

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)

(CCT 48/13) [2014] ZACC 12

Date of Hearing: 11 February 2014

Date of Judgment: 17 April 2014

This judgement deals with the remedy that should follow upon the Constitutional Court having declared the tender awarded by the South African Social Security Agency (SASSA) to Cash Paymaster Services (Pty) Ltd (CPS) for the payment of social grants, constitutionally invalid in the matter of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC).

The declaration of invalidity was based on two grounds. The first was that SASSA failed to ensure that the black economic empowerment credentials claimed by CPS were confirmed. The second was that the Bidder's Notice 2 issued by SASSA, following the Request For Proposals, did not clearly specify what was required of the bidders in relation to biometric verification. This rendered the process uncompetitive. Therefore, SASSA's decision to award the tender to CPS and enter into a contract with CPS for the payment of social grants was set aside because it failed to comply with various sections of the Promotion of Administrative Justice Act, 3 of 2000.

The Constitutional Court suspended the declaration of invalidity pending the determination of a just and equitable remedy. The Court held that the correct approach to be taken when determining a just and equitable remedy in this matter would be the correction and reversal of the invalid administrative action.

In making this order, the Court relied on section 172(1)(b)(ii) of the Constitution which gives the Court the power to grant "an order suspending the declaration of invalidity for any period and on any authority to correct the defect". Moreover, the Court reasoned that this remedy was just and equitable because it prohibited CPS from simply walking away from the contract.

As an organ of state, SASSA is required to administer social assistance in terms of the Social Assistance Act and to respect, protect, promote and fulfil the rights in the Bill of Rights. In terms of the agreement between SASSA and CPS, where CPS would administer the payment of social grants on SASSA's behalf - the Court found that CPS, in so doing, had exercised a public power and performed a public function in terms of the Social Assistance Act, enacted to give effect to the right to social security. CPS therefore played a unique and central role as gatekeeper of the right to social security and effectively controlled beneficiaries' access to social assistance. Thus, CPS had not only contractual obligations, but a constitutional duty to ensure that a workable payment system remained in place until a new one was operational. During the period of suspension, the contract remained operational and CPS stayed bound to its contractual and constitutional obligations.

Similarly, SASSA did not, by the conclusion of the contract, divest itself of its constitutional responsibility and public accountability for rendering public services. It remained accountable to the people of South Africa for the performance of those functions by CPS.

The Court therefore exercised its wide remedial powers to ensure effective relief for a breach of a constitutional right. It thus held that it was appropriate for it to impose a structural interdict requiring SASSA to report back to the Court at each of the crucial stages of the new tender process.

The Court also clarified that although it was true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to CPS, the converse was also true. CPS had no right to benefit from an unlawful contract and any benefit that it may have derived should not be beyond public scrutiny. In light of its assumptions of public power and functions in the execution of the contract, CPS ought to be publicly accountable in respect of any gains or losses made under the contract. CPS was thus directed to provide its financial information to show when the break-even point arrived, and at which point it started making a profit in terms of the unlawful contract.

The Court therefore made an order in the following terms:

1. The contract for the payment of social grants between the SASSA and CPS 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:
 - 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 re-registration 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 section 20(3) and (4) of the Social Assistance Act, 13 of 2004 (Social Assistance Act).
 - 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.