

***South Africa Social Security Agency and Another v Minister of Social Development and Others***

**(CCT48/17) [2018] ZACC 26**

**Date of Hearing: 6 March 2018**

**Date of Judgment: 30 August 2018**

The judgement deals with an urgent application for the extension of the unlawful contract between Cash Paymaster Services (Pty) Ltd (CPS) and the South African Social Security Agency (SASSA) that was declared invalid by the Constitutional Court.

The matter relates back to the contract that was entered into between SASSA, the organ of state established primarily for the administration and payment of social assistance, and CPS. Following a tender process, CPS was contracted to administer the payment of social grants on behalf of SASSA for a fee and a period of five years. However, the tender was subsequently declared invalid by the Constitutional Court on 29 September 2013 due to defects in the tender process.

The declaration of invalidity was suspended until 31 March 2017 in order to enable SASSA to rectify the problem and award a new tender without disrupting the payment of social grants to social grants beneficiaries.

In February 2017, the matter again came before the Court thanks to the Black Sash Trust because it became apparent that SASSA had failed to put in place a mechanism through which social grants would be paid out on 1 April 2017, putting millions of social grant beneficiaries at risk of not receiving their grants.

To avoid this crisis, the Constitutional Court further suspended the operation of the declaration of invalidity of the contract between SASSA and CPS on 17 March 2017 for an additional 12 months, ending on 31 March 2018. In addition, the Court resumed its supervisory role ordering SASSA to first file quarterly, and later on, monthly reports to a panel of independent experts to ensure that the payment of social grants would not be disrupted after the expiry of the suspension period. SASSA was also ordered to formulate a contingency plan that could be implemented should it be unable to finalise a new regime for the payment of social grants before 1 April 2018.

Despite all of this, on 6 February 2018, SASSA filed an urgent application requesting the Court to grant a *further* extension of the suspension of the declaration of invalidity for a further 6 months. The request extension was limited to the part of the contract which dealt with the provision of the cash payment service. This is the subject of the current case.

In its judgment, the Court identified the issues that required determination being (1) whether SASSA was entitled to be heard on an urgent basis; (2) whether SASSA's request for an extension of the suspension of the operation of the order of invalidity of the contract between SASSA and CPS for the payment of social grants should be entertained; and (3) whether the then Minister of Social Development and CEO of SASSA should pay the costs of the application out of their own pockets.

With regards to urgency, the Court noted that SASSA had not complied with Rule 12 of the Constitutional Court Rules in that its supporting affidavit did not explicitly set out circumstances that rendered the matter urgent. Rather, the so-called urgency was self-created by SASSA's own delays and failure to make significant inroads during the 12 month period that the Court had afforded it with the extension of suspension of the order of invalidity. No case was made out for urgency.

Nonetheless, the Court held that the absence of urgency did not necessarily mean that SASSA's application should be dismissed. The Court had to consider whether in the special circumstances of the case there were reasons which otherwise justified the granting of a further extension of the suspension of the order of invalidity.

The Court noted that the extension of a declaration of invalidity cannot be had for the asking – a proper case justifying the extension must be made out. The objective of the suspension of the declaration of invalidity of the SASSA-CPS contract was to (i) avoid disruption in the payment of social grants which would have caused intolerable suffering to social grant beneficiaries and their dependants; and (ii) to afford SASSA the opportunity to put matters right by concluding a fresh contract. Despite being afforded four years to sort out the problem, SASSA had failed to do so.

The question was therefore whether the balancing of the relevant factors favoured the granting of a further extension.

In considering the sufficiency of the explanation furnished by SASSA as to why a further extension ought to be granted, the Court found SASSA's explanation 'utterly inadequate' and neither candid or complete. The Court also considered that on its papers, SASSA did not assure the Court that if the further extension for 6 months, the defect would be remedied in that period. The Court also highlighted the principle of finality in litigation which promotes certainty and which forms part of the rule of law, a founding value of the Constitution. In this regard the Court noted the acute need for finality with regards to the social grants crisis. The tender awarded to CPS in 2012 has generated no less than five cases in the Constitutional Court and several cases in other Courts. The Court found that the uncertainty in relation to whether social grants would be paid must come to an end.

Nonetheless, the Court held that while the factors discussed above warranted the refusal to grant a further suspension, there were other factors which strongly supported the granting of the extension requested. These included the approximately 2.8 million social grants beneficiaries who would have been left without their grants and have their right to social security, their right to food and human dignity violated if the extension was not granted. Furthermore, the fact that social grant beneficiaries were not to blame for SASSA's failure to act diligently and comply with the extended period granted by the Court previously.

The Court therefore held that it was just and equitable in the circumstances of the case to extend the suspension of SASSA and CPS's invalid contract for a further 6 months.

On the issue of whether the Minister of Social Development and the CEO of SASSA were to be held personally liable for the costs of the application, the Court held that it was not appropriate to make this ruling because bad faith or gross negligence could be established for either the Minister or the CEO in the institutions of the application or in the performance of their constitutional functions. However the Court did order that SASSA and its CEO (in her official capacity) pay the costs of the application.