

Black Sash and Another v Minister of Social Development and Others

(CCT 48/17) [2017] ZACC 8

Heard on: 15 March 2017

Decided on: 17 March 2017

This application was brought by the Black Sash Trust, with Freedom Under Law intervening, against the Minister of Social Development, SASSA and its CEO, the Minister of Finance, National Treasury, Cash PayMaster Services (Pty) Limited and the Information Regulator. Corruption Watch and the South African Post Office SOC Limited were admitted to the proceedings as *amicus curiae*.

On 3 February 2012 the South African Social Security Agency (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 the Constitutional Court held that the award of the tender to provide services for payment of social grants to CPS was constitutionally invalid (*AllPay 1*).¹ In the remedial order (*AllPay 2*), the Court suspended the declaration of invalidity.² The suspension of the declaration of invalidity 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. Moreover, the Court ordered SASSA to provide it with a report on progress in respect of the new tender process and its outcome.

In November 2015 SASSA reported that it had decided not to award a new tender. Instead, it would meet the 31 March 2017 deadline by taking over the payment of social grants itself. Pursuant to this report, the Court then decided to discharge its supervisory order.

However, by April 2016 the responsible functionaries at SASSA knew they could not comply with their undertaking to the Court that they would be able to pay social grants from 1 April 2017. The Minister of Social Development claimed that she had only become aware of this fact in October 2016. This despite three different legal opinions obtained from senior counsel by SASSA warning it that it should approach the Court if it would not be able to pay the grants itself. Yet, neither SASSA nor the Minister took any steps to inform the Court of the problems they were experiencing.

On 3 March 2017, SASSA filed a supplementary progress report with the Court in which it made averments to the effect that CPS was the only entity capable of paying grants for the foreseeable future after 31 March 2017. However, as of that date, no agreement had been concluded between SASSA and CPS to ensure payment of social grants and if an agreement with CPS could not be reached, SASSA had no contingency plan to ensure payment on 1 April 2017.

Confronted with possibility that social grants to 17 million South Africans would be unable to be paid out on 1 April 2017, the Court had to deal with the following questions:

1. Are SASSA and CPS under any constitutional duty after 31 March 2017 to continue payment of the social grants?
2. If they are, does the Court have the competence to make an order compelling them to do so?
3. Does the Court have the competence to resume supervision in respect of:

¹ *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) (*AllPay 1*).

² *AllPay 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) (*AllPay 2*).

- 3.1. SASSA's conduct since the discharge of the Court's earlier supervisory order?
- 3.2. The continued performance of SASSA's and CPS's constitutional obligations in the payment of social grants?
- 3.3. SASSA's responsibilities in relation to either another competitive bidding process or taking over responsibility for payment of grants itself?
4. Are there grounds for calling for explanations from the Minister in relation to costs being paid personally?

In answering questions 1 and 2 above, Froneman J reasoned that the threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution triggered the Constitutional Court's 'just and equitable' remedial powers under section 172(1)(b)(ii) of the Constitution. The Court therefore held that the invalid contract between SASSA and CPS be extended for a period of 12 months in order to allow SASSA and CPS to continue to fulfill their constitutional obligations to the pay social grants. In addition, the Court ordered that the contract must contain adequate safeguards to protect various aspects of the personal privacy, dignity and autonomy of grant beneficiaries. The Court further clarified that the extension of the contract between SASSA and CPS meant that the declaration of invalidity of that contract and the suspension thereof were also extended for a period of 12 months.

In relation to question 3 above, given that the Minister and SASSA acted recklessly by failing to alert the Court of the threat of them being unable to pay out social grants on 1 April 2017, the Court held that they must file reports on affidavit with the Court every 3 months. The reports were to set out detailed information on how they plan to ensure the payment of social grants after the expiry of the 12 month process, what steps have been taken in that regard, what further steps will be taken, and when each step is taken.

In relation to question 4 above, it was held that there were reasonable grounds for investigating whether the Court's prior remedial action in *AllPay 2* was willfully disregarded. To this end, the Minister as the accounting officer, was ordered to show cause on affidavit why she should not be joined in her personal capacity and why she should not pay the costs of the application from her own pocket.

In its scathing judgment of SASSA and the Minister of Social Development, the Constitutional Court stated, "[T]he sole reason for the 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."