



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/17

In the matter between:

SOUTH AFRICAN SOCIAL SECURITY AGENCY

First Applicant

**CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY**

Second Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

First Respondent

BLACK SASH TRUST

Second Respondent

MINISTER OF FINANCE

Third Respondent

NATIONAL TREASURY

Fourth Respondent

CASH PAYMASTER SERVICES (PTY) LIMITED

Fifth Respondent

INFORMATION REGULATOR

Sixth Respondent

SOUTH AFRICAN POST OFFICE SOC LIMITED

Seventh Respondent

FREEDOM UNDER LAW NPC

Eighth Respondent

and

CORRUPTION WATCH (NPC) RF

First Amicus Curiae

- Neutral citation:** *South Africa Social Security Agency and another v Minister of Social Development and others* [2018] ZACC 26
- Coram:** Mogoeng CJ, Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J
- Judgments:** Jafta J (unanimous)
- Heard on:** 6 March 2018
- Decided on:** 30 August 2018
- Summary:** Social grants — extension of the declaration of invalidity — just and equitable remedy — case justifying urgency has been made —personal cost liability of the application against the Minister and CEO of South Africa Social Security Agency respectively.

JUDGMENT

JAFTA J (Mogoeng CJ, Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring):

[1] On 23 March 2018 this Court issued an order and indicated that reasons would follow. Here are the reasons which also include the determination of costs that were reserved. The order in question was formulated in these terms:

- “1. The South African Social Security Agency (SASSA) is granted direct access to bring this application.
2. It is declared that, for the period of six months from 1 April 2018, SASSA and Cash Paymaster Services (Pty) Limited (CPS) are under a constitutional obligation to ensure payment of social grants to beneficiaries who are paid in cash.
3. The declaration of invalidity of the contract between SASSA and CPS, in relation to cash payment of social grants to beneficiaries who are paid in cash, is further suspended for a six-month period from 1 April 2018.

4. SASSA and CPS must ensure that for the period of six months from 1 April 2018 payment of social grants is made to beneficiaries who are paid in cash on the same terms and conditions as those in the current contract between them.
 - 4.1 CPS may in writing request National Treasury during the six month period to investigate and make a recommendation regarding the price to be paid for the services it is to render in terms of paragraph 4 of this order.
 - 4.2 National Treasury must file a report with this Court within 21 days of receipt of the request setting out its recommendation.
 - 4.3 Within 30 days of the completion of the period of the contract, CPS must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the contract.
 - 4.4 SASSA must immediately thereafter obtain an independent audited verification of the details provided by CPS under paragraph 4.3.
 - 4.5 The audited verification must be approved by National Treasury and filed by SASSA with this Court within 60 days of the completion of the contract.
 - 4.6 CPS must permit the auditors appointed by SASSA to have unfettered access to its financial information for this purpose.
5. The Minister and SASSA must file reports on the implementation of the order at the end of April and each subsequent month until the end of August 2018.
6. If there is any material change in respect of any matter contained in a report contemplated in paragraph 5, the Minister and SASSA must immediately report on affidavit to this Court and explain the reasons for, and, consequences of, the change.
7. SASSA must ensure that the payment method it determines:
 - 7.1 contains adequate safeguards to ensure that the personal data of beneficiaries obtained in the payment process remains private and may not be used for any purpose other than payment of the grants or any purpose sanctioned by the Minister in terms of section 20(3) and (4) of the Social Assistance Act; and
 - 7.2 precludes a contracting party from inviting beneficiaries to 'opt in' to the sharing of confidential information for the marketing of goods and services.
8. The Panel of Experts appointed by this Court, shall:

- 8.1 evaluate the implementation of cash payment of social grants during the six-month period;
 - 8.2 evaluate the steps proposed or taken by SASSA for any competitive bidding process or any other processes aimed at the appointment of a new contractor or contractors for the cash payment of social grants by SASSA in terms of section 4(2)(a) of the South African Social Security Agency Act 9 of 2004;
 - 8.3 evaluate the steps proposed or taken by SASSA aimed at SASSA itself administering and paying the grants in the future; and
 - 8.4 file reports on affidavit with this Court by 15 May 2018 and by the 15th of every subsequent month until 15 September 2018, for the 6-month period commencing 1 April 2018, setting out the steps they have taken to evaluate the matters referred to in paragraphs 8.1 to 8.3, the results of their evaluations and any recommendations they consider necessary.
9. The former Minister of Social Development Ms Bathabile Dlamini and the acting Chief Executive Officer of SASSA, Ms Pearl Bhengu, are hereby ordered to show cause by way of affidavits why:
- a) They should not be joined in these proceedings in their personal capacities; and
 - b) They should not be held personally liable to pay costs or any portion thereof.
- 9.1 The affidavits referred to in paragraph 9 must be filed by 16 April 2018;
 - 9.2 Should any party wish to file any affidavit in response, it must do so by 25 April 2018;
 - 9.3 Should Ms Bathabile Dlamini and Ms Pearl Bhengu desire to file further affidavits in response, they must do so by 30 April 2018.
10. Pending the finalisation of this matter, costs are reserved.”

[2] This is yet another application for the extension of an unlawful contract that was declared invalid by this Court in 2014. The application was instituted as one of urgency by the South African Social Security Agency (SASSA) and the Chief Executive Officer (CEO) of SASSA. In an unusual manner, they have cited the Minister of Social Development (Minister) as the first respondent. She is the person to whom SASSA is

urgency by the South African Social Security Agency (SASSA) and the Chief Executive Officer (CEO) of SASSA. In an unusual manner, they have cited the Minister of Social Development (Minister) as the first respondent. She is the person to whom SASSA is accountable and in the past cases that came before this Court in respect of the contract in question, the Minister and SASSA were always on the same side. But even now the previous Minister deposed to an affidavit in support of the application and that affidavit is annexed to SASSA's founding papers.

[3] SASSA cited as further respondents, the Minister of Finance; the National Treasury; the Information Regulator and the South African Post Office (SOC) Limited (SAPO). The other respondents are the Black Sash Trust (Black Sash); Cash Paymaster Services (Pty) Ltd (Cash Paymaster) and Freedom Under Law NPC. Apart from the Minister, parties who participated actively in these proceedings were SAPO; the Black Sash; Freedom Under Law and Cash Paymaster.

Factual background

[4] SASSA was established primarily for the administration and payment of social assistance.¹ Its CEO is, subject to the direction of the Minister, responsible for the management of SASSA. With the concurrence of the Minister, SASSA may conclude contracts with third parties for payment of social grants. Following a tender that was awarded to Cash Paymaster, SASSA and Cash Paymaster concluded a contract in terms of which Cash Paymaster was to provide services relating to the payment of social grants on behalf of SASSA, for a fee. The duration of the contract was five years.

[5] But the tender was declared invalid by this Court on 29 September 2013.² Later, and after affording the parties an opportunity to address us on the appropriate remedy, this Court declared the contract between SASSA and Cash Paymaster

¹ Section 4 of the South African Social Security Act 9 of 2004.

² *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay I*).

invalid.³ However, this declaration of invalidity was suspended until 31 March 2017 to enable SASSA to award a new tender. Having advised this Court in November 2015 that it would itself provide the relevant services, SASSA failed to do so. Despite being aware in April 2016 that it would not be able to provide those services, SASSA did not inform this Court of this fact until 28 February 2017. On that day, it launched an urgent application which it sought to withdraw the next day. Fortunately, Black Sash had also instituted an application seeking the extension of the suspension of the declaration of invalidity of the relevant contract, on specified conditions. In that matter this Court promptly delivered judgment and issued an order.⁴

³ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay 2*).

⁴ The order was issued in these terms:

- “1. The Black Sash Trust is granted direct access to bring this application.
2. Freedom Under Law NPC is granted leave to intervene.
3. Corruption Watch NPC (RF) and the South African Post Office SOC Limited are admitted as friends of the Court.
4. It is declared that the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Limited (CPS) are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe upon grant beneficiaries’ rights of access to social assistance under section 27(1)(c) of the Constitution.
5. The declaration of invalidity of the contract is further suspended for the 12- month period from 1 April 2017.
6. SASSA and CPS are directed to ensure payment of social grants to grant beneficiaries from 1 April 2017, for a period of 12 months, on the same terms and conditions as those in the current contract between them that will expire on 31 March 2017, subject to these further conditions:
 - 6.1 The terms and conditions shall:
 - (a) contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; and
 - (b) preclude anyone from inviting beneficiaries to ‘opt in’ to the sharing of confidential information for the marketing of goods and services.
 - 6.2 CPS may in writing request National Treasury during the 12-month period to investigate and make a recommendation regarding the price in the contract.
 - 6.3 National Treasury must file a report with this Court within 21 days of receipt of the request setting out its recommendation.

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- 6.4 Within 30 days of the completion of the period of the contract, CPS must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the contract.
 - 6.5 SASSA must thereafter obtain an independent audited verification of the details provided by CPS under paragraph 6.4.
 - 6.6 The audit verification must be approved by National Treasury and the audited verification must be filed by SASSA with this Court within 60 days.
 - 6.7 CPS must permit the auditors appointed by SASSA to have unfettered access to its financial information for this purpose.
 7. The Minister and SASSA must file reports on affidavit with this Court every three months, commencing on a date three months after the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of the 12-month period, what steps they have taken in that regard, what further steps they will take, and when they will take each future step, so as to ensure that the payment of all social grants is made when they fall due after the expiry of the 12-month period.
 8. The reports filed by the Minister and SASSA as contemplated in paragraph 7 must include, but is not limited to, the applicable time-frames for the various deliverables which form part of the plan, whether the time-frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.
 9. If any material change arises in relation to circumstances referred to in a report referred to in paragraphs 7 or 8, the Minister and SASSA are required immediately to report on affidavit to the Court and to explain the reason for and consequences of the change.
 10. It is declared that SASSA is under a duty to ensure that the payment method it determines:
 - 10.1. contains adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used 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; and
 - 10.2. precludes a contracting party from inviting beneficiaries to 'opt in' to the sharing of confidential information for the marketing of goods and services.
 11. The parties are, within 14 days from the date of this order, required to submit the names of individuals, with their written consent, suitably qualified for appointment as independent legal practitioners and technical experts for the purposes referred to in paragraph 12 below.
 12. The Auditor-General and any other person(s) or institution(s) appointed by the Court after receipt of the names submitted under paragraph 11, shall jointly and until otherwise directed by the Court:
 - 12.1 evaluate the implementation of payment of social grants during the 12-month period;
 - 12.2 evaluate the steps envisaged or taken by SASSA for any competitive bidding process or processes aimed at the appointment by SASSA in terms of section 4(2)(a) of the South African Social Security Agency Act 9 of 2004 of a new contractor or contractors for the payment of social grants;
 - 12.3 evaluate the steps envisaged or taken by SASSA aimed at SASSA itself administering and paying the grants in the future or SASSA itself permitting any part or parts of the administration and payment processes in the future; and
 - 12.4 file reports on affidavit with this Court every three months, commencing on a date three months after the date of this order, or any shorter period as the

[6] It is apparent from paragraphs 5 and 6 of the order of 17 March 2017 that the suspension of the declaration of invalidity was extended for 12 months from 1 April 2017 to 31 March 2018. The Court resumed its supervisory role and ordered the Minister and SASSA to file reports every three months on steps taken to ensure that payment of social grants was not disrupted upon the expiry of the extended period of suspension.

[7] Indeed, SASSA submitted to the Court quarterly reports which were also evaluated by a Panel of Experts,⁵ appointed in terms of the order of 17 March 2017 in *Black Sash*.⁶ Concerns were raised by the Panel of Experts in relation to the reports filed by SASSA and its failure to cooperate with the experts on further information requested by them. As a result of the concerns raised, the Court issued fresh directions in November 2017 which required SASSA to file reports on a monthly basis, setting out the steps taken in preparing for the uninterrupted payment of social grants upon the expiry of the extended suspension.⁷

legal practitioners and experts may deem necessary, setting out the steps they have taken to evaluate the matters referred to in paragraphs 12.1 to 12.3 the results of their evaluations and any recommendations they consider necessary.

13. The Minister is called upon to show cause on affidavit on or before Friday 31 March 2017 why—

13.1 she should not be joined in her personal capacity; and

13.2 she should not pay costs of the application from her own pocket.

14. Costs are reserved until conclusion of these proceedings.”

⁵ Paragraph 12 of the order actioned the appointment of the Auditor-General and other persons, into a Panel of Experts.

⁶ *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash I*).

⁷ The directions of 7 November 2017 read:

“Insofar as the Court retains jurisdiction to ensure proper compliance with the terms of its order dated 17 March 2017, the Chief Justice has issued the following directions:

1. The South African Social Security Agency (SASSA) is directed to—

a) forthwith and fully comply with any present or future request by the Panel of Experts (Panel) for access to information held by SASSA by providing to the Panel soft copies, clearly indexed, of documents containing the information requested within the timeframes stipulated by the Panel and, if unable to do so, to inform the Panel of the reasons for this within three working days of the request;

[8] In summary, those directions instructed SASSA to provide the Panel of Experts with information requested and also to furnish them and the Court with a plan “to effect the uninterrupted payment of social grants”. The report had to address specific issues like “definite roles and responsibilities, precise timelines, dependencies, desired outcomes, and risk-mitigation measures”. SASSA was also required to file monthly reports on the implementation of the plan and steps taken to mitigate risks which could prevent full execution of the plan. Notably, the directions required SASSA, in addition, to furnish the Court with a contingency plan if a seamless transition on 1 April 2018 was not achievable. SASSA was thus ordered to prepare a contingency

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- b) provide the Panel with appropriate and sufficient details on the process or processes undertaken by SASSA to obtain the services of service providers, including communications with the Office of the Chief Procurement Officer and any legal advice provided by SASSA’s legal unit or outside lawyers, by 12 noon on Friday, 17 November 2017;
 - c) combine statistics and information of all mechanisms, or generated by all entities, involved in the payment of social grants in one consolidated document to be provided to the Panel on a monthly basis;
 - d) request that the Government Communication and Information System develop and implement a focused communications plan to inform current and potential beneficiaries/recipients of social grants of the implications of the transition and of the benefits of receiving their social grants via bank accounts provided by a commercial bank or financial institution of their choice;
 - e) report to the Court, on affidavit, each month as to the progress achieved in implementing a communications plan as described in paragraph (d);
 - f) by Friday, 8 December 2017, report to the Court, on affidavit, as to SASSA’s plan to effect the uninterrupted payment of social grants, specifying matters such as definite roles and responsibilities, precise timelines, dependencies, desired outcomes and risk-mitigation measures;
 - g) after filing its plan in terms of paragraph (f) report to the Court, on affidavit, each month as to the progress achieved in implementing the plan, the steps taken to mitigate risks which could prevent the full execution of the plan and any other matters which ought to be brought to the attention of the Court;
 - h) by Friday, 8 December 2017, report to the Court, on affidavit, as to SASSA’s contingency plan if a seamless transition on 1 April 2018 is not realisable; and
 - i) provide the Panel with appropriate and sufficient information on any steps taken to implement these directions.

2. Further directions may be issued.”

plan in November 2017, but we were told at the hearing on 6 March 2018 that the plan does not exist, without any explanation as to why the directions were not obeyed.

[9] It is apparent from these directions read with the obligations imposed by the order of 17 March 2017 that if SASSA discharged its obligations diligently and without delay, the uninterrupted payment of social grants could have been achieved. And the need for instituting an urgent application would not have arisen. More will be said about this later.

Urgent application

[10] On 6 February 2018, SASSA lodged this application, requesting the Court to entertain it as a matter of urgency and grant an extension of the suspension of the declaration of invalidity for six months. The requested extension was limited to that part of the contract which dealt with the provision of the cash payment service.

[11] In this Court, urgent applications are governed by rule 12 of the Rules of this Court which requires that the application be on notice of motion supported by an affidavit, “setting forth explicitly the circumstances that justify a departure from the ordinary procedures”.⁸ The rule stipulates that circumstances which render the application urgent be explicitly set out in the supporting affidavit, to enable the Court to exercise its discretion and authorise a departure from the ordinary procedures.

[12] SASSA’s supporting affidavit does not comply with this rule. It does not set out explicitly circumstances that render the matter urgent. But this shortcoming may not be fatal to its case if such circumstances, although not explicitly mentioned, are

⁸ Rule 12 provides:

- “(1) In urgent applications, the Chief Justice may dispense with the forms and service provided for in these rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these rules, as may be appropriate.
- (2) An application in terms of subrule (1) shall on notice of motion be accompanied by an affidavit setting forth explicitly the circumstances that justify a departure from the ordinary procedures.”

apparent from its affidavits.⁹ Here the only factor apparent from SASSA's papers which suggested that the matter was urgent was the impending expiry of the suspension of the declaration of invalidity.

[13] The question was whether in the present circumstances the imminent expiry of the contract in terms of which social grants are provided, rendered the matter urgent as envisaged in the relevant rule. The answer to this question lay in what was done by SASSA as soon as it realised that a further extension was needed. In the affidavit deposed to by its acting CEO, SASSA told us that the request for the extension was necessitated by the fact that the service that forms the subject-matter of the extension was then recently put out to tender. A further extension would enable SASSA to finalise the tender process and appoint a new service provider to replace Cash Paymaster.

[14] There was a delay on the part of SASSA, relating to advertising the tender. SASSA averred that the decision to call for tenders was taken in September 2017, upon realising that SAPO lacked the capacity to provide the relevant service. But the first step towards advertising was only taken on 8 December 2017. Even then the tender was not advertised but only a notice of it was placed in the Government Gazette. No explanation was furnished for this delay.

[15] Eventually, the tender was advertised only on 24 January 2018 and the closing date was set for 5 February 2018. This was later extended to 28 February 2018. The reason furnished for the delay between 8 December 2017 and 23 January 2018 was that according to the National Treasury's prescripts, the period between 15 December and 15 January is taken as a "closed period" during which no tenders are advertised.

[16] This explanation does not cover the period between 8 December and 14 December 2017. Moreover, we are not told why the National Treasury was not approached with a request to urgently advertise the tender during the closed period.

⁹ Compare *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk) at 948.

Circumstances were unusual and called for urgent action, as the expiry of the extended suspension was drawing closer. Even after the tender was advertised, SASSA was willing to extend the closing date beyond 5 February to 28 February 2018, further reducing the limited time it had. In the report filed in this Court on 9 March 2018, SASSA mentioned that it had been requested to extend the closing date of the tender to 30 March 2018.

[17] After extending the closing date of the tender SASSA approached this Court, urging it to entertain the matter on an urgent basis. Apart from the lack of diligence on the part of SASSA in relation to its preparation for the transition on payment of social grants, there was not even a hint of why SASSA left it until it was too late to approach this Court for relief.

[18] In light of what is outlined above, the inference that SASSA wished to “force” this Court to grant it a further extension, as it did last year, was irresistible. There is no suggestion that the period of 12 months, by which the declaration of invalidity was extended, was inadequate. Despite this Court having ordered on 7 November 2017 that SASSA must develop a “contingency plan if a seamless transition on 1 April 2018” was not attainable, SASSA did not mention the plan in its application for extension. When this issue was raised at the hearing on 6 March 2018, its counsel informed the Court that the plan does not exist and that if the extension is not granted there would be chaos on 1 April 2018. This was contradicted by SASSA a few days later. A report filed with this Court on 9 March 2018 contained a contingency plan, devoted to arresting the situation, in the event of the Court declining to extend the suspension further.

[19] Therefore, not only was the so-called urgency self-created, there are further disturbing features in this case. It is disconcerting that SASSA did not only lack candour but had gone further to suppress information material to the determination of the matter. The issue of the contingency plan was so important to the scheme of things that it could hardly have been omitted from SASSA’s papers, on account of an

innocent oversight. SASSA's affidavit sketches out historical facts and quotes copiously from its December report to illustrate the challenges faced by SASSA and the solutions it proposed to address those challenges. But it failed to mention what SASSA would do if the extension is not granted. No case was made out for urgency.

[20] But the absence of urgency did not mean that as a matter of course, the application should be dismissed. This Court had to consider whether in the special circumstances of this case, there were reasons which justified the granting of a further extension. An enquiry into an extension of this kind involves consideration of relevant principles and facts of a particular case.

Principles

[21] The extension of a declaration of invalidity cannot be had for the asking.¹⁰ A proper case justifying the extension must be made out. This is so because the effect of suspending the operation of a declaration of invalidity is to keep alive conduct that has been declared invalid. In the present instance, a contract that was declared invalid because the process leading up to its conclusion was inconsistent with the values enshrined in the Constitution, continued to operate as if it was valid. This was the consequence of the suspension of the declaration of its invalidity. The object of the suspension was two-fold. The first was to avoid disruption in the payment of social grants which could have caused intolerable suffering to the recipients of social grants and their dependants. The second was to afford SASSA the opportunity to put matters right by concluding a fresh valid contract.

[22] Despite having been initially afforded a period of three years, SASSA has failed to remedy the defect before the expiry of the original period of suspension. This Court was placed in an invidious position last year in March 2017 when it was asked to extend further the period of suspension. The breach of the obligation imposed on SASSA by section 27(1)(c) of the Constitution weighed heavily in the

¹⁰ *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* [2015] ZACC 27; [2015] JOL 33755 (CC); (11) BCLR 1387 (CC) at para 1.

determination to grant a further extension of 12 months.¹¹ All in all, SASSA has been afforded four years to sort out the problem but has failed to do so.

[23] Without showing that the last period of suspension was inadequate and giving a complete explanation as to why it has once again failed to cure the defect, SASSA had a serious obstacle standing in the way of the relief it sought. To clear that obstacle SASSA was required to establish that it would be just and equitable to grant it yet another extension. Justice and equity are the principles that guide the Court in determining whether to grant an extension or not. These principles apply regardless of whether the request relates to a further extension.¹²

[24] Other principles relevant to the enquiry into whether it would be just and equitable to extend a period of suspension were usefully collected in the decision of this Court in *Ex Parte Minister of Social Development*. In that case, Ngcobo J summed them up in these terms:

“The principles that emerge from these cases may be summarised as follows:

- (a) The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is applicable to constitutional matters. If courts were to be asked to reconsider final orders declaring provisions of statutes invalid, this could well lead to an intolerable situation and uncertainty.
- (b) This Court has the power under its ‘just and equitable’ jurisdiction to vary the period of suspension of an order of invalidity and to determine the conditions which are attached to the extension of the period. If the period of invalidity is not suspended or the period of suspension has lapsed, this Court has no

¹¹ Section 27(1) of the Constitution provides:

- “(1) Everyone has the right to have access to-
- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

¹² *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty to Animals* [2016] ZACC 26; 2016 JDR 1560 (CC) (11) BCLR 1419 (CC) at para 14.

power to suspend or extend the suspension of the declaration of invalidity. To do so would be to revive legislation which had been invalidated in terms of the Court's order.

- (c) The Court will vary the period of suspension that has not yet expired when it is just and equitable to do so. The determination of what is 'just and equitable' or is 'in the interests of justice' involves similar considerations. And what is just and equitable depends on the facts of each case.
- (d) Factors that are relevant to the enquiry whether it is just and equitable to extend the period of suspension include the sufficiency of explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.
- (e) What is required is a balancing of all the relevant factors bearing in mind that the ultimate goal is to make an order that is just and equitable.
- (f) An application for the extension of the period of suspension must be made within a reasonable time. It must be made in sufficient time to allow the matter to be considered by this Court before the expiry of the period of suspension.
- (g) The explanation for failure to correct the constitutional defect within the time limit set out in the court order 'must be set out fully, candidly, timeously and in a manner that conforms with the Rules of the Court'.
- (h) It should not be assumed that an extension of the period will be granted as a matter of course and in the public interest. If a proper case for the extension of the period of suspension is not made out, an applicant for the extension of the period of time runs the risk of the request being refused.
- (i) This Court has the responsibility to ensure that the provisions of the Constitution are upheld and enforced. An applicant for the extension of the period of suspension should not therefore assume that the Court will lightly grant the suspension of an order of invalidity."¹³

¹³ *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 50.

[25] The question that arose in the present matter was whether the balancing of the relevant factors favoured the granting of a further extension. In answering this question, the Court had to examine those factors and weigh them up. They are addressed separately.

Sufficiency of explanation

[26] The explanation furnished for why a further extension must be granted was utterly inadequate. It was neither candid nor complete. The details of that explanation were outlined earlier when the urgency of the matter was evaluated. With regard to SAPO's incapacity to provide the cash payment service, SASSA's affidavit did not tell us why SAPO, which was also an organ of state, was not given the necessary capacity instead of opting for inviting tenders from third parties to provide that service. We were informed from the Bar during the hearing that Cash Paymaster's price for the relevant equipment was too high and therefore Government was unwilling to procure the equipment at the price demanded by Cash Paymaster.

[27] But we were not told why similar equipment was not procured from other parties at a price acceptable to Government. The tender that was advertised in January 2018 has elicited responses from other companies. This suggests that those companies have the necessary equipment for providing the cash payment service. It is apparent from these facts that SASSA and Government had other options which they could have explored instead of trying to force the hand of the Court to extend the operation of an invalid contract. Indeed, in the report filed with this Court on 9 March 2018, SASSA explicitly states that various options were considered but does not tell us what options those were and why they were not pursued.

Prospects of compliance with the deadline

[28] SASSA's affidavits did not assure us that if the extension for six months was granted, the defect would be remedied within that period. The closing date for the tender had already been extended to 28 February 2018. In the report filed on

9 March 2018, SASSA stated that there was a further request for extending the deadline to 30 March 2019. However, SASSA did not say whether that request had been acceded to. Even if the tender were to be awarded within the requested period of extension, there is no guarantee that the process would be free from irregularities which might give rise to the validity of the award of that tender being successfully challenged. The information on record is not adequate for determining whether there is a likelihood of compliance with the order that requires SASSA to remedy the defect.

Finality in litigation

[29] The principle of finality in litigation promotes certainty which forms part of the rule of law, one of the founding values of the Constitution. The need for finality here is more acute. The original award of the tender to Cash Paymaster in 2012 has generated no less than five cases in this Court alone.¹⁴ There have been cases in other courts too.¹⁵ The uncertainty in relation to whether social grants would be paid must come to an end. SASSA and other relevant organs of state must make every effort to ensure that the interruption of the payment of social grants is prevented.

[30] With regard to finality in litigation, in *Ntuli* this Court stated:

“The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid.”¹⁶

¹⁴ These are *AllPay 1*; *AllPay 2*; *Black Sash 1*; *Black Sash Trust v Minister of Social Development* ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (*Black Sash 2*) and the present matter.

¹⁵ *AllPay 1* commenced in the High Court and went to the Supreme Court of Appeal before it came to this Court.

¹⁶ *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); (6) 1997 BCLR 677; (CC) at para 29.

Potentiality of prejudice

[31] Apart from setting out the synopsis of steps taken by SASSA in an attempt to comply with the order of 17 March 2017 and outlining the challenges it still faced, SASSA has not said a word about the consequences of a refusal to extend further. That it was SASSA's duty to inform this Court of those consequences is beyond doubt. In approaching this Court for a further extension, SASSA sought an indulgence. It was therefore duty-bound to be candid and place all relevant information before this Court to enable it to decide the matter on the basis of full facts.

[32] SASSA has not established any prejudice it would suffer if the extension was not granted. Nor did it show that any of the parties would be harmed by a failure to extend the suspension in question. However, it was apparent from the papers that the recipients of grants would be seriously prejudiced by the failure to extend. Approximately 2.8 million recipients could have been affected. These people would not have received their grants if a further suspension of the invalidity was not granted. These are poor people with virtually no income for daily financial needs except the grants they receive from SASSA.

[33] The interests of the recipients of grants and the hardship they could have faced had to be weighed against other factors which did not support the granting of a further extension. This was done in order to determine whether a refusal to extend the relevant suspension would be just and equitable in the circumstances of this case.

[34] While factors like finality of litigation, sufficiency of explanation and prospects of compliance with the deadline warranted refusal to grant a further suspension, there were other factors which strongly supported the granting of the extension requested. These included the large number of poor people who would have been adversely affected by the refusal; the violation of their rights of access to sufficient food and social security and the fact that the grant recipients were not to blame for SASSA's failure to act diligently and comply with the extended period in the order.

[35] What emerged from this balancing exercise was that it would be just and equitable to grant a further extension of the suspension of the invalidity order so as to avoid the serious prejudice which millions of poor people could have suffered.

Costs

[36] In the order of 23 March 2018, the question of costs was reserved for determination at a later date. This was necessitated by the fact that the order envisaged an enquiry into whether the former Minister of Social Development, Ms Bathabile Dlamini and SASSA's acting CEO, Ms Pearl Bhengu should be enjoined and be held personally liable for costs of the application. In their respective affidavits, both of them have urged this Court not to order them to pay costs in their personal capacity.

[37] It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation. In *Black Sash 2*, this Court made it clear that this test applies to conduct relating to litigation and the discharge of constitutional obligations. Froneman J said:

“Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order.”¹⁷

[38] In her written submissions the Minister contended that to hold her personally liable for costs would constitute an impermissible encroachment on the powers of the other arms of government. She submitted that this Court lacks the authority to hold a Minister to account by ordering her or him to pay costs out of her or his pocket. There is no merit in this argument. As mentioned, *Black Sash 2* affirms the principle that

¹⁷ *Black Sash 2* above n 14 at para 9.

public officials may be ordered to pay costs out of their own pockets if they are guilty of bad faith or gross negligence. The source of that power is the Constitution itself which mandates courts to uphold and enforce the Constitution. It is apparent from *Black Sash 2* that the object of a costs *de bonis propriis* order is to vindicate the Constitution.

[39] The other submission advanced by the Minister was that it is not competent to make such a costs order in the absence of a request from one of the litigants. The contention is ill-conceived. At common law, courts may raise the issue of a personal costs order of their own accord provided that they act fairly against the affected party. Fairness demands that such a party be warned that the court contemplates issuing a personal costs order and the affected party must be afforded an opportunity to address the court on the issue.

[40] The order of 23 March 2018 meets the requirement of fairness. It called the Minister and the acting CEO to show cause why they should not be enjoined in their personal capacities and be held personally liable for costs. In response to the order, these officials have filed affidavits and written submissions. Therefore, the process followed in matters of this kind have been adhered to.

[41] For her part the acting CEO, while accepting that a personal costs order is competent in circumstances described in *Black Sash 2*, argued that on the facts on record she was not guilty of bad faith or gross negligence. Consequently, she urged this Court not to make a personal costs order against her.

[42] The question that arose in respect of both the Minister and the acting CEO was whether they have acted in bad faith or grossly negligent in conducting this litigation or in the performance of their constitutional functions. The affidavit filed by the acting CEO outlined steps undertaken by her in an attempt to comply with the order issued in *Black Sash 1* on 17 March 2017. It is evident from this affidavit that she was only appointed to the position of acting CEO in July 2017.

[43] Shortly after her appointment she approached the Treasury for approval of the appointment of SAPO as a service provider to replace Cash Paymaster. Once approval was obtained, a proposal was solicited from SAPO. It was during the evaluation of this proposal that it became clear that SAPO lacked the capacity to provide the service for paying social grants in cash. Although SASSA became aware of this shortcoming in September 2017, it was only in mid-December 2017 that steps were taken to put the service to open tender. But the tender was advertised in January 2018. This application was lodged in this Court on 6 February 2018 as a matter of urgency.

[44] As stated the urgency relied on was self-created and the explanation furnished for the delay in approaching this Court was not satisfactory. But the unsatisfactory explanation falls short of gross negligence or bad faith which would warrant a personal costs order.

[45] The test of bad faith or gross negligence has not been established against the Minister too, in respect of compliance with the order of 17 March 2017 which was issued in *Black Sash 2*. It will be recalled that in terms of the empowering legislation SASSA's affairs are the primary responsibility of the CEO. This suggests that the CEO oversees the daily functions and management of SASSA. However, this management is subject to the direction of the Minister. Ultimately the duty to see to it that SASSA attains the objectives for which it was established rests on the Minister.

[46] It is evident from the record that the Minister did not apply an effective supervisory role, particularly after it had come to her attention that SASSA had failed to comply with previous orders. One would have expected that the Minister would demand that she be furnished with reports at frequent intervals, setting out steps taken by SASSA to carry out court orders and for her to intervene as soon as it became clear that difficulties which put payment of social grants at risk had arisen.

[47] The Minister's affidavit reveals that she deferred to the Inter-Ministerial Committee on Comprehensive Social Security which was established by the President to provide oversight and ensure compliance. It is however clear that the duty to give direction to SASSA is imposed on the Minister by the South African Social Security Act. Therefore, the committee established by the President could not relieve the Minister from her statutory duty. On the contrary, the committee could only support her in performing her statutory functions. But the Minister's deference to the committee was mistaken. That is not sufficient to conclude that it constitutes bad faith or gross negligence.

[48] What remains for determination is whether SASSA and its CEO in her official capacity should pay costs of the application. Were it not for the fact that the refusal to extend the period of suspension would have severely prejudiced innocent grant recipients, the application could have been dismissed. Consequently, the applicants must bear the costs of the application.

Order

[49] In the result the following order is made:

1. The South African Social Security Agency and the Chief Executive Officer, in her official capacity, are ordered to pay costs of the application jointly and severally and such costs shall include costs of two counsel.

For the Applicants:

N Cassim SC and H Rajah instructed by Renqe FY Incorporated.

For the First Respondent:

S Kazee instructed by the State Attorney.

For the Second Respondent:

G Budlender SC, G Snyman and Z Ngwenya instructed by Centre for Applied Legal Studies.

For the Fifth Respondent:

L Morison SC, J Bleazard and N Luthuli instructed by Smit Sewgoolam Incorporated.

For the Seventh Respondent:

A Bava SC and G Badela instructed by Shepstone Wylie Attorneys

For the Eighth Respondent:

G Marcus SC, A Coutsooudis and X Hilda instructed by Nortons Incorporated.