

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT 07/16

COURT A QUO CASE NO: 97973/15

In the application for admission as amicus curiae of:

THE BLACK SASH TRUST

Applicant for Admission as
Amicus Curiae

In the matter between:

SOUTH AFRICAN SOCIAL SECURITY AGENCY First Applicant

**MINISTER OF SOCIAL DEVELOPMENT OF
THE REPUBLIC OF SOUTH AFRICA**

and

**LION OF AFRICA LIFE ASSURANCE
COMPANY LIMITED**



A P P L I C A T I O N

FOR ADMISSION AS *AMICUS CURIAE* AND TO ADDUCE EVIDENCE

ON BEHALF OF APPLICANTS

THE STATE ATTORNEY (PRETORIA)
c/o **THE STATE ATTORNEY**
10th Floor, North State Building
95 Market Street (cnr Kruis Street)
JOHANNESBURG

Tel: 012 309 1528
Ref: 6037/2015/Z76/FN
Mr S Zulu

ON BEHALF OF RESPONDENT

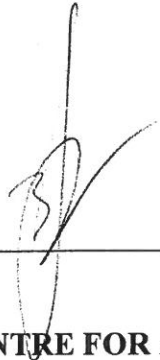
WEBBER WENTZEL
90 Rivonia Road
Sandton
Johannesburg

Tel: 011 530 5385
Ref: Michael Straeuli 3003878

INDEX

DESCRIPTION	Application Page No
VOLUME 5	
Notice of Application to be admitted as <i>amicus curiae</i> and to introduce evidence dated 07 April 2016	401 – 404
Founding Affidavit: application to be admitted as <i>amicus curiae</i> and to adduce evidence: Lynette Maart	405 – 427
ANNEXURE LM1 Black Sash: resolution for admission as <i>amicus curiae</i> dated 2016-04-06	428
ANNEXURE LM2 Black Sash Deed of Trust dated 1999-04	429 - 439
ANNEXURE LM3 Letter from CALS to SASSA, Department of Social Development and Lion of Africa Life Assurance Company Limited dated 2016-03-10	440 - 443
ANNEXURE LM4 Email correspondence between Ms Nyembe and Mr Zulu dated 2016-03-11 to 2016-03-29	444 -445
ANNEXURE LM5 Letter from CALS to Department of Social Development and Lion of Africa Life Assurance Company Limited dated 2016-04-01	446 - 449
ANNEXURE LM6 Letter from SASSA and Department of Social Development dated 2016-04-04	450
ANNEXURE LM7 Letter from Lion of Africa Life Assurance Company Limited dated 2016-04-04	451 - 452
ANNEXURE LM8 Expert Report: Prof R. Da Silva dated 2016-04-04	453 - 460
ANNEXURE LM9 CV: Prof R Da Silva (undated)	461 - 468
ANNEXURE LM10 Executive summary of study conducted by the Department of Social Development, SASSA and UNICEF	469 - 475

Dated at **JOHANNESBURG** on the 7th day of APRIL 2016.



CENTRE FOR APPLIED LEGAL STUDIES

Attorneys for Black Sash

Tel: 011 717 8606

Fax: 011 717 1702

Email: Nomonde.Nyembe@wits.ac.za

1st Floor, DJ Du Plessis Building

West Campus, University of the Witwatersrand

Braamfontein

Ref: N Nyembe

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT, BRAAMFONTEIN**

AND TO: SOUTH AFRICAN SOCIAL SECURITY AGENCY
First Applicant
MINISTER OF SOCIAL DEVELOPMENT
Second Applicant

Tel: 012 309 1528

Mobile: 083 507 4221

Email: SZulu@justice.gov.za

State Attorney (Pretoria)

Ground Floor, SALU Building

316 Thabo Sehume Street, Pretoria

C/O: State Attorney (Johannesburg)

10th Floor, North State Building

95 Market Street, Corner Kruis Street, Johannesburg

Ref: 6037/2015/Z76/FN



AND TO: WEBBER WENTZEL

Respondent's Attorneys

Tel: +2711 530 5385

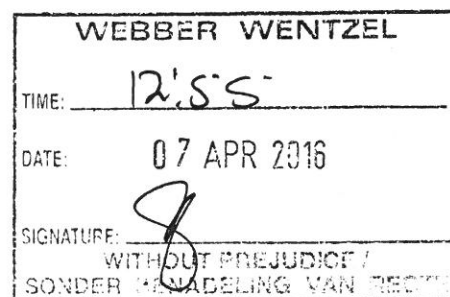
Fax: 011 530 6488

Email: michael.straegli@webberwentzel.com

90 Rivonia Road

Sandton, Johannesburg

Ref: Michael Straegli / 3003878



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT 07/16

In the application for admission as amicus curiae of:

THE BLACK SASH TRUST

Applicant for Admission as
Amicus Curiae

In the matter between:

SOUTH AFRICAN SOCIAL SECURITY AGENCY

First Applicant

MINISTER OF SOCIAL DEVELOPMENT OF THE
REPUBLIC OF SOUTH AFRICA

Second Applicant

and

LION OF AFRICA LIFE ASSURANCE COMPANY
LIMITED

Respondent

NOTICE OF APPLICATION TO BE ADMITTED AS AN AMICUS CURIAE
AND TO INTRODUCE EVIDENCE


PLEASE TAKE NOTICE that the Black Sash Trust hereby makes application to the above Honourable Court for an order in the following terms:

1. The Black Sash Trust is admitted as an *amicus curiae* in terms of Rule 10;
2. The Black Sash Trust is granted leave to:
 - 2.1. Submit written argument in this matter;
 - 2.2. Submit oral argument at the hearing of the above matter;
 - 2.3. Introduce the evidence attached to the founding affidavit, including the annexures thereto;
3. Any party which opposes this application is ordered to pay the costs;
4. Further and/or alternative relief.

TAKE FURTHER NOTICE that the founding affidavit of **LYNETTE MAART**, together with the annexures thereto, are filed together with this notice and will be used in support of this application.

TAKE FURTHER NOTICE that the Black Sash has appointed the Centre for Applied Legal Studies as its legal representatives and the address set out hereunder as the address at which it will accept notice and service of all process in these proceedings. The Black Sash will also accept electronic service through its legal representatives at the following email address:
nomonde.nyembe@wits.ac.za.

Dated at **JOHANNESBURG** on the 7th day of April 2016.


CENTRE FOR APPLIED LEGAL STUDIES
Attorneys for Black Sash

Tel: 011 717 8606

Fax: 011 717 1702

Email: Nomonde.Nyembe@wits.ac.za

1st Floor, DJ Du Plessis Building

West Campus, University of the Witwatersrand

Braamfontein

Ref: N Nyembe

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT, BRAAMFONTEIN**

AND TO: SOUTH AFRICAN SOCIAL SECURITY AGENCY

First Applicant

MINISTER OF SOCIAL DEVELOPMENT

Second Applicant

Tel: 012 309 1528

Mobile: 083 507 4221

Email: SZulu@justice.gov.za

State Attorney (Pretoria)

Ground Floor, SALU Building

316 Thabo Sehume Street, Pretoria

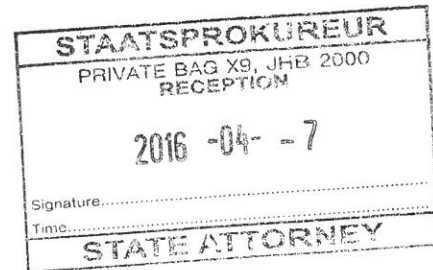
C/O: State Attorney (Johannesburg)

10th Floor, North State Building

95 Market Street, Corner Kruis Street,

Johannesburg

Ref: 6037/2015/Z76/FN



AND TO: WEBBER WENTZEL

Respondent's Attorneys

Tel: +2711 530 5385

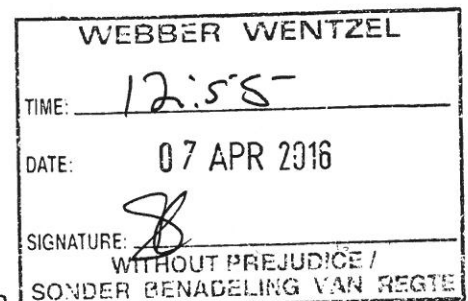
Fax: 011 530 6488

Email: michael.straegli@webberwentzel.com

90 Rivonia Road

Sandton, Johannesburg

Ref: Michael Straeuli / 3003878



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT 07/16

In the application for admission as amicus curiae of:

THE BLACK SASH TRUST

Applicant for Admission as
Amicus Curiae

In the matter between:

SOUTH AFRICAN SOCIAL SECURITY AGENCY

First Applicant

MINISTER OF SOCIAL DEVELOPMENT OF THE
REPUBLIC OF SOUTH AFRICA

Second Applicant

and

LION OF AFRICA LIFE ASSURANCE COMPANY
LIMITED

Respondent

FOUNDING AFFIDAVIT: APPLICATION TO BE ADMITTED AS AN AMICUS
CURIAE AND TO ADDUCE EVIDENCE

dh
R

I, the undersigned,

LYNETTE MAART

state under oath that:

1. I am the National Director of the Black Sash Trust situated at Elta House, 3 Caledonian Street, Mowbray, Cape Town.
2. I am duly authorised by the Trustees of the Black Sash Trust ("the Black Sash") to make this application on its behalf. A resolution signed by the Chairperson of the Black Sash is annexed as "LM 1".
3. The facts contained herein are, to the best of my knowledge, true and correct and unless otherwise stated or indicated by the context are within my personal knowledge.

OVERVIEW OF THIS AFFIDAVIT

4. This is an application in terms of Rule 10 for the admission of the Black Sash as an *amicus curiae* in the appeal by the South African Social Security Agency ("SASSA") and the Minister of Social Development ("the Minister") (collectively the "Applicants") against an interim interdict made by Fourie J in the North Gauteng High Court, Pretoria in favour of Lion of Africa Life Assurance Company Limited ("Lion of Africa"). The order interdicted the Applicants from implementing a moratorium on new funeral policy deductions



from children's grants (i.e. child support grants, foster care grants and care dependency grants).

5. The Black Sash seeks to intervene as *amicus curiae* in order to advance argument and submit limited evidence as follows:

5.1. The purpose of the child support grant is to provide for a child in need of care, and the grant is paid to the parent who is then to utilise it as a contribution for the purpose of caring for the child (*Coughlan NO v RAF* 2015 (1) SA 1 (CC) para 55). It is impermissible for it to be used to buy funeral cover for the event of the death of the child.

5.2. Section 20(4) of the SAA provides that a deduction from a social grant is permissible only if it is necessary and in the interests of the beneficiary. In the context, the reference to the beneficiary must be to the child for whose benefit the social grant is paid. A funeral policy in respect of a child is not authorised by section 20(4).

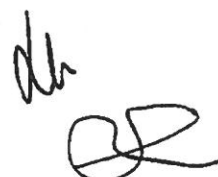
5.3. The actuarial evidence tendered by Black Sash demonstrates that in any event:

5.3.1. the need for funeral cover for children is very limited: it is not "necessary";

5.3.2. the probability is that claims paid come to less than 1% of premiums. This means that 99% of the amount deducted from the children's grants goes towards the administration expenses and profits of the insurance company; and



- 5.3.3. deductions of the kind made by Lion of Africa (through Emerald Life) are wholly disproportionate to the benefit received. This is neither necessary nor in the interests of the beneficiary.
- 5.4. If such deductions do potentially fall within the ambit of the special exemption created by section 20(4) of the Social Assistance Act, the Minister and/or SASSA has a discretion as to whether to allow them, and the Minister is entitled to make general policy as to how that discretion is to be exercised.
- 5.5. The state has an obligation under international law to provide social assistance particularly to children, and should have the discretion to make policy decisions to protect social assistance from depletion.
- 5.6. Corporate entities, including financial institutions, have negative obligations in terms of international and domestic law not to interfere with the state's attempt to fulfil a human right in the Constitution.
6. I now address the following issues:
- 6.1. The aims and objectives of the Black Sash;
- 6.2. The interest of the Black Sash in this application and the position it intends to adopt; and
- 6.3. The evidence and the submissions the Black Sash seeks to advance.

Handwritten signature and initials in the bottom right corner of the page.

THE BLACK SASH'S AIMS AND OBJECTIVES

7. The Black Sash is a non-party-political and non-profit organisation. A copy of the Deed of Trust is annexed as "LM 2".
8. The Black Sash seeks to ensure that poor, vulnerable and marginalised people who are the recipients of social grants are treated with dignity and efficiency, and with due regard to their constitutional and statutory rights. It does this through inter alia:
 - 8.1. working with advice offices and Community Based Organisations ("CBOs") as partners, and assisting these entities to provide free assistance and advice to people who are in need. It works with approximately 400 such partners nationally;
 - 8.2. conducting information and educational services to advise people of their rights and conducting research into the laws which affect basic human rights, employment rights, the rights of the unemployed, activities informed by "on the ground" experience principally (though not exclusively) from the work of the advice offices and other CBOs;
 - 8.3. CBO partners including advice offices, communicating this experience and information to lawmakers, policymakers and administrative officials within government and advocating for appropriate changes; and

Handwritten signature and initials in the bottom right corner of the page.

- 8.4. where necessary and having exhausted other options, litigating to ensure legality, dignity and efficiency in the provision of social security and social assistance grants where rights contained on the Bill of Rights have been infringed or where rights have been denied by officials and service providers responsible for their administration.
9. The Black Sash has for very many years been actively engaged in social security and protection, including ensuring that applicants for social grants receive the grants and benefits to which they are entitled, fully and timeously. We seek to ensure that the procedures followed by the administration are fair and comply with the requirements of the Constitution, the Social Assistance Act 13 of 2004 ("SAA"), the "Social Assistance Regulations",¹ the South Africa Social Security Agency Act 9 of 2004 ("SASSA Act") and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
10. The Black Sash operates a national office and four regional offices and is active in all nine provinces through its partnership arrangements. It seeks to ensure the recognition, in law and in practice, of the human rights of all people of South Africa. The Black Sash's aim is to enable all, especially women and children, to recognise and exercise their human rights, particularly their social and economic rights; and to create a society which has effective laws and delivery systems, including comprehensive social protection for the most vulnerable.

¹ Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance, GN R898 in *Government Gazette* 31356 of 22 August 2008.



11. The Black Sash is a member of the Department of Social Development's Ministerial Task Team ("MTT") that was formed in February 2014. The MTT includes representatives of the Department of Social Development, SASSA, the Association for Community Advice Offices in South Africa ("ACAOSA"), and other civil society partners. It is mandated to explore the nature of debit deductions and ensure that grant recipients have access to appropriate recourse against improper deductions.
12. The Black Sash was admitted as *amicus curiae* in the *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*(No 2).² In *Allpay*, the Black Sash demonstrated its concern about systemic deductions from social grants that are not sanctioned by section 20(3) and 20(4) of the SAA, and by Regulation 26A of the Social Assistance Regulations, which result in an increase in indebtedness, and in a repetitive cycle of poverty and hardship for social grant recipients.
13. The Black Sash has been granted consent to intervene in a case related to the "clean-up process" for social grant deductions: *Channel Life Limited and Another v South African Social Security Agency and Others* (NGHC Case No. 79112/15). That case will be heard on 10 May 2016 in the North Gauteng High Court, Pretoria. Through its intervention in that case, the Black Sash seeks to:

²2014 (6) BCLR 641 (CC).



- 13.1. describe and contextualise the current state of social assistance and social grant deductions and thereby demonstrate the necessity for a "clean-up process" by SASSA;
- 13.2. demonstrate the propensity for exploitative practices concerning deductions from social grants for funeral policies, in support of the necessity for a "clean-up process" by SASSA;
- 13.3. demonstrate the exploitative and harmful impact of funeral insurance deductions from child support and foster grants, as well as the lack of need for funeral deductions from child support grants for funeral cover for children; and
- 13.4. advance arguments that address the state's constitutional obligations to realise the right to social security including social assistance as well as the negative obligation of corporate entities, particularly financial and insurance institutions, to refrain from interfering with the right of the most vulnerable members of society to social security.

THE BLACK SASH'S INTEREST IN THIS MATTER

14. The outcome of this case will impact directly on the work of the Black Sash, the goals and interests that it seeks to promote, and the interests of the grant beneficiaries it serves and seeks to represent.
15. The Black Sash supports the moratorium on funeral policy deductions from children's grants and contends that this moratorium complies with the

Handwritten signature and initials in the bottom right corner of the page.

requirement of regulation 26A. This is because the impact of improper deductions is felt by many marginalised people, and in particular by children.

16. The Black Sash's intervention will not inconvenience or cause prejudice to any of the parties. The Black Sash has made every effort to act consistently with the Rules and the Court's directive of 29 February 2016. The Black Sash does not seek to delay the appeal in anyway nor prejudice the parties in the resolution of the issues before the court.
17. The Black Sash learned of the appeal on 11 January 2016. We were advised to await directives from the Court before seeking to intervene as *amicus curiae*. On about 1 March 2016 we learnt that the Court had issued directives. On 10 March 2016 our attorney, Nomonde Nyembe, wrote to the applicants' and the respondent's attorneys indicating our interest in intervening as *amicus curiae* and asking that a copy of the record be provided to our legal representatives. The letter and its covering email are annexed as "LM 3".
18. On Friday, 11 March 2016, the applicants' attorney, Mr Zulu of the state attorney, informed Ms Nyembe that they would provide us with a copy of the record. On 29 March 2016 Mr Zulu informed Ms Nyembe that he would make the record and the applicants' heads of argument available to her on 30 March 2016. The trail of emails concerning the correspondence between Mr Zulu and Ms Nyembe is annexed as "LM 4".

19. Mindful of the fact that Rules 10(6)(c) and 10(7) disallow an *amicus curiae* from duplicating the arguments made by the parties, the Black Sash only addressed a letter to the parties requesting consent after both the applicants and the respondent had filed their heads of argument, on 1 April 2016. A copy of the letter in which the Black Sash sought consent to intervene as *amicus curiae* is annexed as "LM 5".
20. On 4 April 2016, the Black Sash received replies from the applicants and the respondent as follows:
- 20.1. The applicants consented to the Black Sash's admission on the terms sought: a copy of the letter is annexed as "LM 6".
- 20.2. The respondent refused consent: a copy of the letter is annexed as "LM 7".

SUMMARY OF THE BLACK SASH'S EVIDENCE AND SUBMISSIONS

The evidence

21. I am advised that an *amicus curiae* may introduce evidence in terms of Rule 30, and that the Court has a discretion to permit the introduction of evidence in terms of Rule 31.
22. The evidence which the Black Sash seeks to introduce is a report by Prof Roseanne da Silva, who is an actuary and President of the Actuarial Society



of South Africa, and an adjunct professor in the School of Statistics and Actuarial Science at the University of Witwatersrand.

23. Through our legal representatives, Black Sash requested Prof da Silva to prepare a report on the deduction of funeral insurance premiums from children's social security grants.
24. The report of Prof Da Silva is annexed as "LM 8". A confirmatory affidavit by Prof Da Silva, including a copy of her curriculum vitae, is annexed as "LM 9".
25. Prof Da Silva's report is scientific in nature, and is based on actuarial calculations and the funeral policy submitted by the respondent in this matter. It sets out the likelihood of a claim arising under a funeral insurance policy in respect of a child, having regard to child mortality rates. It then considers the premiums set out in the Lion of Africa policy document,³ both in absolute terms and in relation to the payments made for child support grants, care dependency grants, and foster child grants.
26. Prof Da Silva concludes that funeral policies for children do not offer value to the policy holders:
- 26.1. Less than 4% of children will pass away at some time during the period when the child support grant is payable. The "risk" is therefore limited in the extreme.

³ Appeal record p 47.

26.2. The total premium paid during this period is far in excess of any benefit the policy holder can expect to receive.

26.3. The probability is that claims paid come to less than 1% of premiums. This means that 99% of the amount deducted from the children's grants goes towards the administration expenses and profits of the insurance company.

27. I submit that this evidence falls within Rule 31(1)(a) in that it is incontrovertible, and Rule 31(1)(b) in that it is of "an official, scientific, technical or statistical nature capable of easy verification." It is accordingly to be admitted on that basis. Alternatively, I submit that it should be admitted in terms of Rule 30 because it provides important context to the matters in issue in this case.

28. The Black Sash was not able to seek to have this evidence introduced in the High Court, because it was not a party to the case and was not aware of the case until a later stage.

29. I am aware that this Court has in appropriate circumstances admitted evidence from *amici curiae*, and has remarked on the assistance provided by that evidence. For example:

29.1. In *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), the Aids Law Project was granted leave to introduce medical evidence about "transmission, progression and treatment of HIV". The Court referred



to "this medical evidence that altered the course of argument on appeal." Mr Hoffmann's claim was ultimately upheld in large part because of the factual finding based on the evidence of the amicus that he would be able to perform his job notwithstanding that he was HIV-positive.

29.2. In *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) the Centre for Applied Legal Studies introduced statistics demonstrating that many prisoners were incarcerated because they were unable to pay bail or fines (para 12). The Court relied on the evidence that more than a third of all prisoners had not been convicted of an offence to support its finding that it was unconstitutional to deny prisoners the right to vote (para 32).

29.3. In *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), the Freedom of Expression Institute (FXI) entered a dispute concerning the dilution of South African Breweries' (SAB) "Black Label" trademark. FXI introduced new evidence, drawn primarily from SAB's own materials, demonstrating how Black Label was positioned in the marketplace. The Court accepted the evidence over the objections of SAB (para 33), although it ultimately decided the case on a different ground.

29.4. In *Bannatyne v Bannatyne & Another* 2003 (2) SA 363 (CC), the Commission for Gender Equality was admitted as an *amicus curiae* and was permitted to introduce statistical and other evidence on the

state of the maintenance system. Mokgoro J commented on this evidence at paragraph 3 as follows:

"This evidence proved most useful and gave the necessary context by providing information regarding the frailties inherent in the functioning of the maintenance system and more particularly its effect on the promotion and advancement of gender equality in this country."

Legal submissions

30. I have summarised above, in paragraph 5, the core legal submissions which the Black Sash wishes to make. I now expand briefly on those submissions.
31. The Black Sash recognises the right and autonomy of adults to enter into contracts of their choosing (within the framework permissible by law), and recognises too that many adult grant beneficiaries choose to obtain funeral policies for themselves. However, it submits that such deductions from a child grant (child support grant, care dependency grant or foster care grant) are not in the interests of the beneficiaries, as required by section 20(4) of the SAA. While it is the caregiver who receives the child grant, the grant is for the benefit of the child, who in the context of section 20(4) is the beneficiary.
32. The Black Sash submits that a parent who wishes to take out a funeral policy in respect of his or her child is at liberty to do so from another source of income, but not from the child grant. This is particularly so in relation to a child support grant, where a means test is applicable.

33. A study commissioned by the Department, SASSA and UNICEF and conducted by the Economic Policy Research Institute found that the child support grant not only helps to realise children's rights to social assistance, but is also associated with improved nutritional, health and education outcomes. These goals are not achieved if the grant is spent on funeral insurance premiums. (I annex only the cover page and executive summary of this report ("LM 10") due to its volume. The full report will be made available on request.

Minister and SASSA's Discretion

34. Section 20 of the Social Assistance Act prohibits deductions from social assistance grants, and then creates a limited exception to that prohibition. It provides:

"Restrictions on transfer of rights and payments of social assistance

20. (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.

[...]

(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."



35. Regulation 26A further describes the circumstances under which deductions may be made from social assistance grants:

"(1) The Agency may allow deductions for funeral insurance or scheme to be made directly from a social grant where the beneficiary of the social grant requests such deduction in writing from the Agency.

(2) Subject to the provisions of subregulation (1), the Agency may only allow deductions to be made directly from a social grant where the insurance company requiring such deduction or to whom the money resulting from the deduction is paid, is a financial services provider as defined in section 1 of the Financial Advisory and Intermediary Services Act, 2002 (Act No 37 of 2002) and authorised to act as a financial services provider in terms of section 7 of that Act.

(3) Notwithstanding the provisions of sub-regulation (1), the Agency may only authorise one deduction for a funeral insurance or for a funeral scheme not exceeding ten percent of the value of the beneficiary's social grant."

36. In *Channel Life*, Du Plessis J held that if all the requirements in Regulation 26A are met, SASSA is obliged to allow deductions for funeral insurance directly from social assistance grants, and has no right to disallow requests for deductions in favour of the insurer.

37. The judgment did not engage at all with deductions from child support grants for funeral policies in respect of children, and accordingly did not consider the constitutional imperatives on the Department of Social Development in its provision of child support grants.

38. The Black Sash submits that deductions from child support grants for funeral policies in respect of children do not fall within the ambit of the special



exception created by section 20(4) of the Social Assistance Act, because they are neither necessary nor in the interest of the beneficiary. At the very least, the Minister and/or SASSA has a discretion as to whether to allow them. This is so because of the scheme of the Act, the constitutional imperative of the right to social assistance, and the constitutional principle of the best interests of the child. If there is indeed a discretion, the Minister is entitled to make general policy as to how that discretion is to be exercised.

International Law on Social Assistance

39. The right to social assistance has been recognised as a right in a number of international law instruments.
40. The Universal Declaration of Human Rights first spoke to the right to social security in 1948. Article 22 of the Universal Declaration guarantees everyone the right to social security. Particularised for the needs of children, Article 26 of the Convention on the Rights of the Child provides that states should recognise the right of children to social security and take measures to "ensure the full realisation of this right". This right is replicated in the International Covenant on Economic Social and Cultural Rights ("ICESCR"), drafted in 1967 and ratified by South Africa in 2015. Article 9 guarantees not only the right to social security, but also the protection of social insurance.
41. The ICESCR provides that a state must take steps to achieve the realisation of the right to social security and social insurance: Article 2(1). Most significantly for present purposes, the ICESCR in Article 5(1) disallows any



person from engaging in an activity of performing an act aimed at destroying or limiting the rights therein, including the right to social security. The ICESCR does three things with regard to the right to social security. First, it requires the state to take positive action to realise the right by for instance providing social assistance. Secondly, it requires that other actors not destroy or limit the social assistance. Thirdly, it requires the state to take positive steps to prevent other actors from destroying or limiting the right to social security.

42. The African Commission on Human and People's Rights said the following of a state's obligation to protect rights from violation by non-state actors:

*"Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties . . . This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case Velásquez Rodríguez v Honduras. In this landmark judgment, the Inter-American Court of Human Rights held that when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the state is further emphasised in the practice of the European Court of Human Rights, in X and Y v Netherlands. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person."*⁴

⁴Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60(ACHPR 2001) (hereinafter "SERAC"), para 57.

43. The UN Committee on Economic Social and Cultural Rights ("CESCR") made a similar statement, and particularised it to social security, in General Comment 19 in 2008: It reads as follows:

"The obligation to protect requires that State parties prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures, for example, to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing unreasonable eligibility conditions; arbitrarily or unreasonably interfering with self-help or customary or traditional arrangements for social security that are consistent with the right to social security; and failing to pay legally required contributions for employees or other beneficiaries into the social security system."⁵

44. South Africa has also ratified other international instruments that speak to the right to social assistance. They include Article 10 of the Southern African Development Community Charter of Fundamental Social Rights; Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination; and Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women.

45. I have already referred to the content of the general obligations which flow from these international instruments. The CESCR General Comment 19 provides more detail, stating that states have the obligation to:

⁵ Committee on Economic, Social and Cultural Rights, *General Comment 19: The right to social security (art. 9) (39th session, 2007)*, U.N. Doc. E/C.12/GC/19 (2008) para 45.

45.1. adopt and implement a national social security strategy and plan of action;⁶

45.2. take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;⁷ and

45.3. regulate the activities of individuals or groups so as to prevent them from violating the right to social security.⁸

46. These obligations support an interpretation that recognises a discretion vesting in the state in Regulation 26A.

47. The CESCR has said:

"Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to social security, as soon as possible."

Obligations of financial institutions

48. Juristic persons such as the respondent have both rights and obligations in terms of the Bill of Rights. Section 8(2) of the Constitution recognises that the Bill of Rights may be applied horizontally, and that a juristic person may have positive or negative obligations under the Bill of Rights.

⁶General Comment 19, para 59(d).

⁷Ibid, para 59(e).

⁸Ibid, para 65.

49. The Black Sash submits that in determining the content of the negative duty of juristic persons, a court must consider international law. The United Nations Guiding Principles on Business and Human Rights ("UNGPs") are the most salient instrument in international law that speaks to the duties of juristic persons with regard to internationally recognised human rights.
50. The UNGPs provide for three pillars. Pillars one and two are important for the purposes of this matter. Pillar one provides that the state has a duty to protect human rights. Pillar two provides that corporate entities have the responsibility to respect human rights. According to the commentary on article 11, this entails that they "should not undermine States' abilities to meet their own human rights obligations". Juristic persons thus have an obligation not to interfere with the state's attempt to realise the human right to social security.
51. It is settled law that the non-state agents have negative obligations in respect of the human rights of other non-state agents. This Court said the following in *Juma Masjid*:

*"the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right."*⁹

⁹Governing Body of the Juma Masjid Primary School and Another v Essay N.O. and Others 2011 (8) BCLR 761 (CC), para 58.



52. The Black Sash submits that the right to social security places a negative obligation on private entities to avoid diminishing the realisation of the right to social assistance.

Conclusion

53. I respectfully submit that the Black Sash ought to be admitted as *amicus curiae* in this matter. The evidence and legal arguments that the Black Sash wishes to make are novel to the proceedings and will, I respectfully submit, be useful to the Court in adjudicating this matter. There is inevitably some degree of overlap between what the Black Sash seeks to submit to the Court, and the submissions which will be made by the parties. If the Black Sash is admitted as an *amicus curiae* and given leave to make oral submissions, it will ensure that they do not repeat what is said by the parties.
54. I accordingly ask that an order be granted in terms of the notice of application.

Signed and dated at Mowbray, Cape Town on 7 April 2016.




LM

427

LYNETTE MAART

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Mowbray on this the 07 day of April 2016, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.


COMMISSIONER OF OATHS

Full Names: Ndandase N

Capacity: Corroboration

Designation: .

Address: 32 Main road, Mowbray.



LM
AE