

## CASH PAYMASTER SERVICES (PTY) LTD

### IMPACT OF THE CONSTITUTIONAL COURT'S JUDGMENT IN *BLACK SASH TRUST v MINISTER OF SOCIAL DEVELOPMENT* (CASE CCT 48/17) ON THE LAWFULNESS OF DEBIT ORDERS AND ELECTRONIC TRANSACTIONS ON THE SASSA-BRANDED BENEFICIARY ACCOUNTS

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#### OPINION

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- 1 On 17 March 2017, the Constitutional Court handed down judgment in *Black Sash Trust and Another v Minister of Social Development and Others* (CCT48/17).
- 2 Cash Paymaster Services (Pty) Ltd (“CPS”) seeks our advice on an urgent basis regarding the impact of the Constitutional Court’s judgment on the lawfulness of the continued processing of debit orders and electronic funds transfers (“EFTs”) on the SASSA-branded accounts that social grant beneficiaries hold with Grindrod Bank (“the beneficiary accounts”).
- 3 We are instructed that Black Sash has adopted the view, which it has apparently published in the media, that the Constitutional Court determined in its judgment that the continued processing of debit orders and EFTs on the beneficiary

accounts would be unlawful. For the reasons that follow, we are of the view that the Constitutional Court did not make such a determination.

- 4 There is pending litigation in the Gauteng Division of the High Court on the question whether the Social Assistance Act 13 of 2004 (“the Social Assistance Act”) and the Regulations restrict debit orders and EFTs on the beneficiary accounts. A number of consolidated applications were argued before the High Court in October 2016 and judgment was reserved. In its founding affidavit before the Constitutional Court, the Black Sash referred to this as “the Net1 litigation”.
- 5 In its application to the Constitutional Court, the Black Sash did not seek any relief relating to the lawfulness of the processing of debit orders and EFTs on the beneficiary accounts.<sup>1</sup> The intervening parties and the *amici curiae* also did not seek relief regarding this issue.
- 6 The issues before the Constitutional Court are listed at paragraphs 33 and 34 of the judgment. Significantly, the Constitutional Court did not indicate that one of the issues before it related to the lawfulness of the processing of debit orders and EFTs on the beneficiary accounts.
- 7 In its answering papers, CPS advised the Constitutional Court that judgment in the Net1 litigation was pending in the High Court and may ultimately reach the

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<sup>1</sup> In prayer 5 of its notice of motion, the Black Sash sought relief relating to the use of personal data obtained in the payment process. That relief fell well short of a prohibition on the continued processing of debit orders and EFTs.

Constitutional Court on appeal. CPS submitted that it would not be appropriate for the Constitutional Court to express any view on the issues raised in the Net1 litigation at this stage.

8 If the Constitutional Court had been minded to determine the issue that was pending before the High Court in the Net1 litigation, it would have been necessary to join other interested and affected parties, including Grindrod Bank. The Constitutional Court might have been expected to have made such a finding in express terms and to explain why it was appropriate to determine this issue while judgment in the Net1 litigation was pending. The Constitutional Court did not do so.

9 On the contrary, the Constitutional Court was careful to confine its judgment to the issues squarely before it and to grant an order to address the immediate threat of the non-payment of social grants on 1 April 2017. The Court made this clear in paragraph 54 of the judgment, where it resisted imposing limits in advance on the contractual terms that may be agreed between SASSA and CPS (as it has been urged to do by Freedom Under Law).

10 We have given consideration to whether paragraph 6 of the Constitutional Court's order may be said to provide support for the Black Sash's contention:

10.1 Paragraph 6 provides as follows:

*“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."*

10.2 Paragraph 6.1 is concerned with the terms and conditions of the new contract between SASSA and CPS. It provides that those terms and conditions must contain "adequate safeguards" to protect "personal data obtained in the payment process".

10.3 If the phrase "personal data obtained in the payment process" were to be interpreted as including beneficiaries' bank account details, paragraph 6.1 might be read to mean that the beneficiaries' account details cannot be used for any purpose other than the payment of grants – thereby prohibiting the use of the accounts for any other electronic transactions. In our view, however, such an interpretation is not sustainable for the following reasons:

10.3.1 As appears from the pleadings (Black Sash's founding affidavit para 122), the order sought in paragraph 6.1 was simply as an extension of the Constitutional Court's order in *Allpay II*. It was not premised on any new findings of law or interpretation of section 20 of the Social Assistance Act.

10.3.2 The order in paragraph 6.1 does not prohibit beneficiaries from voluntarily disclosing their bank account details (or any other personal details) in order to utilise their accounts for purposes not sanctioned in terms of section 20(3) and (4) of the Social Assistance Act. If the position were otherwise, it would mean that beneficiaries are prohibited from using their grant money for any purpose other than those contemplated in sections 20(3) and (4). The order is not intended to have such a far-reaching effect; it is intended to do no more than to ensure that CPS does not exploit beneficiaries' personal data for other purposes.

10.3.3 The order does not prescribe how beneficiaries may utilise their grant monies and it does not preclude the processing of debit orders or EFTs through the beneficiary accounts. Considering the seriousness and enormity of the consequences of such an order, it is not one that the Constitutional Court would make other than in the most express terms and without a considered judgment on the issue.

11 It is notable that the Constitutional Court's judgment does not once mention "deductions" or "debit orders". This bolsters our conclusion that the Constitutional Court simply did not address the question whether debit orders or EFTs are prohibited as "deductions" or otherwise.

12 If the Constitutional Court had intended to prohibit the processing of debit orders and EFTs from the beneficiary accounts, such a prohibition may in principle have been sourced in one of three provisions:

12.1 *First:* the prohibition might have been sourced in an interpretation of the Social Assistance Act and the Regulations. However, whether the Social Assistance Act or the Regulations have such an effect is the very issue that is pending in the Net1 litigation. For the reasons stated above, the judgment of the Constitutional Court was not intended to pre-empt the outcome of the Net1 litigation regarding the correct interpretation of the Social Assistance Act and the Regulations.

12.2 *Second:* the prohibition might have been sourced in the contract between SASSA and CPS. However, the existing contract between SASSA and CPS did not contain such a prohibition. Paragraph 6 of the Constitutional Court's order provided for an extension of the existing contract "on the same terms and conditions as those in the current contract between them", save for the matters listed in that paragraph. For the reasons given above, nothing in paragraph 6 of the Constitutional Court's order prohibits debit orders and EFTs on the beneficiary accounts.

12.3 *Third:* the prohibition might have been sourced in the contract between grant beneficiaries and CPS/Grindrod Bank. A copy of the terms and conditions of that contract was annexed to the Black Sash's founding affidavit as annexure "LM17". The contract expressly envisages that a beneficiary might authorise debit orders and EFTs on his or her account. There is nothing in the judgment of the Constitutional Court to suggest that

these contractual provisions would be rendered unenforceable after 1 April 2017.

- 13 For the reasons set out above, we conclude that the judgment of the Constitutional Court has no impact on the lawfulness of the processing of debit orders and EFTs on the beneficiary accounts.

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11 April 2017**