister*, para 57, and also see para 83.

[23] *Glenister*, para 175.

[24] The agreed expedited hearing had already been postponed by more than a month, due to SASSA's failure to timeously provide the full review record, which necessitated AllPay bringing a separate, and successful, compelling application to produce further documentation previously withheld, including communications

because CPS, the winning tenderer, and SASSA, the government agency that awarded the tender, refused to give an undertaking to suspend the implementation of the tender pending the outcome of the High Court litigation) AllPay consented to the relevant portions of the papers being struck out. The effect was that AllPay argued the matter in the High Court without any reference to corruption.

Similarly in the SCA no reliance was placed on any allegations of corruption (the relevant allegations having been struck from the record in the High Court), and there was no mention direct or indirect of corruption in AllPay's heads of argument. Thus at the start of the SCA appeal hearing the SCA questioned AllPay's lead counsel about the issue of corruption; and Gilbert Marcus SC readily and rightly agreed that AllPay, for purposes of the SCA appeal, did not rely on issues relating to corruption.

As it turned out, after the hearing in the SCA, but before the SCA had delivered judgment, AllPay subsequently received further evidence (which it sought to adduce before the SCA in a form that was admissible), of what appeared to be an admission by one of SASSA's own officials, who formed part of the secretariat for the tender and was present at all stages of the tender's evaluation and adjudication processes, that the tender was tainted by widespread dishonesty and mala fides. The receipt of this new evidence in an admissible form (a sworn affidavit by the person in whom the official confided together with a transcript – and tendered audio recording – of the conversation in which the admissions of impropriety were made), allowed AllPay to seek to place the evidence before the SCA, and to seek to rely on it prior to the SCA rendering its judgment.

The SCA refused that request outright, without hearing argument, and without asking SASSA to provide its own response to the evidence of one of its own witnesses in the matter (the official had previously provided an affidavit on behalf of SASSA in the matter). It is unfortunate that the SCA, rather than carping at AllPay for its attempts at late admission of this evidence (which was explained by AllPay when it sought to adduce the evidence), did not grasp the nettle by dealing with the evidence and its implications. Instead, it refused to see or hear any evil in the process by its refusal to admit the evidence without so much as obtaining SASSA's view on the evidence of its own witness.

In any event, by the time the matter was heard by the Constitutional Court AllPay again attempted to place the evidence before the Court (by way of a joint application for leave to appeal and leave to place the further evidence before the Court). That effort drew

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with Mr Michael Hulley ("Hulley"), at the time and currently the special advisor to President Zuma, who had apparently been appointed as "*overall strategic advisor*" to the tender. More of Hulley, later.

attention from Corruption Watch (a notable NGO in South Africa), which intervened in the appeal to contend, inter alia, that the questions of corruption arising from the evidence required further investigation at the very least from SASSA.

In opposing AllPay's application for leave to appeal in the Constitutional Court, both SASSA and CPS, on affidavit, attempted to deal with the new evidence that AllPay sought to adduce (which was the same as that which AllPay had placed before the SCA). While SASSA denied the import of the evidence, there were a number of salient issues, all of which pointed to the real risk that the tender was tainted with corruption, which were not answered, and in answering some of the allegations, SASSA revealed further areas of concern (such as the fact of unexplained payments, during the tender adjudicate process, by the supposedly independent tender process monitor for luxuriating spa treatments for members of the adjudication body). Moreover, SASSA produced an affidavit from its official who had made the key allegations sought to be introduced by AllPay. The official, while now denying that he believed that the tender was awarded due to any impropriety or mala fides (yet inexplicably and ominously still indicating that he feared for his life), admitted making the statements reflected in the transcript sought to be introduced by AllPay, and did not claim that any of those statements were fabrications, but merely that the statements should not be interpreted to suggest that there had been mala fides – and while still maintaining that in his view the tender process had been marked by various unexplained "short-cuts".

Ultimately the Constitutional Court decided the appeal in favour of AllPay without:

a) grappling with the further evidence, which it refused to admit (*inter alia* because it found that the evidence "*remains hearsay evidence and introduces no new independent evidence of major irregularities*")[25];

b) grappling with whether SASSA had discharged its statutory obligation to properly and fully investigate the allegations in relation to corruption (on the basis, *inter alia*, that to do so would require the Court to effectively sit as a court of first instance),[26] even though SASSA's own affidavits indicated that a number of issues were not resolved and had not been properly investigated.

The questions raised by the further evidence and SASSA's affidavits in answer thereto – and the accounts of corruption at the heart of the process – remain unresolved. They raise issues of accountability and the means by which to probe the alleged

[25] *AllPay merits judgment* para 94.
[26] *AllPay merits judgment* para 95.

impropriety (including by foreign investigative agencies through extra-territorially applicable anti-corruption legislation, discussed in the final section of this paper) and the possibility of future steps to be taken to investigate those involved, including individuals such as Mr Michael Hulley, President Zuma's legal adviser, who was implicated in the award of the tender to CPS (in fact, there was a suggestion in the evidence by the SASSA official, not directly disputed by SASSA, that Mr Hulley may even have been paid by CPS), and whose involvement in the process remains shrouded in murkiness.

The AllPay judgment thus provides some useful guidance as to the limits of judicial review to deal with allegations of corruption; and highlights the need for those who might wish to push for greater accountability in respect of the corruption allegations implicated in a tender, to consider alternative processes beyond the court. These will be discussed in the final section.

At the same time, it is impossible from the outside to know whether the Constitutional Court was indeed privately motivated in arriving at its merits judgment (to hold that the SASSA tender was unlawful for violating various administrative law prescripts) and its remedy judgment (requiring a fresh tender with, *inter alia*, new evaluation and adjudication committees and oversight by the Court), precisely because it was mindful of the lurking issues of corruption that had been raised around the tender award. This is at least one explanation for why, unlike the SCA, the Constitutional Court endorsed in its judgment rigorous fealty to the requirements for procedural fairness and constitutionally compliant tender processes, even if it held out publicly in its judgment that it was agnostic as to whether there was or was not corruption involved in the tender. We turn to those different responses and the implications for accountability in the next section.

IV. The applicable review standard – from the supine to the sublime

A centrally important feature of this debate is the difference in approach to the irregularities by the SCA as compared with the Constitutional Court. The SCA found that even though the tender process in this particular matter had irregularities, these were inconsequential irregularities, which - despite their existence - would not have affected the final outcome of the award.

The SCA reasoned that an irregularity is inconsequential when, on a hindsight assessment of the process, the successful bidder would likely still have been successful

despite the presence of the irregularity.[27] According to the approach of the SCA, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome.

With respect to the SCA, this supine approach to irregularities not only ignores the injunction under the Constitution that procurement processes must be consistent with the requirements under section 217 of the Constitution of transparency, fairness and competitiveness, but also opens the door to corrupt practices by court's closing their eyes to their likelihood.

As pointed out earlier, the Constitutional Court has stressed that corruption is a very real threat to the full realisation of our constitutional promises, and has a disproportionate impact on the poor and vulnerable, who, of necessity, are greatly reliant on the state for their very survival. Flaws in tender processes, and tenders that lack fairness, transparency, equity, and competitiveness, are the very handmaidens of more serious forms of unlawfulness: mala fides, malfeasance, dishonesty and corruption. It is only by strict fealty to the former, as indeed required by the Constitution, that the latter can be effectively guarded against. If the approach taken by the SCA in this case had been allowed to stand it would have threatened to undermine the protections put in place under the Constitution in respect of public procurement. The SCA's approach could have had the effect of virtually insulating tenders from review absent the clearest evidence of corruption (and by ignoring that uncontroverted evidence of corruption in tender processes is rarely available, particularly in urgent tender reviews which are usually brought on motion proceedings).

The SCA's approach was therefore at odds with the Constitutional Court's jurisprudence on administrative justice and the constitutional obligations to fight corruption – certainly there was no acknowledgment at all by the SCA of these obligations. The SCA's approach is also at odds with the best of comparative jurisprudence which confirms that a fair, equitable and transparent tender system is necessary precisely because "it precludes any risk of favouritism or arbitrariness on the part of the contracting authority".[28] Furthermore, as Froneman J held (prior to his elevation to the Constitutional Court) "[t]he procurement of goods and services by organs of state and the rendering of those goods and services by third parties is a public, not private, matter under our

[27] See the *AllPay* (SCA judgment) paras 21 and 95; and *AllPay merits judgment* paras 17 – 21.

[28] *R (on the application of the Law Society) v Legal Services Commission; Dexter Montague & Partners (a firm) v Legal Services Commission* [2008] All ER 148 (CA) at paras 42-43.

constitutional system of government. **The mischief that this public gaze seeks to avoid is nepotism, patronage, 'or worse'.** "[29]

Similarly, Cameron JA (as he then was) has cautioned: "The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realizing our constitutional vision of open, uncorrupt and responsive government."[30]

Academic writers have also stressed the point: "One of the primary reasons for the express inclusion of the five principles in section 217(1) of the Constitution is to safeguard the integrity of the government procurement process. The inclusion of the principles, in addition to ensuring the prudent use of public resources, is also aimed at preventing corruption." (emphasis added)[31]

Accordingly, the supine approach adopted by the SCA was in need of firm over-turning. That came in the form of a sublime judgment delivered by Justice Froneman on behalf of a unanimous Constitutional Court on appeal – sublime not only for AllPay, which had been stung by the unduly critical and caustic tone of the SCA's judgment dismissing AllPay's misgivings about the tender as "inconsequential", but also for South African procurement law (and lawyers) urgently in need of clarity and reality as to the appropriate judicial review standard in procurement and tender cases. AllPay was the perfect opportunity for the Constitutional Court to provide such light. Somewhat surprisingly, despite almost 20 years of constitutional democracy, AllPay was the first case where the Constitutional Court directly considered a review of a tender and pronounced on the appropriate review standard.

The Constitutional Court went out of its way to put distance between itself and the views of the SCA in the matter. Crucially, it ruled that the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.[32] The Court furthermore held that the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.[33] This means that the two are interrelated and cannot be severed and that even if it appears that an acceptable outcome is achieved, it is unacceptable if an improper process was followed to get there.

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[29] *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & Others* [2007] JOL 20448 (SE) at paras 29-30 (emphasis added).

[30] *Olitzki Property Holdings v State Tender Board and Another 2001* (3) SA 1247 (SCA) at para 31.

[31] Bolton, *The Law of Government Procurement in South Africa* 2007, pg 57.

[32] Para 22.

[33] Para 22.

As the Constitutional Court held, *"[i]f the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed."*

The Constitutional Court specifically took issue with the reasoning of the SCA regarding its approach to irregularities and found it detrimental to important aspects of the procurement process.[34].In this regard the Court held that the "insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."[35]

Given the impact which corruption relating to the awarding of tenders (in this case, to provide social grants to the poorest of the poor) may have on service delivery – and thus the achievement and fulfilment of fundamental rights – AllPay, and the questions it raises, answers, and leaves unresolved, is a crucial decision.

The review standard set by the Court in the merits judgment and the clarity provided and the insistence on strict fealty to procedural requirements and formalities (while recognising that there can still be, from a purposive perspective, immaterial procedural irregularities) is to be welcomed. So too is the clear enunciation by the Court of the instrumental, not just intrinsic, value of upholding procedural fairness: it leads to better outcomes in tenders and guards against corruption.

However, some of the most significant features of the AllPay matter for the rule of law and accountability arise not from the merits judgment but from the remedy judgment. In that judgment, which we discuss next, the Court showed keen interest in ensuring that that which had been broken, could and should, not only be declared broken, but, where possible, should be fixed.

V. Restoring That Which Has Been Taken: How To Remedy An Unlawful Tender

The Constitutional Court, in its merits judgment, after finding and declaring the tender unlawful, specifically reserved the question of what would be a just and equitable remedy, and directed the parties to submit further facts and legal argument as to how the

[34] Para 24.
[35] Para 27, emphasis added.

Court should approach remedy, particularly given a number of practical difficulties confronting the court.[36]

This bifurcated procedure is, as far as we are aware, a first for any South African administrative review decision, and certainly a first for a tender review on appeal. It is to be welcomed, as an innovative procedure which allows the court to craft a remedy that takes proper account of the facts on the ground, particularly in circumstances where, due to the lapse of time, or perhaps a failure on the part of the state, all the relevant facts are not before the court. It gives due regard to the fact that the relief in a tender is a public law remedy, and as such has broad import and implications for the public, not merely the parties before the court. In the circumstances, the Constitutional Court's approach in AllPay might usefully encourage a similar approach in other deserving administrative review cases.

We now turn to deal with a number of important findings in the AllPay remedy judgment that we believe sound a clarion call for greater accountability in public procurement, provide a guide for how to rectify that which has been broken, and, which may strike a blow against corruption in tenders.

A. The corrective principle

The key finding of the Court, which shaped its approach to the question of what remedy to order, was put succinctly:

> "Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a **default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented**. It is an approach that accords with the rule of law and principle of legality."[37]

This approach the Constitutional Court termed "*the corrective principle*".[38] This is important because it marks a strong rejection of a tendency in certain South African administrative review judgments to view a mere declaration of invalidity (in some instances coupled with suspension of the declaration), while no steps are required to cure the consequences of the invalidity, as sufficient. Indeed, this approach, of declaring the tender constitutionally invalid, but then refusing to review and set aside the tender award

[36] Para 96.
[37] Para 30 (emphasis added).
[38] Para 32.

or take any remedial steps, was precisely the approach adopted by the High Court in AllPay.[39]

The Constitutional Court has thus made clear that declaratory relief, which has no practical consequence, is often hollow – and fails to give proper effect to the requirements of section 172 of the Constitution, [40] or the judicial duty to provide a meaningful remedy. This recognition should embolden our courts to be more vigilant in ensuring that wherever possible the effects of invalidity must be corrected. This approach recognises that while suspension of a declaration may be granted, it is not granted for no purpose or indefinitely. In terms of section 172(1)(b) of the Constitution, suspension has a clear and constitutionally defined remit: to facilitate correction of the constitutional defect. Without that purpose being achieved the suspension runs the risk of rendering nugatory the very declaration of invalidity that is constitutionally mandatory for courts to make. This is not what the Constitution intends, and would show insufficient fealty to the principle of legality. Rather, suspension is intended to allow the administrator sufficient time to correct the defects in its conduct, when the automatic consequences of such invalidity would otherwise cause unjust and inequitable results.

It will be appreciated that if courts, despite making a declaration of invalidity, routinely fail to require a fresh tender or reconsideration to correct the constitutional defects in the tender process, such a failure would entrench the following consequences:

a) It would have a chilling effect on the judicial review of tenders; tenderers would have little incentive to undertake the costly, and length process required to challenge unconstitutional tenderers;
b) It would encourage laxity on the part of officials in relation to ensuring that tender processes are fair and competitive, sending a signal to officials that despite their unconstitutional conduct, defective and uncompetitive tenders will be allowed to stand, even if they are successfully challenged in court. That would disincentivise strict fealty to the requirements of the Constitution and the related procurement and

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[39] See *AllPay* (High Court) paras 79-80, and the order made declaring the tender process "illegal and invalid", but refusing to set aside the award of the tender that flowed from the invalid process.

[40] AllPay remedy judgment para 29. Section 172 provides that

"(1) When deciding a constitutional matter within its power, a court-

(a) **must declare** that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including —

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) **an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect**." (our emphasis)

administrative legislation,[41] thus opening the door to uncompetitive (and hence more expensive) state procurement, and exacerbating the risk of malfeasance and corruption.

AllPay's remedy judgment is thus an important caution against allowing constitutionally invalid tenders to stand despite their invalidity, one reason being that such a position would effectively fail to prioritise the imperative of procedurally fair tendering. It also highlights that judicial creativity will often be required if a court is to discharge its duties under section 172(1)(b) of the Constitution to grant a just and equitable remedy in a tender dispute. That judicial creativity was on full display in the Court's remedy judgment, as we shall now see.

B. On ensuring the public good and considering all the facts

The Court emphasised that in public procurement matters priority in crafting a remedy must be given to the "the public good", such that "the public interest in procurement and social-security matters must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed."[42] This of necessity therefore requires a court to undertake a broader enquiry.[43] This broad enquiry was precisely why the Court, of its own accord, called for further factual (as well as legal) submissions from the parties in relation to remedy.

As indicated in the introduction to the section, this approach is a refreshing one, and one that it is hoped our courts will take in other deserving cases. The significance of the approach is that part of the argument run by SASSA was that AllPay had placed insufficient evidence before the Court in relation to how practically the tender could be redone, while at the same time allowing the payment of social grants to continue in the interim (since obviously this was a vital service which could not be suspended, or taken over immediately). The High Court accepted this argument by SASSA, and this perceived uncertainty in relation to the practical consequences appeared to be the main reason it gave no remedy other than declaring that the tender process was constitutionally invalid.[44] As submitted in the preceding section, failing to give a remedy other than a declaration is a

[41] E.g. the Preferential Public Procurement Framework Act 5 of 2000, the Public Finance Management Act 1 0f 1999, and Promotion of Administrative Justice Act 3 of 2000.
[42] Para 33.
[43] Para 33.
[44] *AllPay* (High Court) paras 75 to 77.

decidedly unsatisfactory approach.

Nevertheless, in the AllPay matter there was indeed a paucity of detailed facts before the various courts in relation to the practical matters of how the tender could be redone and interim arrangements put in place to ensure the continued payment of millions of beneficiaries. Part of the difficulty was that the necessary facts and information on these matters were primarily within SASSA's knowledge, and, as submitted by AllPay, SASSA had failed in its constitutional duty to furnish the court with such relevant evidence,[45] and had instead, unacceptably, played possum with the court.[46]

A court is left in a particularly difficult position when an organ of state furnishes insufficient information in relation to remedy: does it grant a remedy without properly appreciating the impact thereof, or does it refuse the remedy, thus effectively penalising the applicant (and possibly the public) for the state's failure to adduce evidence? Fortunately, in AllPay the Constitutional Court chartered an inspired *via media* between Scylla and Charybdis. It did so by declaring the tender unconstitutional, but suspended the declaration and reserved the question of what would be a just and equitable remedy, while directing the parties to urgently file further factual and legal submissions on remedy (and in particular a number of direct questions, which were of concern to the court) for purposes of a second hearing dedicated to the question of remedy.

C. The nature of the new tender, and issues of discretion and judicial restraint

Having heard the parties on remedy and having received their submissions and further evidence on what would be a just and equitable order, the Constitutional Court delivered its separate remedy judgment. In the remedy judgment it emphasised that the way it crafted the remedy in AllPay arose from the practical difficulties inherent in relation to this specific social grants tender under review, and the on-going disputes in relation to certain facts.

This led the Court in its order, while requiring SASSA to institute a fresh tender (which was to be initiated within 30 days), [47] to refrain from any attempt to impose a final solution

[45] *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) at para 19. See also *Gory v Kolver N.O. and Others (Starke and Others intervening)* 2007 (4) SA 97 (CC) at para 64.

[46] *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) (per Cameron J) para 850.

[47] Para 78, order 3.

on SASSA by requiring it to award the tender after that fresh tender process.[48]

The Court did this because it found that it was not in a position to determine what the effect of making a new tender award would be on a number of interests. It listed those interests in relation to which there was uncertainty:[49]

a) the ability of other potential tenderers to make truly competitive bids;
b) whether a new system would necessarily disrupt existing payments (a particular concern, and one which was strongly argued by the Centre for Child Law, an amicus curiae in the matter);
c) whether SASSA will be able to run the administration and payment of social grants independently at the time envisaged, which SASSA had stated to be in 2017; and
d) what advantages CPS may derive from its incumbency.

The Court therefore held that "[a] new tender process will make it possible for SASSA to have more information available to it when it makes a decision whether to award a new tender at the end of the process."

In order to give effect to this, the Court ordered that the RFP (request for proposals) for the new tender had to ensure that:

a) if any re-registration process is required, no loss of lawful existing social grants occurs; and
b) the payment of lawful existing grants is not interrupted.

The Court held further that while normally the term of a procurement contract could be set by the government, in the present matter the fresh tender must be for a five year period. The Court's explicit *ratio* for this requirement was an acceptance that without extending the duration of the new contract beyond the current period, CPS would have an insuperable advantage because of its incumbency, given that without a long-term contract a tenderer's huge initial outlay could not be recouped.[50] This, the Court held, would "simply perpetuate the consequences of the unlawful tender awarded to Cash Paymaster."[51]

This is an important acceptance by the Court that in fashioning an equitable remedy, it can and should, at least to some extent, dictate to the state certain aspects of the tender, to ensure a fair outcome, and so that a retender order is not merely a pyrrhic

[48] Para 40.
[49] Para 40.
[50] Para 43.
[51] Para 44.

victory.

D. Great accountability: private companies as organs of state for the purpose of public tenders

The Court held that for the purposes of the contract to distribute social grants CPS was, by virtue of the fact that its contract entailed it exercising a public power and performing a public function, an "*organ of state*", within the meaning of section 239 of the Constitution. CPS therefore bore the responsibilities of an organ of state imposed by the Constitution.[52] In particular, the Court held that this means that CPS (and by extension any new bidder awarded such tender) is accountable to the people of South Africa in relation to the payment of social grants. The Court emphasised that this did not mean that "its entire commercial operation suddenly becomes open to public scrutiny".[53] However, the commercial part of its business dependent on, or derived from, the distribution of social grants, both in its operational and financial aspects, would be open to public scrutiny.[54]

It is not clear in what other tenders this will apply, and it may be limited to the type of situation envisaged in AllPay, where the tenderer effectively fulfils a constitutional obligation on behalf of the state (the distribution of social grants). Nevertheless, this is an important finding by the Court. It should ensure great accountability, not only in the tender phase, but also in the implementation phase of public procurement. It casts a definite public duty, at least in some cases, on those awarded public tenders.

It remains to be seen how this principle is applied in other tender cases, and more broadly in relation to holding tenderers accountable for the proper implementation of tenders once awarded. The need for accountability ought to lead to a generous application of this principle.

We should note that the Court also made clear that SASSA did not, by the conclusion of the contract with CPS for the distribution of social grants, divest itself of its constitutional responsibility and public accountability for the payment of social grants.[55] This means that it is accountable, together with CPS, for the performance of those functions by CPS. Again, through this pronouncement in relation to remedy the Court

[52] Para 52.
[53] Para 59.
[54] Para 59.
[55] Para58.

again appears to have had a clear eye towards ensuring greater accountability.

E. Holding a gun to the court's head: on suspension of invalidity and the right of contractors to walk away

In what appeared to be a calculated attempt to avoid any new tender being ordered, CPS had in the various courts specifically suggested that it may not be willing to continue to pay social grants in the interim while a new tender was being undertaking (a serious threat, given that no court could lightly countenance the possibility that millions of vulnerable beneficiaries may not receive their grants). The Constitutional Court rightly rejected the underlying premise of CPS's argument that "if the existing contract is declared invalid Cash Paymaster would have no further obligations towards anyone and would be entitled to walk away from the contract without any sanction for doing so."[56] The Court did so on the following grounds:

a) Since the Court, in terms of section 172(1)(b) of the Constitution, is entitled to suspend the declaration of invalidity of the contract until any new payment process is operational, during the period of suspension the contract remains operational and CPS would stay bound to its contractual and constitutional obligations.[57]

a) As a consequence of concluding a procurement contract for the performance of public functions (the distribution of the social grants), "even after the dissolution of the contract, but before the appointment of another service provider, [CPS] will have constitutional obligations."[58] In the circumstances, the Court held that CPS "has the **constitutional obligation to ensure that a workable payment system remains in place <u>until a new one is operational</u>**."[59]

These on-going obligations are relevant as they continue to bind CPS, since in terms of the Court's order while its contract was declared invalid, that declaration was suspended pending the completion of the fresh tender process and the award of a new tender or the completion of the original five-year term of the contract if no new tender is awarded.[60]

Once again the Court's findings in this regard are signal in the struggle to ensure

[56] Para 61.
[57] Para 63.
[58] Para 64.
[59] Para 66, emphasis added.
[60] Para 78, orders 1, 2, and 4.

responsive and accountable government (in line with section 1(c) of the Constitution), including by those private bodies tasked with undertaking public responsibilities.

F. No right to benefit from an unlawful tender

Critically important for accountability, and a warning to those who would wish to profit on the back of an unlawful tender process, the Court held that while invalidation of CPS's contract as a consequence of the invalidity of the tender should not result in CPS making a loss, CPS had no right to *benefit* from an unlawful contract.[61] As a consequence the Court held as follows:

a) any benefit that CPS may derive from the unlawful contract (which invalidity was suspended to allow for the rerunning of a fresh tender) is open to public scrutiny;[62]
b) this duty was to be discharged by CPS providing "the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract";[63] and
c) unless the new tender was awarded to a different contractor, CPS will benefit from an unlawful contract, and therefore the public is entitled to know the extent to which it has so benefited.[64]

We note that the Court's findings in relation to when CPS would benefit does not properly engage with the possibility of the new tender not being awarded to CPS but to another tenderer, yet CPS still benefiting from an unlawful contract. This was surprising, because the expert evidence before the Court, as plainly recognised earlier in its judgment,[65] made clear that CPS could well make profits by the time any new tenderer was able to take over the contract after the fresh tender (in fact, the evidence before the Court was to the effect that even by the time of the hearing, CPS may have already made such profits).[66]

In any event, as a consequence of the Court's finding that CPS should not benefit from an unlawful contract, the Court ordered that if SASSA did not award a new contract,

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[61] Para 67.
[62] Ibid.
[63] Ibid.
[64] Ibid
[65] Para 8.
[66] Para 8.

then:[67]

a) CPS must file with the Court an audited statement of the expenses incurred, the income received, and the net profit earned under the completed contract.
b) SASSA must obtain and file with the Court an independently audited verification of the audited statement provided by CPS.

The findings of the Court raise interesting possibilities about the basis for a possible enrichment-type action by SASSA to reclaim any such profits from CPS.[68]

Other interesting questions that arise from this, are whether, if SASSA fails to try and reclaim any profits made, this would in itself constitute a reviewable administrative action, and whether SASSA could be compelled by a court to institute the necessary procedures to reclaim any profits (particularly if SASSA does not award the tender to a new tenderer).

In any event, this innovation by the Constitutional Court should make any successful tenderer, even if innocent, wary of involving itself in an improper tender. This can only be a boon for open, accountable and responsive government, and another blow to any malfeasance in public procurement.

G. The need for new tender bodies

The Court held that in the fresh tender it had ordered, new members should be appointed to the Bid Evaluation Committee and the Bid Adjudication Committee (the two bodies that effectively consider the bids, score them and advise on who should be awarded the contract) since the existing members "*were not always sure of the requirements set out in Bidders Notice 2 [one of the tender documents which caused confusion in relation to what the tender required of bidder, which was found to lead to a serious reviewable irregularity]…[therefore] their involvement in the first bid may make it difficult for them to bring an independent assessment to bear on a new tender process*".[69]

H. Guarding against taking advantage of beneficiaries

[67] Order 4.
[68] See para 29 of the remedy judgment and the references in footnote 15 of the judgment in particular *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at para 15.
[69] Para 68.

The Court also felt at liberty to direct SASSA in relation to certain aspects that the new tender should require (in addition to the length of the contract), in order to guard against serious concerns that had been raised about the manner in which CPS was implementing the payment of social grants.

This related to evidence led by AllPay that indicated there were serious concerns about unlawful deductions being made from beneficiaries' accounts, sometimes by companies that were, like CPS, wholly owned by NET1 UEPS Technologies Inc ("NET1").

In the circumstances, the Court held that since it was unclear "to what extent confidential information of beneficiaries gathered in the payment process is protected, and to what extent the information gathered may create the potential for future commercial gain for Cash Paymaster or any other successful tenderer",[70] the new tender was required to addressed this concern.

To give effect to this finding the Court ordered that the new RFP should ensure that "***personal data obtained in the payment process*** *remains private and* ***may not be used*** *in any manner for any purpose* ***other than payment of the grants or any other purpose sanctioned by the Minister*** *in terms of section 20(3) and (4) of the Social Assistance Act 13 of 2004*."[71]

I. Order fresh tenders and structural interdicts

The Court held that proper accountability in the initiation and execution of the new tender process required the Court to monitor the process by compelling SASSA to report back to the Court. It therefore ordered that the BEC's and BAC's "*evaluation and adjudication must be made public by* ***filing with the Registrar of this Court a status report on the first Monday of every quarter of the year until completion of the process***."[72]

The fact that the court was willing to require oversight of the process (effectively what is often termed a "structural interdict"[73]) is also an important development in the

[70] Para 69.

[71] Para 78, emphasis added.

[72] Para 78, order 3.3.

[73] See generally Hoexter, *Administrative Law of South Africa* (2nd ed) 2012, pgs 561-564; Kent Roach & Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005) 122 *SALJ* 325. See for instance *Minister of Health v TAC (No 2)* 2002 (5) SA 721 (CC)

journey towards proper public procurement.

VI. Corruption: the long arm of the law and duties to investigate

A. Introduction

The AllPay matter demonstrates the difficulties that review courts face when dealing with allegations of corruption or impropriety that arise during judicial review proceedings. Often the principle difficult a review court will face is that it is dealing with a civil case were the evidence before is on affidavit, and procedural rules require it to settle disputes of fact in favour of the respondents (generally the state and the winning tender).[74] In those circumstances – and absent clear and uncontroverted or incontrovertible evidence of malfeasance within the tender process – often a Court will be unable to make a definitive finding of corruption, and similarly, it would arguably be unfair for it to elevate serious, but as yet unproven, allegations or suspicions of corruption to the level where they affect the outcome of its case. As we have indicated earlier, it may well have been such considerations that led the Constitutional Court to sidestep dealing directly with the corruption evidence that AllPay sought to place before it, particularly because it is a primarily a court of appeal and thus – like any appeal court – not best placed to act as a court of first instance.

But that raises a separate question of how these serious allegations might be dealt with, if not by a Court in the review application directly, then by alternative means.

B. A duty to investigate

If review courts are either unable or unwilling to deal with such allegations, what are the alternative tools of accountability? One approach, which, as discussed above was proposed in *AllPay* by Corruption Watch, is for the court to specifically require the state to investigate these allegation. Particularly where the allegations are serious and the state's

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para 129; *S v Z and 23 Similar Cases* 2004 (4) BCLR 410 (E) para 39; *City of Cape Town v Rudolph* 2004 (5) SA 39 (C); and *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) para 45.

[74] In terms of the trite principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 635C.

response thereto has been inadequate, this is arguably an appropriate via media approach, which does not treat the allegations (particularly where, as in AllPay, serious issues were left unanswered) too lightly, while on the other hand avoids the Court being required to make any final pronouncements on matters where the evidence is incomplete or context (a particular concern for the Constitutional Court, given that it was sitting not as a court of first instance but as a court of final appeal).

This middle road has the value of requiring organs of state to do their statutory duty, particularly in cases where, to avoid further embarrassment, or due to some complicity on their part, they are disinterested in undertaking any, or suitably rigorous, investigations.

It should be noted that the Treasury Regulations, promulgated in terms of the Public Finance Management Act, create an obligation on organs of state to investigate even allegations of a failure to comply with the organ's supply chain management system (the constitutionally and statutorily required system that governs each organ's public procurement processes), and not merely allegations of corruption or improper conduct.[75] Each organ of state's accounting authority (for instance the CEO of SASSA) must:

> "(b) investigate any allegations against an official or other role-player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified-
>
> (i) take steps against such official or other role-player and inform the relevant treasury of such steps; and
>
> (ii) report any conduct that may constitute an offence to the South African Police Service;
>
> …
>
> (f) cancel a contract awarded to a supplier of goods or services—
>
> (i) if the supplier committed any corrupt or fraudulent act during the bidding process or the execution of that contract; or
>
> (ii) if any official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of that contract that benefited that supplier. " [76]

[75] This is in line with international best practice: see for instance Transparency International's *Handbook: Curbing Corruption in Public Procurement* (2006) pg 47, which provides that: "Whenever controls or audits demonstrate or suggest that a contractor, supplier or consultant has possibly committed any acts of corruption, the case should be fully **investigated** by the prosecution authorities. If a crime is confirmed, the contractor / supplier / consultant should be held **accountable** – by claiming an adequate amount of damages and by debarring the person or company from participation in future bidding processes." (emphasis in the original).

[76] Treasury Regulations, Reg 16A9.1. See also *Viking Pony Africa Pumps (Pty) Limited t/a Tricom Africa v Hydro-Tech Systems (Pty) Limited and another* 2011 (1) SA 327 (CC), in the context of the duty created under Preferential Procurement Regulations 2001 (now replaced by the Preferential Procurement Regulations 2011) to investigate any fraud in relation to claims of black economic empowerment credentials.

Such investigations (or even the failure to so investigate) would clearly constitute the exercise of a public power. Accordingly, interested litigants, such as public interest NGOs, could challenge any failures to properly investigate in court, and perhaps force the relevant organs to effectively route out corruption. If in addition the failure to properly investigate is also in violation of a (prior) court order which required such investigation, then this would of course also allow for potential knock-on challenges to enforce the court order and contempt proceedings.

C. Corruption legislation

The other approach to deal with allegations of corruption in tenders, and one that does not require review courts to give directions in their judgments, is criminal investigation under statutes both, domestic and foreign, that deal specifically with corruption.

We turn now to briefly consider these criminal law options that could provide alternative or additional means for dealing with allegations of corruption in public tenders, and which thus provide parallel processes for ensuring accountable and transparent government.

When it comes to corruption, particularly in relation to tenders, there are, in particular, three corruption regimes which are relevant and need to be considered:

a) the South African Prevention and Combating of Corrupt Activities Act 12 of 2004 ("the Corruption Act");
b) the UK Bribery Act 2010 ("the Bribery Act"); and
c) the US Foreign Corrupt Practices Act ("FCPA").

The South African statute is a potential bulwark against corruption because of the reporting provision contained in section 34, which we discuss below. And the British and American statutes are particularly relevant given their broad extra-territorial reach, wide definition of the type of corrupt practices which are prohibited, and the fact that many large South Africa companies have significant links to the UK and the US (often being the subsidiaries of UK or US companies).

Once again the AllPay matter provides a useful lens through which to consider the implications of corruption legislation for public procurement in South Africa:

a) As indicated in the court papers (particularly in its application to adduce further evidence), in tandem with the tender review, and given the concerns about possible corruption in the tender arising from allegations brought to its attention, AllPay had

been advised that it had a duty to report the allegations to the police in terms of section 34 of the South African Corruption Act, and had done so.

b) Moreover, it was not only the SA Corruption Act that was relevant, or implicated in the AllPay matter. As revealed in the papers placed before the Constitutional Court in relation to the remedy hearing, according to NET1's (CPS's parent company) Annual Report for 2013, the following was stated in relation to the on-going criminal investigation by American authorities into the conduct of CPS in winning the tender, on account of CPS being a NET1 subsidiary:

> "On November 30, 2012, we received a letter from the U.S. Department of Justice, Criminal Division, informing us that the DOJ and the Federal Bureau of Investigation have begun an investigation into whether we and our subsidiaries, including our officers, directors, employees, and agents and other persons and entities possibly affiliated with us violated provisions of the FCPA [the US Foreign Corrupt Practice Act] and other U.S. federal criminal laws by engaging in a scheme to make corrupt payments to officials of the Government of South Africa in connection with securing our SASSA contract and also engaged in violations of the federal securities laws in connection with statements made by us in our SEC filings regarding this contract. On the same date, we received a letter from the Division of Enforcement of the SEC advising us that it is also conducting an investigation concerning our company. The SEC letter states that the investigation is a non-public, fact-finding inquiry and that the SEC investigation does not mean that the SEC has concluded that we or anyone else has broken the law or that the SEC has a negative opinion of any person, entity or security. We are continuing to cooperate with the DOJ and the SEC regarding these investigations.
> We have been, and will continue to be, exposed to a variety of negative consequences as a result of these investigations. There could be one or more enforcement actions in respect of the matters that are the subject of one or both of the investigations, and such actions, if brought, may result in judgments, settlements, fines, penalties, injunctions, cease and desist orders or other relief, criminal convictions and/or penalties. We cannot predict accurately at this time the outcome or impact of the investigations."[77]

c) On the back of these alleged violations of the Foreign Corrupt Practices Act, class action lawsuits have been instated against NET1 by its shareholders in the US.[78]

d) At the time of preparing this paper, we are not aware of any further developments in relation to American investigations and litigation, but it clearly demonstrates the reach particularly of the FCPA.

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[77] http://ir.net1.com/phoenix.zhtml?c=73876&p=irol-reportsAnnual.

[78] See e.g. Wall Street Journal, January 24, 2014, *SHAREHOLDER ALERT: Pomerantz Law Firm has filed a Class Action Against NET1 UEPS Technologies, Inc. and Certain Officers – UEPS* (available at http://online.wsj.com/article/PR-CO-20140124-910864.html).

The AllPay matter amply demonstrates the likelihood that one or other of these national corruption statutes may be triggered in the context of a public tender involving allegations of malfeasance. It is therefore worth reflecting on the scope of these pieces of corruption legislation both as to their subject matter as well as to their extra-territorial jurisdiction.

1. South African Corruption Act

The Corruption Act provides for the strengthening of measures to prevent and combat corruption and corrupt activities, and specifically codifies the offence of corruption and offences relating to corrupt activities. In particular the Act prohibits and criminalises the payment (or promise of payment) or receipt (or promise of receipt) of gratification to achieve certain impermissible outcomes.

Gratification is defined extremely broadly in section 1 of the Corruption Act to include:

> " (a) money, whether in cash or otherwise;
> (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;
> (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;
> (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;
> (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
> (f) any forbearance to demand any money or money's worth or valuable thing;
> (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;
> (h) any right or privilege;
> (i) any real or pretended aid, vote, consent, influence or abstention from voting; or
> (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage". (emphasis added).

The Act creates a number of offences of corruption in relation to specific officials: for instance judicial officers (section 8), members of legislative assemblies (section 7), foreign public officials (section 5), members of the prosecuting authority (section 9) and a general provision in relation to public officials (section 4)).

The Act then also creates a number of subject matter specific offences of corruption, which, of relevance for present purposes, includes offences relating to contracts (section 12) and tenders (section 13).

Most of the provisions share the requirement that the offence relates to the provision (or receipt) of gratification to achieve certain improper outcomes.

Section 3 creates a broad general crime of corruption, which provides as follows:

> "Any person who, directly or indirectly-
> (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
> (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,
> in order to act, personally or by influencing another person so to act, in a manner –
> (i) that amounts to the-
> (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
> (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
> (ii) that amounts to-
> (aa) the abuse of a position of authority;
> (bb) a breach of trust; or
> (cc) the violation of a legal duty or a set of rules,
> (iii) designed to achieve an unjustified result; or
> (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
> is guilty of the offence of corruption."

This is, self evidently, a broad provision and is clearly intended to ensure that any corrupt activity, however intricately organized to avoid detection, can be prosecuted.

Section 4 of the Act, which indicates the intention of the legislature to act against corruption in relation to public officials, would amongst other sections find potential application in matters of public procurement. It provides as follows:

> **"Offences in respect of corrupt activities relating to public officers**
> 4.(1) Any-- *(a)* public officer who, directly or indirectly accepts or agrees or offers to accept any gratification f
> of himself or herself or for the benefit of another person; or *(b)* person who directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person in order to act, personally or by influencing another person so to act, in a manner-
> (i) that amounts to the-
> *(aa)* illegal, dishonest, unauthorised, incomplete, or biased: or

(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual, obligation;

(ii) that amounts to the -

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules; or any other legal obligation;

(iii) designed to achieve an unjustified result: or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to public officers.

*(2)*Without derogating from the generality of section 2(4),"to act" in subsection (1).

includes-

(a) voting at any meeting of a public body;

(b) performing or not adequately performing any official functions:

(c) expediting, delaying, hindering or preventing the performance of an official act;

(d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;

(e) aiding or assisting in procuring or prev enting the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;

(f) showing any favour or disfavour to any person in performing a function as a public officer;

(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration. custody or for any other reason, to another person;

(h) or exerting any im pr

performing functions in a public body."

Once again the breadth of section 4 speaks for itself: it is clearly wide enough to cover many envisioned scenarios where attempts are made to improperly influence the outcome of a tender, or otherwise gain an improper advantage during the process.

More specifically implicated by the possibility of malfeasance in public procurement, are sections 12 and 13.

Section 12 provides for a specific offence relating to corrupt activities in respect of contracts. The section provides that:

"(1) Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept **any gratification** from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person **any gratification**, whether for the benefit of that other person or for the benefit of another person,

(i) in order to **improperly influence, in any way**—

(aa) **the promotion, execution or procurement of any contract with a public body**, **private organisation, corporate body or any other organisation or institution**; or

(bb) **the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract;** or

(ii) **as a reward for acting as contemplated** in paragraph (a),

is guilty of the offence of corrupt activities relating to contracts.

(2) Any person who, in order to obtain or retain a contract with a public body or as a term of such contract, directly or indirectly, gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or for the benefit of another person— (a) for the purpose of promoting, in any way, the election of a candidate or a category or party of candidates to the legislative authority; or (b) with the intent to influence or affect, in any way, the result of an election conducted for the purpose of electing persons to serve as members of the legislative authority,

is guilty of an offence." (emphasis added)

The section is evidently broad enough to include not only corruption in relation to tenders but also any public contract however procured, and also deals with any form of improper action as a consequence of corruption in the implementation of any public contracts.

In a similar vein to section 12, but more directly crafted to deal with tenders, is section 13. It provides:

"13 Offences in respect of corrupt activities relating to procuring and withdrawal of tenders

(1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as-

(a) an inducement to, personally or by influencing any other person so to act-

(i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) upon an invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or

(iii) withdraw a tender made by him or her for such contract; or

(b) a reward for acting as contemplated in paragraph *(a)* (i), (ii) or (iii),

is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

(2) Any person who, directly or indirectly-

(a) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or the benefit of another person, as-

(i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or

(ii) a reward for acting as contemplated in subparagraph (i); or

(b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person, as-

(i) an inducement to withdraw the tender; or

(ii) a reward for withdrawing or having withdrawn the tender,

is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

In terms of section 26, any person convicted of a crime under sections 3, 4, 12 and 13, is liable for the following punishment:

"(i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;

(ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or

(iii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years".

Lastly, it should also be borne in mind that in terms of section 21 of the Act, attempting, conspiring or aiding and abetting another to commit any of the offences discussed above would also constitute an offence (and carries the same penalty as the underlying offence in question).[79]

As mentioned earlier, section 34 creates a reporting duty, which carries a criminal sanction of its own. In particular the section provides that:

"(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2, 3 or 4,or section 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more,

[79] See section 26(2).

must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act 68 of 1995).

(2) Subject to the provisions of section 37 (2), any person who fails to comply with subsection (1), is guilty of an offence." (emphasis added).

The Corruption Act was recently amended (in 2012) to ensure that the reports must be directed specifically to the Directorate for Priority Crime Investigation, colloquially known as the Hawks, who are intended to be a dedicated independent corruption fighting unit within the South African Police Service (whether they are in law adequately independent and focused on combating corruption is currently the subject of a judgment awaited from the Constitutional Court).[80]

The courts have not yet had occasion to interpret the ambit of section 34 of the Corruption Act, but the section's potential is obvious as a means by which to ensure that corruption is investigated and brought to light. It also should disincentivise officials and senior managers in private companies turning a blind eye to corruption.

There is some debate as to the best interpretation of section 34, and when the duty arises. Although consistent with a literal meaning of the section, we think in context, that section 34 probably was not meant to require any person who holds position of authority (which is further defined in the Act), to report any suspected corruption even if committed outside their organisation. To put this onerous obligation on senior individuals only makes sense in the context of reporting suspected corruption in their own organisation. If the obligation is broader than that, it would mean that in any situation in which people in authority find themselves suspecting corruption, they would be required to report it to the police even if the corruption was unrelated to their organisation. Ultimately it lies for future determination how a Court will interpret this section, but given that failing to comply carries a significant criminal sanction, it seems more likely that the section will be interpreted in the restrictive manner we have suggested above.

[80] See *Helen Suzman Foundation v Judicial Service Commission (Police and Prisons Civil Rights Union, National Association of Democratic Lawyers and Democratic Governance and Rights Unit Amicus Curiae)* 2014 JDR 1782 (WCC), in which certain provisions of the SAPS Act in relation to the Hawks were declared unconstitutional. The matter came before the Constitutional Court for confirmation of this decision on 19 August 2014, and at the time of writing judgment is still awaited.

2. United Kingdom Bribery Act

The Bribery Act, a recent piece of legislation, came into force on 1 July 2011. Section 1 provides in general terms for an offence of bribery, and section 2 makes it an offence to accept a bribe. Of particular relevance for South African public procurement is section 6 of the Act which makes it an offence to bribe a foreign public official. For the sake of completeness we set out the entire section, which is helpfully drafted in very clear language:

> "**6 Bribery of foreign public officials**
> (1)A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
> (2)P must also intend to obtain or retain—
> (a)business, or
> (b)an advantage in the conduct of business.
> (3) P bribes F if, and only if—
> (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
> (i) to F, or
> (ii) to another person at F's request or with F's assent or acquiescence, and
> (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.
> (4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
> (a)any omission to exercise those functions, and
> (b)any use of F's position as such an official, even if not within F's authority.
> (5)"Foreign public official" means an individual who—
> (a)holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
> (b)exercises a public function—
> (i)for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
> (ii)for any public agency or public enterprise of that country or territory (or subdivision), or
> (c)is an official or agent of a public international organisation.
>
> (6)"Public international organisation" means an organisation whose members are any of the following—
> (a)countries or territories,
> (b)governments of countries or territories,
> (c)other public international organisations,

(d)a mixture of any of the above.

(7)For the purposes of subsection (3)(b), the written law applicable to F is—
(a)where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,
(b)where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,
(c)where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—
(i)any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
(ii)any judicial decision which is so applicable and is evidenced in published written sources.

(8)For the purposes of this section, a trade or profession is a business."

The other relevant provision is section 7. This creates liability for commercial organisations that fail to have adequate systems in place to prevent bribery occurring by persons associated with them (e.g. employees, agents, and subsidiaries).[81] Section 7 provides as follows:

"7. Failure of commercial organisations to prevent bribery
(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
(a) to obtain or retain business for C, or
(b)to obtain or retain an advantage in the conduct of business for C.
(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
(3) For the purposes of this section, A bribes another person if, and only if, A—
(a)is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

[81] Section 8 defines an "**associated person**" as follows:

"Meaning of associated person

(1)For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2)The capacity in which A performs services for or on behalf of C does not matter.

(3)**Accordingly A may (for example) be C's employee, agent or subsidiary**.

(4)Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5)But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C." (emphasis added)

(b)would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—

….

"relevant commercial organisation" means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business."

Lastly one then has to understand the territorial and extra-territorial applicability of the Bribery Act. In this respect the relevant provisions are fully set out in section 12. Once again for the sake of convenience we set out relevant portions of the section in their entirety:

"12 Offences under this Act: territorial application

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.

(2) Subsection (3) applies if—

(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,

(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and

(c) that person has a close connection with the United Kingdom.

(3) In such a case—

(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

> **(h) a body incorporated under the law of any part of the United Kingdom,**
> (i) a Scottish partnership.
> (5) **An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere**.
> ……" (emphasis added)

While the wording is slightly strained, the effect of sections 12(2) and (3) is that even if a section 6 offence takes place outside of the UK, provided the person whose actions give rise to the offence has a close connection to the UK then he or she is guilty of the offence and can be tried in the UK. For present purposes we note that this would include, for instance, any company incorporated in terms of UK Law.

More generally, section 7 offences (failing to stop corrupt activities, by failing to have proper policy in place) can be committed wherever the acts or omissions take place. There is no need for any part of the corrupt activity to take place in the UK.

As required by section 9 of the Bribery Act, the UK Ministry of Justice has published a document entitled "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing."[82] The Guidance contains a useful summary of the principles of jurisdiction discussed above:[83]

> "15. Section 12 of the Act provides that the courts will have jurisdiction over the sections 1, 2 or 6 offences committed in the UK, but they jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, **a body incorporated in the UK** or a Scottish partnership.
> 16. However, as regards section 7, the requirement of a close connection with the UK does not apply. **Section 7(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither** a UK national or resi **in the UK, nor a body incorporated or formed in the UK. In addition, section 12(5) provides that it does not matter whether the acts or omissions which form part of the section 7 offence take part in the UK or elsewhere**. So, **provided the organisation is incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction**". (our emphasis)

[82] Ministry Of Justice, The Bribery Act 2010: Guidance (2010) ("The Guidance").
[83] The Guidance pg 9.

We also point out that in terms of section 14, where a company commits an offence in terms of section 6, with certain qualifications, if the offence is proved to have been committed with the consent or connivance of a senior officer of the company the senior officer will be guilty of the offence.[84]

3. United States FCPA

The provisions of the FCPA, in a similar fashion to the Bribery Act, prohibit directly or through an intermediary, offering, authorising a payment, or paying anything of value to foreign public officials or candidates for public office in order to secure or retain business.[85]

A foreign official includes "[A]ny officer or employee of a foreign government or any department, agency or instrumentality thereof [. . .] or any person acting in an official capacity for or on behalf of any such government, department, agency, or instrumentality ...".[86]

However, the FCPA is only applicable to "issuers" (a corporation that has issued securities that have been registered in the United States or that is required to file periodic reports with the Securities and Exchange Commission (SEC))[87] and US "domestic concerns" (in essence US companies and the like)[88], or to foreign companies who cause, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.[89]

Korkor and Ryznar have recently summarised the jurisdictional requirements, in an American journal, as follows:

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[84] Section 14.

[85] Section 78dd-l(a) -2(a).

[86] Sections 78dd -3(f)(2)(A).

[87] Section 78dd-1(a) of the FCPA provides that the section applies to "any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title".

[88] FCPA defines "domestic concern" as follows: "(1) The term "domestic concern" means--

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."

[89] See section 78dd-3(a); see also Ashe "Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the US Foreign Corrupt Practices Act, The." Fordham L. Rev. 73 (2004): 2897, at pg 2902; and *Foreign Corrupt Practices Act: Antibribery Provisions Guide* prepared by the Department of Justice and the Department of Commerce available at http://www.justice.gov/criminal/fraud/fcpa.

> "The anti-bribery provisions apply to citizens and residents of the United States, regardless of where the corrupt conduct occurred. The provisions also extend to companies, foreign and domestic, that conduct business in the United States, as well as their subsidiaries. Also implicated are companies whose shares are traded on any U.S. exchange or that are registered with the SEC. Finally, the FCPA anti-bribery provisions cover foreign persons, including corporations, who perform **any act** within the territory of the U.S. in furtherance of an offer, promise to pay, or payment to a foreign government official."[90]

D. Corruption legislation – only as good as the sheriff

The fact that the American authorities are currently investigating NET1 for possible corruption in relation to a public tender in South Africa, which relates wholly to work to be done by its South African subsidiary and to be paid for in South Africa, clearly demonstrates the extraordinary reach of the FCPA, and the determination by the US authorities to make use thereof.

Ironically, the South African police, and in particular the Hawks, who have an equally, if not more exacting piece of corruption legislation at their disposal (SA Corruption Act), have never, at least publicly, indicated that they have opened any similar investigation into the actions of CPS.

This raises an important but separate issue: in the fight against corruption in the public life of the country, the effectiveness thereof, is largely determined by the institutional will and competence to investigate, and if necessary, prosecute such corruption. It is unfortunate to think that American officials are more interested in routing out corruption in respect of a South African tender process (albeit through the means of NET1's holdership of CPS) than our own officials appear to be. Nevertheless, the AllPay experience at least sounds a warning to companies and local officials that merely because local policing and prosecutorial authorities may not vigorously pursue certain types of corruption, or corruption implicating certain parties, does not mean that foreign authorities will necessarily show equal reticence to act in response to such allegations and evidence, where their domestic legislation's very long reach allows them to do so.

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[90] Korkor, S., & Ryznar, M. (2011). 'Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing'. *Missouri Law Review, 76*, 415, at pgs 423-4 (emphasis added).

VII. Conclusion

The AllPay saga demonstrates that a constitutional, democratic government that is open, accountable and responsive can only be achieved by a strong and unwavering commitment to the rule of law in all areas of public endeavour. In matters of public procurement, the rule of law is of great value not merely as a principle to ensure fairness between competing private parties who wish to secure the rights to a tender. Rather, the rule of law, and its specific incarnations in public procurement (the requirements for fairness, competitiveness, and transparency), ensures the realisation of important public goods: better services, at better prices, and services which are acquired and delivered free of the pervasive and corroding influence of corruption.

Yet, AllPay has shown the limits of any one legal regime's ability to deal with allegations that a public tender has been afflicted with corruption. Review courts are generally not best placed to make any definitive factual findings in relation to corruption (particularly not on appeal), a crime of the shadows and hard to prove at the best of times. Nevertheless, courts dealing with public procurement can do little better, and do very well indeed, by requiring strict fealty to the prescripts of public procurement law. By doing so, while they may never know what, if any, malfeasance they have thwarted, the possibility of such malfeasance within and its corroding influence on public procurement is nevertheless significantly checked. The Constitutional Court in AllPay has also made clear that courts should not fear taking, at least in some matters, a more proactive oversight role so as to ensure that the fresh tenders which they require do lead to better, more just, outcomes for the public as well as any individual litigants. The potential remains, one hopes, that in future this will include requiring state agencies to fully and vigorously investigate serious allegations of corruption.

Of course, the fight against corruption is not limited to, or even mainly to be fought in, the realm of administrative law reviews. There is excellent and wide-ranging domestic and foreign corruption fighting legislation. Its success will, however, largely be determined by the institutions enforcing it. There are signs of hope in this regard too. The American authorities have shown a refreshing robustness in seeking to prosecute corruption wherever it may flourish, and domestically, the time may well come when local authorities are challenged to follow the example of their foreign counterparts or justify their failure to do so.

As our constitutional democracy faces perhaps its biggest challenge, as the weeds of corruption threaten to sap the new hope and life that we can rightly be proud of as a nation, South Africans may remain greatly encouraged by the response of our courts and civil society, as demonstrated in AllPay and in the other matters we have discussed.