



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/17

In the matter between:

BLACK SASH TRUST Applicant

FREEDOM UNDER LAW NPC Intervening Party

and

MINISTER OF SOCIAL DEVELOPMENT First Respondent

CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY Second Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY Third Respondent

MINISTER OF FINANCE Fourth Respondent

NATIONAL TREASURY Fifth Respondent

CASH PAYMASTER SERVICES (PTY) LIMITED Sixth Respondent

INFORMATION REGULATOR Seventh Respondent

and

CORRUPTION WATCH (NPC) RF First Amicus Curiae

SOUTH AFRICAN POST OFFICE SOC LIMITED Second Amicus Curiae

Neutral citation: *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojaelo AJ, Pretorius AJ, and Zondo J

Judgments: Froneman J (majority): [1] to [76]
Madlanga J (concurring): [77] to [81]

Heard on: 15 March 2017

Decided on: 17 March 2017

Summary: social grants -**judicial** supervision — direct access — section 172 — just and equitable remedy — continuing constitutional obligation-*Al!Pay 1* —*Al!Pay 2*

ORDER

It is ordered that:

1. The Black Sash Trust is granted direct access to bring this application.
2. Freedom Under Law NPC is granted leave to intervene.
3. Corruption Watch NPC (RF) and the South African Post Office SOC Limited are admitted as friends of the Court.
4. It is declared that the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Limited (CPS) are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe upon grant beneficiaries' rights of access to social assistance under section 27(1)(c) of the Constitution.
5. The declaration of invalidity of the contract is further suspended for the 12-month period from 1 April 2017.

6. SASSA and CPS are directed to ensure payment of social grants to grant beneficiaries from 1 April 2017, for a period of 12 months, on the same terms and conditions as those in the current contract between them that will expire on 31 March 2017, subject to these further conditions:
- 6.1 The terms and conditions shall:
- (a) contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; and
 - (b) preclude anyone from inviting beneficiaries to "opt-in" to the sharing of confidential information for the marketing of goods and services.
- 6.2 CPS may in writing request National Treasury during the 12 month period to investigate and make a recommendation regarding the price in the contract.
- 6.3 National Treasury must file a report with this Court within 21 days of receipt of the request setting out its recommendation.
- 6.4 Within 30 days of the completion of the period of the contract, CPS must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the contract.
- 6.5 SASSA must thereafter obtain an independent audited verification of the details provided by CPS under paragraph 6.4.
- 6.6 The audit verification must be approved by National Treasury and the audited verification must be filed by SASSA with this Court within 60 days.
- 6.7 CPS must permit the auditors appointed by SASSA to have unfettered access to its financial information for this purpose.

7. The Minister and SASSA must file reports on affidavit with this Court every three months, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of the 12-month period, what steps they have taken in that regard, what further steps they will take, and when they will take each future step, so as to ensure that the payment of all social grants is made when they fall due after the expiry of the 12-month period.
8. The reports filed by the Minister and SASSA as contemplated in paragraph 7 must include, but is not limited to, the applicable time-frames for the various deliverables which form part of the plan, whether the time-frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.
9. If any material change arises in relation to circumstances referred to in a report referred to in paragraphs 7 or 8, the Minister and SASSA are required immediately to report on affidavit to the Court and to explain the reason for and consequences of the change.
10. **It is declared that SASSA is under a duty to ensure that the payment method it determines:**
 - 10.1 contains adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; and
 - 10.2 precludes a contracting party from inviting beneficiaries to "opt-in" to the sharing of confidential information for the marketing of goods and services.
11. The parties are, within 14 days from the date of this order, required to submit the names of individuals, with their written consent, suitably qualified for appointment as independent legal practitioners and technical experts for the purposes referred to in paragraph 12 below.

12. The Auditor-General and any other person(s) or institution(s) appointed by the Court after receipt of the names submitted under paragraph 11, shall jointly and until otherwise directed by the Court:
 - 12.1 evaluate the implementation of payment of social grants during the 12-month period;
 - 12.2 evaluate the steps envisaged or taken by SASSA for any competitive bidding process or processes aimed at the appointment by SASSA in terms of section 4(2)(a) of the South African Social Security Agency Act 9 of 2004 of a new contractor or contractors for the payment of social grants;
 - 12.3 evaluate the steps envisaged or taken by SASSA aimed at SASSA itself administering and paying the grants in the future or SASSA itself permitting any part or parts of the administration and payment processes in the future; and
 - 12.4 file reports on affidavit with this Court every three months, commencing on a date three months after the date of this order, or any shorter period as the legal practitioners and experts may deem necessary, setting out the steps they have taken to evaluate the matters referred to in paragraphs 12.1 to 12.3, the results of their evaluations and any recommendations they consider necessary.
13. The Minister is called upon to show cause on affidavit on or before Friday 31 March 2017 **why-**
 - 13.1 she should not be joined in her personal capacity; and
 - 13.2 she should not pay costs of the application from her own pocket.
14. Costs are reserved until conclusion of these proceedings.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] One of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment.¹ In so doing it has given some content to the core constitutional values of dignity, equality and freedom.² This judgment is, however, not an occasion to celebrate this achievement. To the contrary, it is necessitated by the extraordinary conduct of the Minister of Social Development (Minister) and of the South African Social Security Agency (SASSA)³ that have placed that achievement in jeopardy. How did this come about?

[2] The Constitution provides that everyone has the right to have access to social security, which includes, if they are unable to support themselves and their dependants, appropriate social assistance.⁴ In terms of its obligations to take reasonable legislative and other measures, within its available resources, to achieve

¹ See Delany and Jehoma "Implementation of social grants: Improving delivery and increasing access" in Delany et al (eds) *South Africa Child Gauge* (Cape Town Children's Institute, University of Cape Town, 2016) at 60.

² Freedom in the sense of being able to start looking after themselves. See Friedman "Dlamini may unwittingly have given a boost to grants project" *Dispatch Live* (9 March 2017), available at <http://www.dispatchlive.co.za/opinion/2017/03/09/dlamini-may-unwittingly-given-boost-grants-project/>.

³ The Minister and SASSA both bear responsibility: See sections 92, 195(1) and 217 of the Constitution and section 4 of the South African Social Security Agency Act 9 of 2004.

⁴ Section 27(1)(c) of the Constitution provides:

"Everyone has the right to have access to--

- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

the progressive realisation of this right,⁵ Parliament enacted the Social Assistance Act⁶ which makes provision for various forms of social grants.⁷ The South African Social Security Act⁸ (SASSA Act) provided for the establishment of SASSA as an agent for the administration and payment of social assistance.⁹ The Chief Executive Officer (CEO) of SASSA is responsible, subject to the direction of the Minister, for the management of SASSA.¹⁰ SASSA may with the concurrence of the Minister enter into an agreement with any person to ensure effective payments to grant beneficiaries.¹¹

[3] On 3 February 2012 SASSA concluded a contract with Cash Paymaster Services (Pty) Limited (CPS) to provide services for the payment of social grants for a period of five years. On 29 September 2013 this Court held that the award of the tender to provide services for payment of social grants to CPS was constitutionally invalid (*Al!Pay 1*).¹² In the remedial order (*Al!Pay 2*)¹³ the Court suspended the declaration of invalidity. The declaration was based on the premise that either a new five-year tender would be awarded after a proper procurement process or SASSA would itself take over the payment of social grants when the suspended contract with CPS came to an end on 31 March 2017. SASSA was ordered to report to the Court on progress in respect of the new tender process and its outcome. In November 2015 SASSA finally reported that it had decided not to award a new tender, it would itself

⁵ Section 27(2) of the Constitution provides:

"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

⁶ 13 of 2004.

⁷ Section 4 provides for the responsible Minister to make available child support grants, care dependency grants, foster child grants, disability grants, older person grants, war veteran grants and grants-in-aid.

⁸ 9 of 2004.

⁹ Section 4.

¹⁰ Section 6(1)(a).

¹¹ Section 4(2)(a).

¹² *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*Al!Pay 1*).

¹³ *Al!Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Al!Pay 2*).

take over the payment of social grants and it would be able to meet the deadline of 31 March 2017.

[4] On accepting this assurance the Court discharged its supervisory order.

[5] But this assurance turned out to be without foundation.

[6] Since April 2016 the responsible functionaries of SASSA have been aware that it could not comply with the undertaking to the Court that it would be able to pay social grants from 1 April 2017. The Minister says she was informed of this only in October 2016. There is no indication on the papers that she showed any interest in SASSA's progress before that. Despite repeated warnings from advising counsel and CPS,¹⁴ neither SASSA nor the Minister took any steps to inform the Court of the problems they were experiencing. Nor did they see fit to approach the Court for authorisation to regularise the situation.

[7] The Minister and SASSA tell us that CPS is the only entity capable of paying grants for the foreseeable future after 31 March 2017.

[8] This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures,¹⁵ to get it out of this predicament.

¹⁴ Four opinions from counsel were obtained on 31 May 2016, 27 October 2016, 10 November 2016 and 12 December 2016, respectively.

¹⁵ *AllPay 1* above n 12 at para 72.

[9] It is necessary to stand back for a moment to reflect on the significance of the Court's acceptance of SASSA's assurance that it was capable of making payment of social grants after 31 March 2017.

[10] In a constitutional democracy like ours, it is inevitable that at times tension will arise between the different arms of government when a potential intrusion into the domain of another is at stake. It is at times like these that courts tread cautiously to preserve the comity between the judicial branch of government and the other branches of government.¹⁶ But there was no constitutional tension about social grants in November 2015. There was no legitimate reason for the Court not to accept the assurance of an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was no threatened infringement to people's social assistance rights and no suggestion that the foundation of the Court's remedial order would be disregarded. Now there is.

[11] SASSA will not be able to take over the payment of social grants by 1 April 2017 and may not be able to do so for some time to come. It intends to enter into a contract with CPS without a competitive tender process as required by section 217 of the Constitution¹⁷ in order to continue the payment of social grants. In

¹⁶ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 1 I; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 19; *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 23; and *President of the Republic of South Africa v South African Rugby Football Union* (1999) ZACC II; 1999 (2) SA 14 (CC); 1999 (10) BCLR 1059 (CC).

¹⁷ Section 217 provides:

- "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

so doing it has walked away from the two fundamental pillars of this Court's remedial order in *AllPay 2*. That is serious enough, but it has also broken the promise in its assurance to this Court in November 2015, that it would take over the payment of social grants by 31 March 2017, which formed the basis of the withdrawal of the supervisory order.

[12] To make matters worse, the Minister and SASSA did not deign to inform the Court of these developments until 28 February 2017 when SASSA and its CEO launched an application on an urgent basis for an order authorising it to take further steps to ensure payment of social grants from 1 April 2017. In an unexpected about-turn, SASSA sought to withdraw that application the next day.¹⁸ On 3 March 2017 it filed a "follow-up report" with limited information on how this had arisen and what might happen in the future. The Court issued directions in response to this report. An answer of sorts was received only just the day before the hearing.

[13] Until the forced reply to this Court's directions there has certainly been no reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government. It must be considered whether their conduct went even beyond that.

[14] There must be public accounting for how this was allowed to happen. Accountability is a central value of the Constitution.¹⁹ It accompanies the conclusion of procurement contracts for the procurement of public functions.²⁰ This judgment is the judicial part of that accounting. It is founded on the commitment to openness and responsiveness the Constitution requires.²¹ It is important to note that this particular role, at this particular time, is not one of the Court's choosing. The sole reason for the

¹⁸The application was withdrawn on the instruction of the Minister.

¹⁹ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (I) SA 343 (CC); 2006 (II) BCLR 1255 (CC) at para 89.

²⁰ *AllPay 2* above n 13 at para 64.

²¹ Section 1(d) of the Constitution.

litigation leading to this judgment is the failure of SASSA and the Minister to keep their promise to this Court and the people of South Africa.

[15] What needs to be understood, however, is that it is not this Court's standing or authority, for their own sakes, that are important. Judges hold office to serve the people, just as members of the executive and legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat. A graphic illustration would be if social grants are not paid beyond 31 March 2017. It is to the practical avoidance of that potential catastrophe that we must now turn.

Facts

[16] As stated in [3] above this Court held, on 29 September 2013, that the award of the tender to provide services for payment of social grants to CPS was constitutionally invalid.²² In the remedial order, the Court suspended the order of invalidity.²³ The order was based on the premise that either a new five-year tender would be awarded after a proper procurement process, or SASSA would itself take over the payment of social grants when the suspended contract with CPS came to an end on 31 March 2017.

[17] The remedial order reads:

- "1. The Contract for the Payment of Social Grants between the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Ltd (Cash Paymaster) dated 3 February 2012 is declared invalid.
2. This declaration is suspended pending the decision of SASSA to award a new tender after completion of the tender process ordered in paragraph 3 below.
3. SASSA must initiate a new tender process for the payment of social grants within 30 days of this order:

²² *AllPay 1* above n 12.

²³ *AllPay 2* above n 13.

- 3.1 The request for proposals for the new tender must, in addition to any other requirements that SASSA is entitled to prescribe, contain adequate safeguards to ensure **that-**
- (a) if any reregistration process is required, no loss of lawful existing social grants occurs;
 - (b) the payment of lawful existing grants is not interrupted; and
 - (c) 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 sections 20(3) and (4) of the Social Assistance Act 13 of 2004.
- 3.2 The new tender must be for a period of five years.
- 3.3 A new and independent Bid Evaluation Committee and Bid Adjudication Committee must be appointed to evaluate and adjudicate the new tender process. Their 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.
4. If the tender is not awarded, the declaration of invalidity of the contract in paragraph 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded:
- 4.1 Within 14 days of the decision not to award the tender SASSA must lodge a report with the Registrar of this Court setting out all the relevant information on whether and when it will be ready to assume the duty to pay grants itself.
 - 4.2 Within 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster must file with this court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.
 - 4.3 SASSA must within 60 days thereafter obtain an independent audited verification of the details provided by Cash Paymaster under paragraph 4.2 and file the audited verification with this Court.

5. The applicants must pay SASSA and Cash Paymaster's costs in relation to the application, brought in the main application on the merits, to lead further evidence."

[18] SASSA followed a new competitive tender process under the terms of the remedial order, but on 15 October 2015 it decided not to award the tender, and informed the Court of its decision not to award a new contract in early November 2015. In terms of paragraph 4.1 of the order SASSA then had to file a report "setting out all the relevant information on whether and when it will be ready to assume the duty to pay the grants itself". This it did on 5 November 2015. On 25 November 2015 the Court issued an order discharging its supervisory jurisdiction:

"The Constitutional Court has considered the Progress Report filed in terms of paragraph 4.1 of this Court's order dated 17 April 2014. It has concluded that the Progress Report is compliant with this Court's order and that the supervisory jurisdiction should be discharged."

[19] By now this is common cause, after this Court accepted SASSA's assurance that it would be in a position to pay the social grants itself after 31 March 2017, things started going awry. What had happened is best summarised by the Minister's and SASSA's response to the Chief Justice's directions:

- "1. In view of the fact that this Court's order of 25 November 2015, discharging its supervisory jurisdiction, was based on SASSA's decision not to award a new contract and on SASSA's progress report of 5 November 2015 setting out the information relating to its own ability to assume paying the grants at the end of March 2017, the following information is required:

- (a) Who was the person responsible for determining on behalf of SASSA whether SASSA itself would not be able to pay the grants by end of March 2017?

The person responsible was the CEO, on the advice of Ms Mvulane, as explained further below. Ms Mvulane was responsible for the management of the project aimed at giving effect to the steps set out in the 5 November 2015 Progress

Report by means of which SASSA proposed to assume the duty to take over the payment function itself after 31 March 2017. The advice of Ms Mvulane was adopted by all incumbents of the CEO's office, including:

Ms V Petersen, CEO of SASSA from May 2011 to May 2016;

Ms R Ramokgopa, acting CEO 23 May 2016 to 31 October 2016;

Mr T Magwaza, CEO of SASSA from 1 November 2016 to date;

In terms of section 6(1) of the SASSA Act, the CEO is responsible for the management of SASSA subject to the direction of the Minister.

What has complicated things in this instance is, firstly, that the incumbent of the office has changed several times since 5 November 2015 and, secondly, Ms Mvulane was responsible for the management of the project aimed at giving effect to the steps set out in the 5 November 2015 Progress Report by means of which SASSA proposed to assume the duty to take over the payment function itself after 31 March 2017.

As regards the changes in the incumbency of the CEO's office, Ms Petersen was CEO at the time SASSA filed the Progress Report and remained as CEO until her term of office expired on 14 May 2016. During the period 23 May 2016 to 31 October 2016, Ms Ramokgopa held office as SASSA's acting CEO. With effect from 1 November 2016, the Minister appointed a new CEO, Mr Magwaza. As stated, between 27 February and 12 March 2017 Mr Magwaza was on sick leave. Although Ms Mzobe was appointed as acting CEO, she also was forced to withdraw because of illness, which led to my appointment as acting CEO for the periods to 12 March 2017.

[Mr] Todd and Mr Haffegee have not yet managed to get hold of Ms Petersen. They have not tried to get hold of Ms Mzobe because she is ill and in any event her involvement with SASSA post-dated the period relevant to this question by several months. They have however spoken with Ms Mvulane, Ms Ramokgopa and Mr Magwaza.

The information gathered by Mr Todd and Mr Haffegee suggests that the determination on behalf of SASSA whether SASSA itself would not be able to pay the grants by end of March 2017 was

first made by Ms Mvulane. I understand Ms Mvulane agrees that is correct.

- (b) The date when the responsible person on behalf of SASSA first became aware that it would not be able to pay the grants itself by end March 2017;

19 April 2016, as explained below.

As appears from paragraph 19 above, Ms Mvulane was aware by 19 April 2016 at the latest that SASSA would not be able to pay the grants by itself by the end of March 2017. It was for this reason that an opinion was sought from counsel on certain of the legal implications of SASSA's inability to pay the grants by itself by the end of March 2017.

As to the CEO's knowledge of SASSA's inability to pay the grants by itself by the end of March 2017, as appears from paragraph 20 above, on 20 April 2016 SASSA's legal general manager's letter to the State Attorney requesting the opinion was emailed to the then CEO Ms Petersen; and, as appears from paragraph 24 above, on 10 June 2016 the legal opinion of Advocates Cassim SC and Mostert, which recorded Ms Mvulane's instructions to Adv. Mostert (described in paragraph 21 above) that deliverables 4 and 5 and 7 listed in the Progress Report could not be achieved by 31 March 2017, was forwarded to the then acting CEO Ms Ramokgopa.

- (c) The exact dates when the responsible person on behalf of SASSA became aware that the [requirements in the] respective time frames set out in paragraph 13 of its progress report to the Court could not be fulfilled;

The exact dates when the responsible person came to know the relevant time frame in relation to each deliverable listed in the Progress Report are not known at this stage.

The information gathered by Mr Todd and Mr Haffegee suggests that, in relation to Deliverables 54 and 5 and 7, this occurred in mid-April 2016.

At this stage it is not clear whether this determination was made in relation to all of the other deliverables listed in the Progress

Reports and if so, when. In the limited time available, it has not been possible for sufficiently detailed consultations to be conducted with Ms Mvulane and the others involved in the project aimed at giving effect to the steps set out in the Progress Report.

- (d) The reason why this Court was not immediately informed of this fact and who made the decision that it was not necessary to do so;

No one made a decision not to inform this Court that the respective time frames set out in paragraph 13 of the progress report could not be fulfilled.

As appears from certain annexures to this affidavit the timing of the report to the Court was the subject of various discussions and was also the subject of legal advice from May 2016 onwards. Furthermore SASSA first had to concretize its plan for the period after 31 March 2017. See paragraph 14.1 of the 31 May 2016 opinion of Adv. Cassim SC and Mostert (Annexure WM9) and the 12 December 2016 memorandum of Adv. Cowen and Drake (Annexure WM14).

I accept that the Court ought to have been informed at a much earlier stage of the fact that the time frames set out in paragraph 13 of its progress report to the Court could not be fulfilled.

- (e) Whether the Minister was informed that SASSA would not be able to pay the grants itself by end of March 2017 and, if so, when this happened.

Yes, in October 2016.

2. In relation to the legal opinion attached to the follow-up report and SASSA's assertion that it has taken steps to act on the advice contained in it, as well as SASSA's intended course of action, the following information is required:

- (a) Has SASSA entered into any agreement with Cash Paymaster Services (Pty) Limited (CPS) in relation to the payment of grants from 1 April 2017?

No, SASSA did not enter into any agreement with CPS in relation to the payment of grants from 1 April 2017.

- (b) If so, full details of the agreement are required. If in writing, a copy is required;

The agreement has yet to be negotiated and concluded.

- (c) Is it SASSA's contention that this agreement is lawful and in compliance with the procurement requirements of the Constitution and applicable legislation? Full details are required of the steps taken in compliance with applicable procurement legislation.

If the National Treasury approves the deviation for any resulting any interim contract, the contract will comply with the applicable legislation.

See paragraphs 48 to 69 above.

- (d) Full details are required of the steps taken, or envisaged, to run a competitive bidding process again to have a new contractor or contractors appointed for the payment of grants, and the exact timeframe within which this will occur.

Government is reviewing the approach to its payment model, and this Court will be apprised once a determination is made. As stated in paragraphs 36 and 37 above, a Request For Information (RFI) process was concluded a month ago and an analysis of the responses is being compiled which will inform the way-forward. SASSA will provide the Court with a concrete "road map" within the next three months.

- (e) Full details are required of the steps to be taken to ensure that SASSA itself will become capable of administering and paying the grants in future, and the exact timeframe within which this will occur.

SASSA will continue with the process of expert evaluation and advice and stakeholder consultation which commenced in July 2016. This with a view to preparing and presenting to the Minister and, if approved by the Minister, to the Court, a detailed plan for the payment of the grants. This will be after the end of the contract period for the contractor or contractors who will be appointed following the competitive bidding process referred to above. At this stage government is reviewing the

approach to its payment model, and this Court will be apprised once a determination is made.

3. In view of the Minister's and SASSA's acceptance of responsibility for delays in identifying and redressing deficiencies in the plan since the last report to the Court on 5 November 2015 to date, the following information is required:

- (a) Do SASSA and/or the Minister have any objection to independent monitoring of any agreement SASSA may have entered into with CPS for the payment of grants from 1 April 2017?

No, see paragraphs 4, 5, 6, 8, 12.1 and 12.4 of the proposed draft order as regards the disclosure and monitoring of the agreement, if concluded.

- (b) If so, the content and nature of the objections must be set out;

Not applicable.

- (c) Do SASSA and/or the Minister have any objection to independent monitoring of the steps taken or envisaged to run, again, a competitive bidding process to have a new contractor or contractors appointed for the payment of grants?

No, SASSA and/or the Minister do not have an objection to independent monitoring, see paragraphs 9 to 11, 12.2 and 12.4 of the proposed draft order.

- (d) If so, the content and nature of the objections must be set out;

Not applicable.

- (e) Do SASSA and/or the Minister have any objection to independent monitoring of the steps to be taken to ensure that SASSA itself will become capable of administering and paying the grants in future?

No, SASSA and/or the Minister do not have any objection to independent monitoring of the steps to be taken to ensure that SASSA itself will become capable of administering and paying the grants in future, see paragraphs 9 to 11, 12.3 and 12.4 of the proposed draft order.

- (f) If so, the content and nature of the objections must be set out;

Not applicable.

- (g) If SASSA and/or the Minister do not have objections to independent monitoring in relation to any or all of these processes, they are invited to propose practical measures as to how and by whom the independent monitoring may be done.

See paragraph 12 of the proposed draft order."

[20] CPS also alerted SASSA in May 2016, that in order to prevent disruption in the payment process, it might be better for SASSA to extend the current CPS contract. Three legal opinions from different senior counsel were obtained by SASSA in 2016. All, in varying terms, warned SASSA that it was in trouble because it would not be able to pay the grants itself and that it should approach the Court to inform it of the situation. The first opinion was received by SASSA in June 2016, the second in October 2016 and another in November 2016. The Minister was informed that SASSA was unable to pay the grants only in October 2016.

[21] In summary, then. Since April 2016 the responsible functionaries of SASSA have been aware that it could not comply with the undertaking to the Court that it would be able to pay social grants from 1 April 2017. The Minister was apparently informed of this only in October 2016. There is no indication on the papers that she showed any interest in SASSA's progress in that regard before that. Despite warnings from counsel and CPS, neither SASSA nor the Minister took any steps to inform the Court of the problems they were experiencing. Nor did they see fit to approach the Court for authorisation to regularise or ameliorate the situation. When, eventually, SASSA brought an application on 28 February 2017 for authorisation, the Minister intervened and ordered SASSA to withdraw the application. On 3 March 2017 the Minister and SASSA filed a supplementary progress report, without any acknowledgement that they were under any legal obligation to do so.

[22] This is how things stand at present. There is no certainty whether and how social grants will be paid after 31 March 2017. No agreement has, as yet, been concluded between SASSA and CPS to ensure payment of social grants after that date.

On the papers it appears that, if an agreement with CPS cannot be reached, SASSA has no other contingency plan to ensure payment.

These proceedings

[23] The applicant (Black Sash Trust) applies for direct access on an urgent basis (direct access application) for an order:

- (a) That SASSA must file a report on affidavit on how it intends to deal with an interim contract with CPS for payment of social grants from 1 April 2017;
- (b) Declaring that CPS is under a duty to act reasonably in negotiating that contract with SASSA;
- (c) That the contract must contain adequate safeguards for various aspects of the personal privacy, dignity and autonomy of grant beneficiaries;
- (d) That the Minister and SASSA must file continuous reports with the Court on the steps taken and to be taken to ensure that payment of social grants is made from 1 April 2017; and
- (e) Declaring that SASSA is under a duty to ensure that the payment method must contain adequate safeguards for various aspects of the personal privacy, dignity and autonomy of grant beneficiaries.

[24] The Minister and SASSA did not file opposition to the direct access application, nor did any of the other cited parties,²⁴ except for CPS and the Information Regulator.

[25] CPS filed an opposing affidavit setting out information relating to its interaction with SASSA. It does not oppose the relief sought by the Black Sash Trust, except for the initial prayer for an order declaring that the personal information of

²⁴ The Minister of Finance and National Treasury. The Information Regulator only opposed the application in part.

grant beneficiaries is the property of SASSA. The Black Sash Trust now accepts that this order is misconceived and has abandoned it.

[26] Freedom Under Law NPC seeks leave to intervene as an applicant (intervention application) and asks for additional orders:

- (a) That details of the negotiations and conclusion of the interim contract between SASSA and CPS be disclosed to the Court;
- (b) Declaring that irrespective of the terms of the contract CPS may not charge more than the current beneficiary fee; may not refuse to enter the interim contract because of this restriction; and that the contract may not endure for longer than 18 months;
- (c) That CPS must file with the Court an audited statement of expenses, income and net profit earned under the interim contract upon its completion; and
- (d) That SASSA must obtain an independent audited verification of CPS figures, to be approved by National Treasury and filed with the Court.

[27] The Minister and SASSA do not oppose the intervention of Freedom Under Law as an applicant, but oppose the extent of the disclosure of documentary information it requires, as well as the determination by this Court, in advance, of the terms as to price and duration on which SASSA and CPS may contract with each other.

[28] Similarly, CPS does not object to Freedom Under Law's intervention, but also objects to the extent of the disclosure sought and the imposition of contractual terms by the Court.

[29] Corruption Watch NPC (RF) also seeks admission as *amicus curiae* (friend of the Court). It supports the relief sought by the Black Sash Trust in the direct access application and added some suggestions in relation to the remedy, especially that of the Court's supervisory role.

(30) There has been no opposition to Corruption Watch 's application.

[31] The South African Post Office SOC Limited (SAPO), a state-owned corporation established by statute,²⁵ too, seeks admission as an *amicus*. In the main, its depositions sought to establish that it has the capacity, immediately, or in the medium term, to take over the distribution of the grants.

(32) On 8 March 2017, after receiving the "follow up report", the Court issued to the Minister and SASSA the directions referred to in [12] above. The reply was filed a day late, on 14 March 2017.

Issues

[33] The preliminary issues that need to be determined are:

- (a) Should the application for direct access succeed?
- (b) Should Freedom Under Law 's application to intervene succeed?
- (c) Should Corruption Watch's application to act as *amicus* succeed?
- (d) Should SAPO's application to act as *amicus* succeed?

(34) On the merits, the issues that need to be determined are:

- (a) Are SASSA and CPS under any constitutional duty after 31 March 2017 to continue payment of the social grants?
- (b) If they are, does this Court have the competence to make an order compelling them to do so?
- (c) Does this Court have the competence to resume supervision in respect of:
 - (i) SASSA's conduct smce the discharge of the Court's earlier supervisory order;

²⁵ South African Post Office SOC Ltd Act 22 of 2011 .

- (ii) the continued performance of SASSA's and CPS's constitutional obligations in the payment of social grants;
 - (iii) SASSA's responsibilities in relation to either another competitive bidding process or taking over responsibility for payment of grants itself?
- (d) Are there grounds for calling for explanations from the Minister in relation to costs being paid personally?

Direct access

[35] Whether direct access should be granted in the interests of justice depends **on-**

"the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise . . . the possibility of obtaining relief in another court, and time and costs that may be saved by coming directly to this Court."²⁶

[36] Direct access should be granted. The Black Sash Trust clearly has standing to bring the application in the public interest. Although this Court is not well-suited to hear urgent matters²⁸ and it is a rule in the High Court that self-created urgency should not usually be countenanced,²⁹ it is difficult to conceive of a matter more urgent on a national scale. The constitutional right to social assistance that for many, especially children, the elderly and the indigent, provide the bare bones of a life of dignity, equality and freedom is directly involved, across the land. The conduct of the Minister and SASSA has created a situation that no one could have contemplated: the very negation of the purpose of this Court's earlier remedial and supervisory order. The matter can be decided on facts that are not disputed. Due to the time constraints

²⁶ *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12.

²⁷ Section 38(d) of the Constitution.

²⁸ *Ramakatsa v Magashule* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 39.

²⁹ *Freedom Under Law (RF) NPC v National Director of Public Prosecutions* [2015] ZAGPPHC 759 at paras 45-6.

of the emergency created by the Minister and SASSA the forum for effective final relief is this Court.

Freedom Under Law's intervention application

[37] For much the same reasons, Freedom Under Law's application to intervene as an applicant should also be allowed. It has the same kind of standing to act in the public interest and adds important aspects that need to be considered in relation to the interim contract.

Corruption Watch's application to appear as a friend of the Court

[38] Corruption Watch was a friend of the Court in the original *Al/Pay* litigation. In light of the fact that the Minister and SASSA are of the view that their conduct in deviating from the remedial order does not legally oblige them to account to the Court, the perspective offered by Corruption Watch will be of assistance to the Court in determining the correct position. Corruption Watch is admitted as a friend of the Court.

SAPO's application to appear as a friend of the Court

[39] To what extent SAPO is in fact able to come to the rescue is a consideration that belongs to an assessment of the merits of this case. But even if this assertion does not find favour in the end it does not detract from the fact that SAPO's perspective was important. Not only did it add a fresh, empowering perspective. It gave a real sense that, with sufficient will and energy, the State itself could creditably and competently manage the grants distribution process. It is worth admitting it as a friend of the Court.

Constitutional obligations

[40] In *Al/Pay 2* the Court held that the suspension of the validity of the contract between SASSA and CPS did not prevent the Court from regulating and supervising both the content and performance of the contract. It did so on the basis that both

SASSA and CPS were organs of state in relation to the contract and that this entailed constitutional obligations for both entities;³⁰ that this Court's remedial power under section 172(1)(b)(ii) of the Constitution allowed it;³¹ and that CPS also bore obligations under section 8(2) of the Constitution because it had performed a constitutional function for a significant period already, the constitutional obligation persisted to ensure that a workable payment system remains in place until a new one is operational.³² The conclusion that the contract was invalid meant that CPS could not benefit from it, but, conversely, should not suffer prejudice from being compelled to continue its performance in the face of its invalidity.³³

[41] The constitutional obligations of both SASSA and CPS as organs of state performing a constitutional function for a considerable period do not end on 31 March 2017. Both accept that. The difficulty that arises is how this Court may enforce the performance of those continuing constitutional obligations after 31 March 2017.

Enforcement and remedy

[42] SASSA failed to honour its assurance to this Court that it will be in a position to make payment of social grants after 31 March 2017. It and CPS failed to timeously conclude a lawful contract to provide for that payment. These circumstances provide a different context for the enforcement of a just and equitable remedy from that obtained when we made the remedial order in *AllPay 2*. The context then was a breach of the constitutional and legislative framework for fair, equitable, transparent, competitive and cost-effective procurement. The constitutional defect here lies elsewhere.

³⁰ *AllPay 2* above n 13 at paras 52-60.

³¹ *Id* at para 63.

³² *Id* at paras 64-6.

³³ *Id* at para 67.

[43] The primary concern here is the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution. It is that threatened breach that triggers the just and equitable remedial powers the Court has under section 172(1)(b)(ii) of the Constitution, not only the potential invalidity of the proposed new contract that SASSA and CPS seeks to conclude. The need to intervene under these and similar circumstances was aptly captured by Mogoeng CJ in *Mhlope* in these terms:

"It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And there explains the unique or extraordinary remedy we have crafted"³⁴

[44] This Court's extensive powers to grant a just and equitable order also permit it to extend the contract that would otherwise expire on 31 March 2017. Since the contract was declared invalid in *Al/ Pay I*, if we extend the contract, it will be necessary to also extend the declaration of invalidity and the suspension of that declaration for the period of extension of the contract. In *Allpay 2* we tied up the suspension of the declaration of invalidity to the period of the invalid contract. That was done, in order "to allow the competent authority to correct the defect" and to avoid disrupting the provision of crucial services that it was constitutionally obliged to render.³⁵

[45] As the judgment of my brother Madlanga J shows, there is another valid way of arriving at an identical outcome, but I do not think there is any harm in declaring, to the extent necessary, the continued suspension of the invalid contract.

³⁴ *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA I (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*) at para 137.

³⁵ See section 172(1)(b)(ii) of the Constitution.

[46] CPS is correct in submitting that its continued constitutional obligation to provide services for payment after 31 March 2017 exists only if there is no-one else to provide those services. It is also correct that it will not be in a position to perform its continuing constitutional obligation for payment of social grants if the reciprocal obligations of SASSA and CPS in relation to that payment are not specified. But it is not correct that those obligations can only be specified by way of a negotiated contract between itself and SASSA.

[47] Is there anyone else who can provide the grant payment services? SAPO made bold to say that it would be in a position to do so soon. But it sought admission as friend of the Court, not as a party seeking substantive relief. Its factual assertions of its capability introduced new evidence that does not fall within the ambit of the application. The Court is not in a position at this stage to assess its worth and it is in any event not within its remit to do so. So it must be accepted that CPS is, at present, the only entity capable of making payment of the social grants after 31 March 2017.

[48] All that remains then is the just and equitable remedy to ensure that the reciprocal obligations between SASSA and CPS for payment of the social grants are properly identified and circumscribed. CPS says that can be done only by way of a consensual contract concluded between it and SASSA. But once it is accepted that the constitutional obligations of SASSA and CPS are not sourced in any contract still in practical existence, but in their mutual constitutional obligation to ensure that the right to social assistance of the many people that have been dependent on past payment through CPS are not rendered nugatory, the logic of private consensual agreement as the only way to determine the content of their respective reciprocal obligations in respect of payment falls away. It is then for the Court in the exercise of crafting a just and equitable remedy to spell out the content of those obligations.

[49] Can this be done outside the fair and equitable procurement framework put in place under the authority of section 217 of the Constitution? All parties agreed that it

could, for the very reason that the constitutional and legal source is that of section 172(1)(b)(ii) of the Constitution and not section 217.

[50] There was much debate during the oral hearing on whether it would be just and equitable to order that those reciprocal obligations should be same as that of the contract that expires on 31 March 2017. I consider that it should be. No party has any claim to profit from the threatened invasion of people's rights. At the same time no one should usually be expected to be out of pocket for ensuring the continued exercise of those rights. That equilibrium was the premise of the Court's previous remedial order. It is just and equitable to continue on that basis. Our order below reflects that SASSA and CPS should continue to fulfil their respective constitutional obligations in the payment of social grants for a period of 12 months as an extension of the current contract. To the extent necessary, our earlier declaration of invalidity of that contract will be further extended, as well as the suspension of that declaration of invalidity. In the event that CPS wishes to alter the content of its financial obligations or entitlement, the order makes provision for it to approach National Treasury for its consideration and approval, to be confirmed after a report on the issue to this Court.

[51] It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one.

Content and performance of the proposed contract

[52] The Black Sash Trust, Freedom Under Law, Corruption Watch and SAPO all, in varying degrees, suggest that this Court should regulate or prescribe the obligations

that SASSA and CPS should adhere to in the conclusion of the proposed contract to provide services for the payment of social grants.

[53] As stated above the constitutional obligations of both SASSA and CPS as organs of state performing a constitutional function for a considerable period do not end on 31 March 2017. Both accept that. There is no opposition to the relief sought by the Black Sash Trust in relation to declaring that CPS is under a duty to act reasonably in negotiating that contract with SASSA; and that the contract must contain adequate safeguards to protect various aspects of the personal privacy, dignity and autonomy of grant beneficiaries.

[54] To go further than that by imposing limits in advance on specific contractual terms that may be agreed to between SASSA and CPS is not justified. If these terms turn out to be constitutionally or otherwise legally objectionable they may be challenged in due course. But now is not the opportune time to do so. CPS has indicated that it has no problem with disclosure in relation to this contract similar to what was ordered earlier. That will also be provided for in the order.

Court supervision

[55] That leaves the issue of supervision of the performance of the contract. It is justified, but more appropriately dealt with under SASSA's obligations in this regard, because that is where the problem lies.

[56] In *Al!Pay 2* this Court commented on SASSA's conduct:

"Before concluding, it is necessary to say something about SASSA's conduct. SASSA is an organ of state. It is bound by the basic values and principles governing public administration set out in section 195 of the Constitution. As is evident from this judgment, and the merits judgment, SASSA's irregular conduct has been the sole cause for the declaration of invalidity and for the setting aside of the contract between it and Cash Paymaster.

This court sought further submissions from the parties to assist in the difficult task of determining appropriate relief. The importance of this is obvious, not only because of the vast sums of money involved but more importantly because of the enormous consequences of irregularities where the interests of beneficiaries, particularly children, play a pivotal role in assessing the appropriate remedy.

Yet, contrary to the obligations it carries under section 195, SASSA has adopted an unhelpful and almost obstructionist stance. It failed to furnish crucial information to AIPay regarding the implementation of the tender, and to Corruption Watch in respect of steps it took to investigate irregularities in the bid and decision-making processes. Its conduct must be deprecated, particularly in view of the important role it plays as guardian of the right to social security and as controller of beneficiaries' access to social assistance."³⁶

[57] Regrettably, not much has changed, except that this time around the Minister may have contributed to the continued recalcitrance. For purposes of this part of the judgment the problem to be addressed is the demonstrated inability of SASSA to get its own affairs in order, in relation to the performance of the contract, a competitive bidding process and becoming able to make payment of grants under its own steam.

[58] All this requires explanation and accountability. This conduct puts grant recipients at grave risk and appears to disregard Court orders. Both these aspects fall within the Court's jurisdiction and wide remedial powers and will be addressed in the order we make at the end of this judgment.

[59] SASSA and the Minister have used the discharge by this Court of its supervisory jurisdiction as justification that there was no need for them to inform or approach the Court when it became clear that SASSA would not be in a position to assume the duty to pay the grants itself. This is disingenuous and incorrect.

[60] Although the supervisory part of the order was discharged, the material content of the order remained. SASSA had only two options under the order, either to make

³⁶ *AIPay 2* above n 13 at paras 73-5.

provision for the payment of social grants through a competitive tendering process, or to pay the grants itself after 31 March 2017. When it became aware that it could do neither, any steps to go outside these two options was in disregard of this Court's remedial order.

[61] Nothing practical or legal prevented the Minister and SASSA from approaching the Court. They were aware that compliance was impossible from late August to October 2016. They could have filed a further report immediately on becoming aware of this dire situation or they could have filed an application authorising SASSA to take steps to remedy the situation that had arisen. The former they did on 3 March 2017, the latter on 28 February 2017 – only to attempt withdrawal of the application a day later.

[62] That inability has compromised the continued protection of access to their right to social assistance for grant recipients. That justifies further Court supervision. But that has been proved not to be enough to coax SASSA into doing what it was constituted to do. More is required.

[63] The Black Sash Trust initially sought an order requiring SASSA to file a report on how it was proposing to deal with its proposed "interim contract" with CPS; declaring that CPS was under a duty to act reasonably in negotiating and concluding the interim contract; that the contract should: contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; provide that personal information of beneficiaries is the property of SASSA; provide that such personal information shall at the end of the contract be given to SASSA, and removed from the possession of CPS, its parent company and all its affiliate companies, except where such a company and a beneficiary have a continuing contractual relationship; and preclude a contracting party from inviting beneficiaries to "opt-in" to the sharing of their confidential information for the marketing of their goods and services.

[64] It also sought an order that the Minister and SASSA are to file reports on affidavit with this Court on or before a date determined by the Court on what steps they have taken, what steps they will take, and when they will take each such future step, to ensure that the payment of all social grants is made when they fall due after 31 March 2017 and matters ancillary to that. The Minister and SASSA were to file reports on affidavit with this Court on a quarterly basis, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of any "interim contract", what steps they have taken in that regard, what further steps they will take, and when they will take each such future step, so as to ensure that the payment of all social grants is made when they fall due after the expiry of any "interim contract".

[65] These reports by the Minister and SASSA should include, but not be limited to, the applicable time-frames for the various deliverables that form part of the plan, whether these time-frames have been complied with, and if not, why so and what will be done to remedy the situation. If any material changes occurred these should immediately be reported to the Court. The payment method it determines should contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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, and should preclude a contracting party from inviting beneficiaries to "opt-in" to the sharing of their confidential information for the marketing of their goods and services.

[66] During oral argument the Black Sash Trust accepted that an order of the kind contemplated in [50] above would make much of its prayers redundant. It accepted that it was competent for the Court to make an order of that nature and asked that its requested safeguards in relation to the personal information of grant recipients should remain. It supported the appointment of independent monitors to be involved with the supervision process.

[67] Our proposed new just and equitable remedial order will have a similar effect on many of the proposals the other parties made as well.

[68] What remains relevant of Corruption Watch's suggestions are the appointment of a legal practitioner and the nomination of suitably qualified experts to report on legal and technical issues arising during the period of the remedial order. It also sought similar audited statements in respect of the new remedial order to those in the old remedial order on financial information during the relevant period. It still seeks an order that this matter be referred to:

"The Public Protector to conduct an investigation, and if necessary to order remedial action, into the conduct of SASSA, the Department of Social Development, the Minister of Social Development and CPS since 17 April 2014, when the Court handed down the order in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) until the conclusion of the contract between SASSA and CPS for the distribution of social grants from 1 April 2017; and

[t]he Directorate for Priority Crime Investigation to investigate the conduct of SASSA, the Department of Social Development, the Minister of Social Development and CPS since 17 April 2014, when the Court handed down the order in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC), until the conclusion of the contract between SASSA and CPS for the distribution of social grants from 1 April 2017."

[69] The first to third respondents proposed a draft order to this Court. In this order, the Auditor-General is nominated as a possible independent monitor to assist the Court. In terms of section 188(2)(b) of the Constitution, the Auditor-General may audit and report on the accounts, financial statements and financial management of any institution that is authorised in terms of any law to receive money for a public purpose. CPS is such an institution in the present circumstances.

[70] Freedom Under Law asked for information relating to the proposed contract between SASSA and CPS to be disclosed and that a cap be placed on the price that could be charged and paid. Most of that falls away, except the duty relating to financial reporting. The Minister and SASSA did not oppose the Black Sash Trust's original prayers and its agreement thus falls to be trimmed in a similar way.

[71] In its submissions, the Black Sash Trust relies on case law to enhance the importance of the appointment of independent monitors by courts.³⁷ None of the parties opposed the appointment of independent monitors.

Breach of constitutional obligation and costs

[72] From what has been stated, especially in [55] to [71], there are reasonable grounds for investigating whether this Court's remedial order was disregarded and, if so, whether this was done wilfully. The Black Sash Trust submitted that the Minister misled Parliament during her appearance before the Parliamentary Committee in November 2016. There is little doubt that the Minister and SASSA are liable in their official capacity for the costs, but in view of the possibility that individual conduct may have played a material role in the matter, the order will also provide for further opportunity for explanation in that regard.

[73] The Minister bears the primary responsibility to ensure that SASSA fulfils its functions. She appoints its CEO. There is little the CEO can do without her direction.³⁸ Attempts to obtain evidence of what steps she took after *Al/Pay 2* to ensure that beneficiaries would continue to be well catered for drew a blank.

[74] Given this chain of responsibility, there may thus be no grounds, in the end, for considering whether any individual officials of SASSA should be mulcted, personally,

³⁷ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (I) SA 46 (CC); 2000 (II) BCLR 1169 (CC) at para 97; *South African Human Rights Commission v Minister of Home Affairs: Naledi Pandor* [2014] ZAGPJHC 198; and *Madzodzo v Minister of Basic Education* [2014] ZAECMHC 5; 2014 (3) SA 441 (ECM).

³⁸ See [2] above.

in costs. The office-holder ultimately responsible for the crisis and the events that led to it is the person who holds executive political office. It is the Minister who is required in terms of the Constitution³⁹ to account to Parliament. That is the Minister, and the Minister alone.

[75] All these aspects require further scrutiny, but that can only be done after the potentially affected parties are joined to the proceedings in their personal capacities and given an opportunity to explain their conduct in relation to each of these issues.

Order

[76] It is ordered that:

1. The Black Sash Trust is granted direct access to bring this application.
2. Freedom Under Law NPC is granted leave to intervene.
3. Corruption Watch NPC (RF) and the South African Post Office SOC Limited are admitted as friends of the Court.
4. It is declared that the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Limited (CPS) are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe upon grant beneficiaries'

³⁹ Section 55 of the Constitution sets out the powers of the National Assembly. It provides:

- "(1) In exercising its legislative power, the National Assembly may—
- (a) consider, pass, amend or reject any legislation before the Assembly; and
 - (b) initiate or prepare legislation, except money Bills.
- (2) The National Assembly must provide for mechanisms—
- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
 - (b) to maintain oversight of—
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state."

rights of access to social assistance under section 27(1)(c) of the Constitution.

5. The declaration of invalidity of the contract is further suspended for the 12-month period from 1 April 2017.
6. SASSA and CPS are directed to ensure payment of social grants to grant beneficiaries from 1 April 2017, for a period of 12 months, on the same terms and conditions as those in the current contract between them that will expire on 31 March 2017, subject to these further conditions:
 - 6.1 The terms and conditions shall:
 - (a) contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; and
 - (b) preclude anyone from inviting beneficiaries to "opt-in" to the sharing of confidential information for the marketing of goods and services.
 - 6.2 CPS may in writing request National Treasury during the 12 month period to investigate and make a recommendation regarding the price in the contract.
 - 6.3 National Treasury must file a report with this Court within 21 days of receipt of the request setting out its recommendation.
 - 6.4 Within 30 days of the completion of the period of the contract, CPS must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the contract.
 - 6.5 SASSA must thereafter obtain an independent audited verification of the details provided by CPS under paragraph 6.4.

- 6.6 The audit verification must be approved by National Treasury and the audited verification must be filed by SASSA with this Court within 60 days.
- 6.7 CPS must permit the auditors appointed by SASSA to have unfettered access to its financial information for this purpose.
7. The Minister and SASSA must file reports on affidavit with this Court every three months, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of the 12-month period, what steps they have taken in that regard, what further steps they will take, and when they will take each future step, so as to ensure that the payment of all social grants is made when they fall due after the expiry of the 12-month period.
8. The reports filed by the Minister and SASSA as contemplated in paragraph 7 must include, but is not limited to, the applicable time-frames for the various deliverables which form part of the plan, whether the time-frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.
9. If any material change arises in relation to circumstances referred to in a report referred to in paragraphs 7 or 8, the Minister and SASSA are required immediately to report on affidavit to the Court and to explain the reason for and consequences of the change.
10. It is declared that SASSA is under a duty to ensure that the payment method it determines:
- 10.1 contains adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; and

- 10.2 precludes a contracting party from inviting beneficiaries to "opt-in" to the sharing of confidential information for the marketing of goods and services.
11. The parties are, within 14 days from the date of this order, required to submit the names of individuals, with their written consent, suitably qualified for appointment as independent legal practitioners and technical experts for the purposes referred to in paragraph 12 below.
12. The Auditor-General and any other person(s) or institution(s) appointed by the Court after receipt of the names submitted under paragraph 11, shall jointly and until otherwise directed by the Court:
- 12.1 evaluate the implementation of payment of social grants during the 12-month period;
- 12.2 evaluate the steps envisaged or taken by SASSA for any competitive bidding process or processes aimed at the appointment by SASSA in terms of section 4(2)(a) of the South African Social Security Agency Act 9 of 2004 of a new contractor or contractors for the payment of social grants;
- 12.3 evaluate the steps envisaged or taken by SASSA aimed at SASSA itself administering and paying the grants in the future or SASSA itself permitting any part or parts of the administration and payment processes in the future; and
- 12.4 file reports on affidavit with this Court every three months, commencing on a date three months after the date of this order, or any shorter period as the legal practitioners and experts may deem necessary, setting out the steps they have taken to evaluate the matters referred to in paragraphs 12.1 to 12.3, the results of their evaluations and any recommendations they consider necessary.
13. The Minister is called upon to show cause on affidavit on or before Friday 31 March 2017 why-

- 13.1 she should not be joined in her personal capacity; and
 - 13.2 she should not pay costs of the application from her own pocket.
14. Costs are reserved until conclusion of these proceedings.

MADLANGAJ

[77] I commend my colleague, Froneman J, for this feat within so short a time. But for one issue, I agree with his reasoning and order.⁴⁰

[78] I do not see why we would want to follow a path that orders the extension of the contract that expires on 31 March 2017, presumably with all its invalidity stemming from our declaration in *Allpay 1*, only to extend the "earlier" declaration of invalidity. Presumably this is being done to ensure that the contract under which SASSA and CPS will fulfil their obligation of paying social grants will be valid.

[79] But – in order to get to a valid contract – it is not necessary to follow a tortuous route. As the main judgment says, we have an extremely wide remedial power afforded us by section 172(1)(b)(ii) of the Constitution.⁴¹ In addition, *Allpay 2* tells us – and so does the main judgment – that CPS is an organ of state; as such it bears a constitutional obligation to see to the continued payment of social grants.⁴² It is within our remit – in the exercise of our wide remedial power – to order CPS to continue fulfilling this constitutional obligation. So, I prefer making that direct order.

[80] I am happy with the resultant contract being on the same terms as those of the expiring contract.

⁴⁰ 1 refer to Froneman J's judgment as the main judgment.

⁴¹ Id [58]. See also *Mhlope* above n 34 at para 137.

⁴² *Allpay 2* at para 52; and main judgment [41] and [53].

As for validity, the new contract will be valid because it comes into being as a result of our order.

[81] I would thus accept the order contained in the main judgment shorn of that part that provides for an extension of the old contract and the extension of the declaration of invalidity.

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