

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 43557/16

46024/16

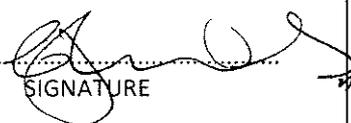
46278/16

47447/16

Date: 9 May 2017

DELETE WHICHEVER IS NOT APPLICABLE .
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

9/05/2017
DATE


SIGNATURE

In the matter between:

NET1 APPLIED TECHNOLOGIES SOUTH
AFRICA

MONEY LINE FINANCIAL SERVICES (PTY)
LTD

MANJE MOBILE ELECTRONIC PAYMENT
SERVICES (PTY) LTD

and

THE CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY

THE SOUTH AFRICAN SOCIAL SECURITY
AGENCY

Case number: 43557/16

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THE MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA THIRD RESPONDENT

THE SOUTH AFRICAN RESERVE BANK FOURTH RESPONDENT

THE PAYMENT ASSOCIATION OF SOUTH AFRICA FIFTH RESPONDENT

GRINDROD BANK LIMITED SIXTH RESPONDENT

Case number: 46024/16

FINBOND MUTUAL BANK APPLICANT

and

THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY FIRST RESPONDENT

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY SECOND RESPONDENT

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA THIRD RESPONDENT

THE SOUTH AFRICAN RESERVE BANK FOURTH RESPONDENT

THE PAYMENT ASSOCIATION OF SOUTH AFRICA FIFTH RESPONDENT

GRINDROD BANK LIMITED SIXTH RESPONDENT

Case number: 46278/16

THE SMART LIFE INSURANCE COMPANY LIMITED APPLICANT

and

THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY FIRST RESPONDENT

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY SECOND RESPONDENT

THE MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA THIRD RESPONDENT

THE SOUTH AFRICAN RESERVE BANK FOURTH RESPONDENT

THE PAYMENT ASSOCIATION OF SOUTH AFRICA FIFTH RESPONDENT

GRINDROD BANK LIMITED SIXTH RESPONDENT

Case number: 47447/16

INFORMATION TECHNOLOGY CONSULTANTS (PTY) LTD APPLICANT

and

THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY FIRST RESPONDENT

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY SECOND RESPONDENT

THE MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA THIRD RESPONDENT

THE SOUTH AFRICAN RESERVE BANK FOURTH RESPONDENT

THE PAYMENT ASSOCIATION OF SOUTH AFRICA FIFTH RESPONDENT

GRINDROD BANK LIMITED SIXTH RESPONDENT

IN THE APPLICATIONS TO INTERVENE OF:

THE BLACK SASH TRUST FIRST APPLICANT

SIPHO LENNOX BANI SECOND APPLICANT

MARIA HENDRICKS THIRD APPLICANT

PATRICIA SAPTOE FOURTH APPLICANT

EVERNESS VEPI NKOSI FIFTH APPLICANT

SANNIE SEIPATI NTHITE SIXTH APPLICANT

ALETTA BEZUIDENHOUT

SEVENTH APPLICANT

IN THE APPLICATIONS FOR ADMISSION AS *AMICI CURIAE* OF:

DAVID DANIEL CONSTABLE

FIRST APPLICANT

LUNGILE VICTOR MNYATELI

SECOND APPLICANT

NELLIE OERSON

THIRD APPLICANT

THENJIWE JANUARY

FOURTH APPLICANT

JUDGMENT

VAN DER WESTHUIZEN, AJ

- [1] Initially this judgment commenced as an extended and rather lengthy judgment, however, after much reflection and reconsideration and for what follows, it was happily not to be.
- [2] Various applicants brought similar applications against the first, second and third respondents. At the commencement of the hearing of those applications, they were consolidated and heard together. It was agreed between the parties that Grindrod Bank Limited (Grindrod), although the sixth respondent, would argue as applicant, as it supports the relief sought by the various applicants. This is a consolidated judgment.
- [3] It is recorded that various parties applied to intervene and others to be admitted as *amici curiae*. I heard submissions from those parties and indicated that I would consider the applications to intervene and for the admission as *amici curiae* and deal therewith in this judgment. I have considered those applications thoroughly and gave much thought thereto. For what follows in this judgment and in view of the approach taken herein, I am of the view that those applications should not be granted. The relief sought in those applications are not relevant, nor

appropriate, to the approach adopted in this judgment and particular in view of the relief sought by the applicants and the relief I intend granting. I shall briefly return thereto later in this judgment.

- [4] Net1 Applied Technologies South Africa (Pty) Ltd (Net1) applied for condonation of the filing of a supplementary affidavit responding to new facts raised in the application by The Blacksash Trust. Leave was granted and the supplementary affidavit admitted into evidence. However nothing turns thereon.
- [5] The consolidated applications concern the meaning and legality of amendments to regulations 21 and 26A of the Regulations under the Social Assistance Act 13 of 2004 (the Act), that were promulgated on 6 May 2016 (the Regulations).
- [6] The relief that all the applicants in the main applications seek is in effect a declarator that the amended regulations, and in particular regulations 21 and 26A thereof, do not restrict beneficiaries in the manner in which they operate their respective bank accounts.
- [7] As the applications concern primarily the interpretation of the aforementioned regulations, I do not intend to deal with other issues, raised in the papers, that are not directly relevant to the issue of interpretation.
- [8] When reference is made to applicants, it refers to the various applicants in the main consolidated application excluding the applicants in the applications for intervention and admission as *amici curiae*.
- [9] The crux of the first, second (SASSA) and third (the Department) respondents' interpretation of the new regulations 21 and 26A, relates to an interpretation as prohibiting all electronic debits, stop orders and electronic fund transactions (EFTs) from beneficiary accounts held at Grindrod. The alleged premise being that the bank accounts held at Grindrod constitute a "*method determined by the Agency*".
- [10] Following on that interpretation, SASSA instructed Cash Paymaster

Services (Pty) Ltd (CPS) and Grindrod to stop all debit orders being processed off the beneficiary accounts with immediate effect from promulgation of the new regulations.

[11] The various applicants contested SASSA and the Department's interpretation and have resisted implementation of the said instruction. Consequently, Net1, CPS and Grindrod have been criminally charged under s 30 of the Act.

[12] The practical implications of the first, second and third respondents' interpretation of the said new regulations affect the operation of over 10 million beneficiary bank accounts that translate into a value of approximately R550 million per month.

[13] In this regard, the South African Reserve Bank (SARB) cautions that the effect of the first, second and third respondents' aforesaid instruction "*would disrupt the system of collection and payment by creditors and debtors*" that "*would result in a broader economic impact*" due to the unsuccessful collection of debts.

[14] New regulation 21 provides as follows:

"21 Method of payment of social assistance

- (1) *The Agency shall pay a social grant-*
 - (a) *into a bank account of the beneficiary or institution where the beneficiary resides, provided that*
 - (i) *the beneficiary of the social grant consents to payment in accordance with sub regulation 21(1)(a) in writing and has submitted such consent in person to the Agency;*
 - (ii) *where a beneficiary is unable to submit the consent contemplated in sub paragraph (i) in person, alternative arrangements must be made with the Agency; or*
 - (b) *by the payment method determined by the Agency;*
- (2) *Social assistance must be paid monthly by the Agency or a*

person appointed by the Agency for that purpose in terms of section 4 of the SASSA Act;

- (3) Subject to the provisions of subregulation (2)-
- (a) in the case of manual payments a beneficiary must-
 - (i) identify himself or herself by means of an identity document or biometric identification;
 - (ii) personally or via a person appointed by the beneficiary or Agency, take receipt of the social assistance payable to him or her; and
 - (iii) sign an acknowledgement of the amount received, if he or she receives payment of his or her social assistance manually;
 - (b) a beneficiary's signature or biometric identification serves as acknowledgement of receipt for the amount received, unless the amount of the social assistance is credited to an account held at a financial institution.
- (4) The method of payment contemplated in sub-regulation 1(b) shall not allow for any deductions, except for deductions allowed for in terms of this Act."

[15] The amended regulation 26A reads as follows:

"26A Circumstances under which a deduction may be made directly from a social grant

- (1) The Agency may allow only one deduction per month not exceeding 10 percent of the value of the beneficiary's social grant for a funeral policy issued by an insurer registered under the Long-Term Insurance Act, 1998 (Act 52 of 1998) to be made directly from a social grant where-
 - (a) the beneficiary of the social grant consents to such deduction in writing and has submitted such consent in person to the Agency;
 - (b) a beneficiary is unable to submit the consent

contemplated in paragraph (a) in person, alternative arrangements must be made with the Agency.

- (2) *Despite sub-regulation (1) no deduction may be made in respect of a-*
 - (a) *foster child grant;*
 - (b) *care dependency grant;*
 - (c) *child support grant; and*
 - (d) *social grant awarded for a period not exceeding twelve months.*
- (3) *Active deductions for a funeral insurance or a funeral scheme from social grants that are excluded in terms of sub-regulation (2), may continue to be deducted from a social grant for a period not exceeding six months following publication of these Regulations to allow the beneficiaries and funeral service providers to make alternative payment arrangements.”*

[16] The Supreme Court of Appeal has confirmed the approach to be followed when interpreting a document, whether it be a statute or other statutory instrument or contract, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA). The following was said in that regard at [18]:

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its

production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[17] Counsel appearing on behalf of Net1 submitted that the first, second and third respondents' aforementioned interpretation militates against the ordinary language of the said regulations when read with s 20 of the Act.

[18] That section provides as follows:

"20. Restrictions on transfer of rights and payments of social assistance.—

(1) A grant may not be transferred, ceded, pledged or in any other way encumbered or disposed of unless the Minister on good grounds in writing consents thereto.

(2) Any act in contravention of subsection (1) is void and if the Minister becomes aware of any such act, he or she may order that payment of the relevant grant be terminated or suspended immediately and the Agency must, in writing by registered mail at the last known address of that beneficiary or procurator, as the case may be, inform him or her in the official language of the Republic in which he or she made the application for the grant—

(a) of the Minister's decision;

(b) of the reasons for that decision; and
(c) that he or she has a right of appeal contemplated in section 18 and of the mechanism and procedure to invoke that right.

(3) A beneficiary must without limitation or restriction receive the full amount of a grant to which he or she is entitled before any other person may exercise any right or enforce any claim in respect of that amount.

(4) Despite subsection (3), the Minister may prescribe circumstances under which deductions may be made directly from social assistance grants: Provided that such deductions are necessary and in the interest of the beneficiary.

(5) An amount that accrues or has accrued to a beneficiary or his or her estate in terms of this Act may not be attached or subjected to any form of execution under a judgment or order of a court or by law, or form part of his or her insolvent estate.

(6) Notwithstanding the provisions of subsection (1), in the case of death of a parent, procurator or primary care giver receiving a grant on behalf of or in respect of another person or child as the case may be, the Agency must appoint a person to receive the grant on behalf or in respect of such person or child, and to use it for his or her benefit without suspending the grant, subject to prescribed conditions."

[19] It may be prudent to recap on the payment system applicable in respect of social grants. In a nutshell it involves the following procedure. Social grants are paid from the budget of the Department of Social Development, administered by SASSA through CPS. In that regard, SASSA pays over the total amount of social grant payments to CPS. In turn, CPS pays the amount received from SASSA into the SASSA Funding Accounts at *inter alia*, Grindrod. From those accounts, the respective payments to the recipients are paid into their respective personal accounts held at Grindrod. Each of those recipients who hold the bank accounts with Grindrod in their own names, have direct client/banker relationships with Grindrod, or with any other banking institution. The grant recipients hold their accounts

subject to the terms and conditions of the respective bank accounts. Furthermore, the Grindrod bank accounts operate within the ordinary and regulated banking environment of the National Payment System.

- [20] No contractual relationship exists between SASSA and Grindrod. Furthermore, SASSA does not operate the accounts held at Grindrod. Each recipient of a grant is obliged to present himself or herself every month at an ATM, CPS pay-point or other merchant's point-of-sale device to authenticate the transfer of the grant into his or her bank account. This is also true where recipients of social assistance hold bank accounts at other banking institutions.
- [21] The process provides that "direct deductions" are made prior to the recipient's receipt of the grant, i.e. before the grant is paid into the recipient's bank account. This much is clear from the provisions of s 20(3) of the Act. In contrast thereto, any debit order against an account at Grindrod, or other bank institution, is made after the grant is paid into the said account, i.e. the processing of a debit order entails compliance on the part of Grindrod, or other bank, with an instruction from an account holder to pay a third party and is effected only if sufficient funds are in the said account.
- [22] In my view, from the foregoing procedure, it is clear that once the grant is transferred into the recipient's account at Grindrod, it operates as any bank account at any Commercial Banking Institution. There is clearly no difference and SASSA equally has no control over such account with Grindrod as it does not have control over any account with a Commercial Bank. For the foregoing, there is no merit in the submission on behalf of the first, second and third respondents that the Grindrod bank accounts are not bank accounts chosen by the beneficiaries, but is "*a method of payment chosen by the Agency*".
- [23] Further support is to be found in the provisions of new regulation 21(1)(a) which stipulates that a social grant is to be paid into a bank

account. The type of bank account is not defined, nor specified. Regulation 21(1)(a) clearly provides for two *scenarios*, either a bank account, or a payment method determined by the Agency. The latter method envisages a specific alternative method that is not a bank account. No such determination appears to have been made, but for the constrained and forced interpretation by the first, second and third respondents referred to above.

- [24] On a purposive reading of regulation 21(1), it is clear that the prohibition in regulation 21(4) is not applicable in respect of regulation 21(1)(a). The two categories, regulations 21(a) and (b), must of necessity entail different and distinct payment methods. That much is clear from the use of the disjunctive “or” in regulation 21(1).
- [25] Furthermore, I find support for the foregoing in the provisions of s 20(3) of the Act recorded above. That sub-regulation clearly stipulates that a recipient is to receive the full grant amount before any third party may exercise any rights or enforce any claim in respect of that amount. Consequently, the full amount of the grant (bar any direct deduction of a 10% funeral subscription) is to be transferred into the recipient’s bank account prior to any deduction thereof by way of a debit order. No other deductions may be made prior to the transfer of the grant amount into the recipient’s account, whether at Grindrod or other banking institution.
- [26] Section 20(4) of the Act, recorded above, qualifies the provisions of s 20(3) of the Act. It provides that the Minister may prescribe circumstances under which deductions may be directly made from social assistance grants, provided that such deductions are “*necessary and in the interest of the beneficiary*”. By necessary implication such deduction must be made prior to the beneficiary receiving the grant amount in his or her bank account. Such interpretation is in accordance with the dictionary meaning of the word “direct”, i.e.: *should*

be direct, straight and close, not devious and remote". (Concise Oxford English Dictionary, s.v. 'direct')

- [27] Neither, in my view, does s 20(1) of the Act assist in interpreting regulations 21 and 26A in accordance with first, second and third respondents' view. That sub-section clearly does not apply in respect of debit orders entered against a banking account. A debit order is nothing more than an electronic form of payment that is effected upon an instruction by the bank account holder to his or her bank in favour of a third party. In no way can it be interpreted as a "*cession, pledge or other encumbrance*". The debit order levied against a recipient's bank account is nothing other than payment of a legitimate debt. In that sense, it does not amount to a transfer, cession, pledge, encumbrance or disposal of such grant.
- [28] Furthermore, it is common cause that neither SASSA, nor the Minister of Social Development, is extended regulatory powers under the Act that would empower them to regulate and impose rules and restrictions relating to electronic payment. Such powers are deferred to the SARB.
- [29] The first, second and third respondents correctly concede that where recipients hold bank accounts with other commercial banking institutions, their aforesaid interpretation of sub-regulations 21 and 26A does not and cannot apply. In my view that concession puts paid to the first, second and third respondents' arguments. The procedure of payment of the grant amount into the beneficiary's account with Grindrod outlined above, is no different to that where the grant amount is paid into a recipient's bank account with a Commercial Bank. Accordingly, the first, second and third respondents' interpretation is contrived, forced and untenable.
- [30] Applying the principles enunciated in *Natal Joint Pension Fund, supra*, the first, second and third respondents' interpretation cannot be upheld

for the reasons dealt with above. From the foregoing, the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production, clearly militates against the first, second and third respondents' interpretation. That interpretation leads to an insensible and unbusinesslike result. It defies the purpose of the provisions of the regulations. Accordingly, the correct and appropriate interpretation of those regulations are as contended for by the applicants.

[31] In the alternative to a declarator, relief is sought in the form of a review of the promulgation of the offending regulations. In view of the foregoing findings of the correct and appropriate interpretation of the said regulations, it is not required to further consider such relief.

[32] I have held above that the applications to intervene and for admission as *amici curiae* cannot succeed. The relief that those parties seek, go much further. It deals with alleged constitutional issues. Those are not strictly relevant in considering the interpretation of the provisions of regulations 21 and 26A, the subject of the main applications. This is not the forum to consider such issues and possible relief in that regard. Accordingly, those applications are refused. I intend to make no order in respect of costs occasioned by those applications.

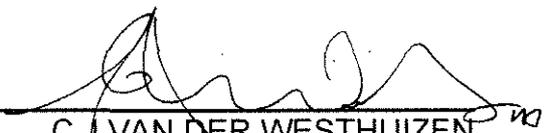
[33] It follows that the applicants are entitled to a declarator.

I grant the following order:

- (a) It is declared that regulations 21 and 26A of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance, as amended under Government Notice R.511 in Government Gazette 39978 of 6 May 2016, read with section 20 of

the Social Assistance Act 13 of 2004, do not operate to restrict beneficiaries in the operation of their bank accounts;

- (b) The first, second and third respondents are to pay the costs, including the cost of two counsel where applicable, jointly and severally, the one paying, the other to be absolved;
- (c) The applications to intervene and the applications for admission as *amici curiae* are refused;
- (d) No order is made in respect of the costs occasioned by the applications to intervene and for admission as *amici curiae*.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT