

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter of:

Case number: CCT 48/13

**ALLPAY CONSOLIDATED INVESTMENT
HOLDINGS (PTY) LTD & 19 OTHERS**

Applicants

and

**THE CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY
& 17 OTHERS**

Respondents

CORRUPTION WATCH (NPC) RF

Amicus curiae

And in re the matter of:

Case number: CCT 48/17

THE BLACK SASH TRUST

Applicant

and

**THE MINISTER OF SOCIAL DEVELOPMENT
& 6 OTHERS**

Respondents

and

FREEDOM UNDER LAW

Intervening party

and

CORRUPTION WATCH (NPC) RF

Amicus curiae

CORRUPTION WATCH'S WRITTEN SUBMISSIONS¹

¹ Corruption Watch intended to study SASSA's response to the Court's questions before finalising these submissions. However, due to the delay in their delivery, we were unable to do so. We will incorporate our response into our oral argument where necessary.

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INTRODUCTION

1. It appears that SASSA and CPS are about to enter into an interim arrangement in terms of which CPS will administer the payment of social grants to beneficiaries from 1 April 2017. This interim arrangement is necessarily unlawful. The regulatory provisions do not allow for SASSA to deviate from a competitive tender bid process in these circumstances.²
2. The interim arrangement will undermine every element of section 217(1) of the Constitution. The process will not be fair, equitable or competitive and, as a result, is unlikely to be cost-effective.
3. However, this Court's hands are tied. The state has a constitutional obligation to pay the grants.³ SASSA cannot take over the payment function from CPS, and it cannot approach another contractor to do so from 1 April 2017. The only way of ensuring the uninterrupted payment of grants is to allow for some form of the unlawful interim arrangement.
4. For Corruption Watch, this application presents an opportunity for the Court to:
 - 4.1. First, minimise the extent and duration of the unlawful interim arrangement;
 - 4.2. Secondly, ensure that in the longer term SASSA's conduct is lawful; and
 - 4.3. Thirdly, to take steps towards establishing the causes of SASSA's failure and holding the people responsible for the failure to account.

² The reasons for this are set out in the opinion for SASSA of 27 October 2016 of Trengove SC et al, paras 14 - 18, Annexure "LM9" of Black Sash Trust's ("BS") Founding Affidavi, Record: p 144.

³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) ("Allpay1").

5. SASSA's conduct since the Court's order of 17 April 2014⁴ has been – at best for it – grossly incompetent. SASSA in effect had two options. By 31 March 2017, it could either award a new tender pursuant to a competitive bidding process or take control of social grant payments itself. SASSA is months, perhaps years, away from achieving either.
6. It is not possible to determine from the evidence before the Court whether or not SASSA's conduct resulted from corruption. What is clear, however, is that many of the internationally recognised “red flags” or indicators of corruption are present.
7. In these submissions, Corruption Watch attempts to identify the red flags and to suggest remedial relief that might best ameliorate the unlawfulness of the interim arrangement and ensure the lawfulness of the longer term process.

THE 'RED FLAGS' FOR CORRUPTION

8. Any interim arrangement SASSA enters into with CPS will be unlawful. That is because the exception under Treasury Regulation 16A6.4 is not open to SASSA in these circumstances. Its inability to run a competitive bidding process is not due to emergency or unforeseen urgency. It is due instead to SASSA's own inability or unwillingness to run a competitive bidding process.
9. The Treasury Regulations allow for deviation from the competitive bidding process in very limited circumstances. The reasons for this are obvious. Every time the competitive process is bypassed, the outcome is not fair, transparent, competitive nor cost-effective. In this instance, SASSA is not merely deviating from the competitive process, but is doing so by in effect extending CPS's unlawful 2012

⁴ This Court's order in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) 2014 (4) SA 179 (CC) (“AllPay 2”)

contract.

10. Transparency International's *Handbook for Curbing Corruption in Public Procurement* identifies "contract renegotiation" as an inherently high risk moment in the procurement cycle for at least the following reasons:

10.1. "The grounds for the selection of the winner are not made public (transparency of bid evaluation)"⁵,

10.2. "Excessive (unnecessarily high) price as a result of limited or non-existent competition"⁶;

10.3. It presents an opportunity to introduce substantial changes to the contract resulting in price increases "reflecting changes in specifications or cost increases, facilitated often by collusion between corrupt contractor and corrupt control official"⁷; and

10.4. It introduces "substantial changes that render the bidding process useless"⁸.

11. In addition, self-created emergencies constitute a "special risk factor" as it allows officials to pursue "direct contracting procedures when otherwise open bidding would be possible".⁹

12. These risk factors are all present with regard to the interim arrangement. Of particular concern is that CPS says that, when it assesses the "reasonableness of

⁵ Corruption Watch's Founding Affidavit "CW FA", annexure "DL1" Transparency International *Handbook for Curbing Corruption in Public Procurement* Record p 619.

⁶ *Ibid*

⁷ *Ibid*

⁸ *Ibid*

⁹ *Ibid* Record p 624.

the price” it has renegotiated with SASSA, the Court must take into account some ten factors that have driven up the original 2012 fixed price of R16.44 per beneficiary.¹⁰

13. This Court is simply not in a position to determine whether or to what extent these factors have driven up the cost. But there are reasons to doubt or to at least interrogate CPS’s claims:

13.1. The aborted 2015 tender capped the price per beneficiary at a lower than the original price of R16.44. Why did SASSA believe in 2015 that a contractor could do the job at a lower price than the 2012 price? What factors had driven the price down rather than up?

13.2. In *Allpay II*, the Court noted that on conservative assumptions, the expert estimated that CPS recovered its capital costs after just two years¹¹ and would have made a profit in the remaining three years. CPS can presumably use its existing infrastructure to disburse grants after 31 March 2017. Why then is the proposed price for the interim arrangement higher than the 2012 price when CPS had to establish an infrastructure from scratch?

13.3. A related question is why the duration of the interim contract should affect the price, as CPS claims it does.¹² Why should duration affect the price if CPS is merely extending its services from five years to seven years, especially given that it covered its costs within the first two years?

¹⁰ Cash Paymaster Service’s Answering Affidavit to Freedom Under Law (“CPS AA to FUL”) para 20 – 20. 10, Record: pp116-118.

¹¹ *Allpay 2* note 4 above para 8.

¹² CPS AA to FUL para 21 Record: p118.

14. In Corruption Watch's view, the Court needs assistance in determining what a reasonable price would constitute in these circumstances. We make submissions in this regard in our section on remedy below.¹³
15. From Corruption Watch's point of view, the botched 2015 competitive bid and the tardiness of SASSA and the Minister are of particular concern.
16. The 2015 competitive bid floundered due to the lack of responsive bids. Transparency International identifies the following red flags or indicators of corruption at the RFP stage:
 - 16.1. "Bidding documents or terms of reference are designed to favour a particular provider so that in fact, competition is not possible (or restricted)."¹⁴
 - 16.2. "Unnecessary complexity of bidding documents or terms of reference is used to create confusion to hide corrupt behavior and make monitoring difficult."¹⁵
 - 16.3. "Grounds for direct contracting are abused".¹⁶
17. This Court is not in a position to assess why it was impossible for potential contractors to bid at all or to submit compliant bids. What stands out, however, is the price cap: it is curious that the price was set below the 2012 price and considerably below the price CPS says is reasonable in 2017. CPS says that the price is necessarily driven upwards over the years by reason of, among other

¹³ CPS AA to FUL para 22-24 Record: p118-119.

¹⁴ CW AA: *Transparency International Handbook for Curbing Corruption in Public Procurement* Record pp 618.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

factors, inflation and salary increases.¹⁷ Did SASSA set a price cap that made it impossible for the winning bidder to make a profit? Were there other terms of the RFP that made it difficult or impossible for bidders to submit responsive bids?¹⁸

18. In the circumstances, only one of two scenarios pertains. Either SASSA deliberately designed the RFP to ensure that no bid could possibly be responsive or SASSA lacks the competence to design a workable RFP. Either way, the only winner was CPS.
19. SASSA's conduct frustrated this Court's order of 17 April 2014. This has serious consequences not only for the public purse, but also for the administration of justice, the rule of law, and the standing of this Court.
20. In the section that follows, Corruption Watch makes submissions as to the type of remedial relief that would be appropriate in this situation.

REMEDY

21. This Court has wide powers to grant just and equitable relief.¹⁹

21.1. An appropriate remedy "must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced";²⁰

¹⁷ It is also curious that, in its first report to the Court, and at least as early as 26 May 2014, SASSA prepared the ground for running an unsuccessful competitive bid process. SASSA warned the Court that, "if after testing the market through a new tender the proposals emanating from this process does not offer appropriate/workable solutions, or poses risks to the timeous and regular payments of grants, SASSA is not obliged by the Court order to award the new tender ("LM3" to Black Sash FA para 2.2 Record: p.77).

¹⁹ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at paras 96 - 97.

²⁰ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 67.

- 21.2. The facts and circumstances of a particular case may require courts “forge new tools’ and shape innovative remedies” if this is necessary on the facts to ensure that the rule of law, and any rights implicated, are vindicated.²¹
22. In the circumstances of this case, Corruption Watch makes the following submissions with regard to appropriate relief.
23. Corruption Watch supports the relief proposed by the Black Sash. However, this relief is directed primarily at safeguarding the interests of the beneficiaries.²² It does not address adequately the need for this Court to ensure the legality of the administrative process. All that the Black Sash proposes to this end is that the Court supervises the process in the form of regular reports from SASSA, as it in terms of the *AllPay 2* order.²³
24. SASSA managed to frustrate the *AllPay 2* order. To merely replicate that type of relief is, in the circumstances, inadequate. Our view is that SASSA requires additional supervision and guidance.
25. SASSA says that it has engaged Wim Trengove SC as an independent third party to oversee a process of seeking National Treasury’s approval for the interim contract to ensure that this process “*is legally sound*”.²⁴
26. Corruption Watch supports this appointment, but believes that it does not go far enough. Corruption Watch suggests that Trengove SC remain involved as an

²¹ *Mvumvu and Others v Minister for Transport and Another* 2011 (2) SA 473 (CC) at para 48, quoting *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69. See also: *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).

²² Prayers 4,5,and 11 of BS’s NOM.

²³ Prayers 8 – 10 BS’s NOM.

²⁴ South African Social Security Agency “SASSA” affidavit of 10 March 2017, para 8.

independent legal expert for the duration of the implementation of the interim contract in order to report to the Court on any legal issues arising during its currency.

27. The Court's appointment of Trengove SC to this role is within its powers under section 172(1)(b) of the Constitution. It is also supported by recent Supreme Court of Appeal authority on the appointment of "special masters" to assist courts in the complex cases such as the present where continued judicial supervisory oversight is necessary.²⁵
28. Oversight of the legal process without more is, in Corruption Watch's view, insufficient. A legal expert is unable to determine whether the terms of the contract, including the price and duration, are reasonable. Corruption Watch therefore suggests that this Court appoint a second "special master": an independent person with the requisite technical and financial expertise to oversee and report on technical matters pertaining to the interim contract during its currency.

²⁵ See the judgment of the Land Claims Court in *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform* ZALCC 21 (14 November 2016), which referred to the Supreme Court of Appeal's judgment in *Meadow Glen Homeowners Association & Others v City of Tswane Metropolitan Municipality & Another* 2015 (2) SA 413 (SCA) at para 35, where the court held as follows:

"Both this court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order; and the myriad other issues that may arise with orders, the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure ongoing oversight of the implementation of the order. There is considerable experience in the United States of America with orders of this nature arising from the decision in *Brown v Board of Education* and the federal court-supervised process of desegregating schools in that country. The Constitutional Court referred to it with approval in the TAC (No 2) case. Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders."

(Underlining added).

29. In this regard, Corruption Watch suggests that this Court order all parties to submit the names of suitable candidates to the Court within two weeks of the date of the order.
30. A striking feature of this matter is the appalling lack of transparency since the Court's order of 17 April 2014. This Court – together with parliament and the public – is left in the dark as to why SASSA flouted the Court's order and whether the terms of the interim contract with CPS will be reasonable.
31. Corruption Watch suggests that, in the event that SASSA and CPS conclude an interim contract, the Court:
- 31.1. orders SASSA to file a copy of the contract together with an explanatory affidavit with this Court and with the parties in this matter;
 - 31.2. orders SASSA to produce the record of SASSA's decision to conclude the interim contract with CPS to the Court and the parties in this matter; and
 - 31.3. gives leave to the parties in this matter to make further submissions in writing to this Court on what further directions this Court should make, if any, and what further procedures should take place in this Court in this or any other court, if any.
32. Corruption Watch supports the proposed order of Freedom Under Law that CPS file an audited statement of account under the interim contract.²⁶ We note the CPS accepts this proposal.²⁷ Corruption Watch also supports Freedom Under Law's proposal that SASSA should be ordered to file an independently verified audit of

²⁶ FUL's notice of motion, prayer 4.3.

²⁷ CPS states that it has "no difficulty with the order sought ... which requires public and audited accounting on the part of CPS". See para 11 of its answering affidavit filed on 10 March 2017.

the accounting submitted by CPS, which must be approved by the National Treasury.²⁸ These orders give effect to the principles expressed by this Court in *AllPay II* that CPS has no entitlement to benefit under an unlawful contract, and that any benefit derived by CPS under an unlawful contract is not beyond public scrutiny.²⁹

33. While it is clear that SASSA's conduct since the Court's order of 17 April 2014 has been at least grossly incompetent, it is not yet possible to determine from the evidence whether or not it resulted from corruption. However, it is plain that the matter cries out for a proper investigation.
34. Accordingly, Corruption Watch further suggests that this Court refer the matter to Public Protector and the Hawks for investigation.
35. We attach a draft court order marked "A".

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²⁸ FUL's notice of motion, prayer 4.4.

²⁹ *AllPay II* (supra) at para 67.