

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE CCT**

In the application:

**THE BLACK SASH TRUST** Applicant

and

**THE MINISTER OF SOCIAL DEVELOPMENT** First Respondent

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

**SOUTH AFRICAN SOCIAL SECURITY AGENCY** Third Respondent

**THE MINISTER OF FINANCE** Fourth Respondent

**NATIONAL TREASURY** Fifth Respondent

**CASH PAYMASTER SERVICES (PTY) LTD** Sixth Respondent

**THE INFORMATION REGULATOR** Seventh Respondent

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**NOTICE OF APPLICATION**

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**KINDLY TAKE NOTICE** the Black Sash Trust (the Applicant) hereby applies for orders in the following terms:

- 1 The Applicant's failure to comply with the time limits and process prescribed by the Rules of this Court is condoned, and this application is dealt with as a matter of urgency.
- 2 The Applicant is granted direct access to this Court for the purposes of applying for the relief set out in paragraphs 3 to 13 below.
- 3 The South African Social Security Agency ("SASSA") is forthwith to file with the Court a report on affidavit in which it states how it proposes to award an "interim" contract with Cash Paymaster Services (Pty) Ltd ("CPS") or any other person for payment of social grants after 31 March 2017 in a lawful manner, having regard to the provisions of section 217 of the Constitution and the relevant statutory provisions in that regard.
- 4 It is declared that CPS is under a duty to act reasonably, with due regard to its constitutional obligations arising from the history of this matter and the fact that grant beneficiaries are dependent on it for the achievement of their constitutional rights, in negotiating and contracting with SASSA for the purpose of making payments to grant beneficiaries after 31 March 2017.

- 5 Any such contract must:
- 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 sections 20(3) and (4) of the Social Assistance Act 13 of 2004.
  - b. provide that personal information of beneficiaries is the property of SASSA;
  - c. provide that such personal information shall at the end of the contract be given to SASSA, and removed from the possession of CPS, its parent company and all its affiliate companies, except where such a company and a beneficiary have a continuing contractual relationship.
  - d. preclude a contracting party from inviting beneficiaries to “opt in” to the sharing of their confidential information for the marketing of their goods and services.
- 6 The Minister of Social Development (“the Minister”) and SASSA are to file reports on affidavit with this Court on or before a date determined by the Court, on what steps they have taken, what steps they will take, and when they will take each such future step, to ensure that the payment of all social grants is made when they fall due after 31 March 2017.

- 7 If any material change arises in relation to circumstances referred to in a report referred to in paragraph 6, the Minister and SASSA are required forthwith to report on affidavit to the Court and to explain the reason for and consequences of such change.
- 8 The Minister and SASSA are to file reports on affidavit with this Court on a quarterly basis, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of any “interim” contract, what steps they have taken in that regard, what further steps they will take, and when they will take each such future step, so as to ensure that the payment of all social grants is made when they fall due after the expiry of any “interim” contract.
- 9 The reports filed by the Minister and SASSA as contemplated in paragraph 8 shall include, but not be limited to, the applicable time-frames for the various deliverables which form part of the plan, whether such time-frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.
- 10 If any material change arises in relation to circumstances referred to in a report referred to in paragraphs 8 or 9, the Minister and SASSA are required forthwith to report on affidavit to the Court and to explain the reason for and consequences of such change.

- 11 It is declared that SASSA is under a duty to ensure that the payment method which it determines:
- a. 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 sections 20(3) and (4) of the Social Assistance Act 13 of 2004;
  - b. provides that personal information of beneficiaries is the property of SASSA;
  - c. provides that such personal information in the possession of a third party shall at the end of the relevant contract be given to SASSA, and removed from the possession of that third party and its affiliates.
  - d. precludes a contracting party from inviting beneficiaries to “opt in” to the sharing of their confidential information for the marketing of their goods and services.
- 12 The Minister, SASSA, and any person opposing this application are ordered to pay the costs of this application jointly and severally, the one paying, the other to be absolved.
- 13 Further or alternative relief.

**TAKE NOTICE FURTHER** that if you wish to file an answering affidavit in this application, you are required to do so by not later than 10h00 on Monday 6 March 2017, or within such other time as may be directed by the Chief Justice or the Court.

Dated at **JOHANNESBURG** on the \_\_\_\_\_ day of \_\_\_\_\_ 2017.

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**CENTRE FOR APPLIED LEGAL STUDIES**

**Applicant's Attorney**

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Ref: BHR/0062/NN

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

**AND TO: STATE ATTORNEY, JOHANNESBURG**

**First Respondent: Minister of Social  
Development**

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**SERVICE BY  
HAND AND BY  
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**AND TO: STATE ATTORNEY, JOHANNESBURG**

**Second & Third Respondents: CEO of the South  
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**AND TO: STATE ATTORNEY, JOHANNESBURG**

**Fourth & Fifth Respondents: Minister of Finance  
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**Attorneys for the Sixth Respondent**

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**AND TO: THE INFORMATION REGULATOR (SOUTH AFRICA)**

**SERVICE BY  
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**Seventh Respondent**

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In the application:

**THE BLACK SASH TRUST** Applicant

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**CASH PAYMASTER SERVICES (PTY) LTD** Sixth Respondent

**THE INFORMATION REGULATOR** Seventh Respondent

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FOUNDING AFFIDAVIT

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I, the undersigned

**LYNETTE MAART**

do hereby make oath and state that:

1. I am the National Director of the Black Sash Trust, with its head office at Elta House, 3 Caledonian Street, Mowbray, Cape Town.
2. I am duly authorized 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 “**LM1**”.
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. Where I make submissions of a legal nature, these are made on advice of the Black Sash’s legal representatives.

#### **THE PURPOSE OF THIS APPLICATION**

4. In 2012 the South African Social Assistance Agency (“SASSA”) contracted Cash Paymaster Services (Pty) Limited (“CPS”) to pay social grants on its behalf. This contract was declared invalid by this Court. The order of invalidity was suspended.<sup>1</sup>
5. SASSA filed a report with this Court on 5 November 2015 that it would not award a new contract, but intended to take over the payment function of social grants

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<sup>1</sup> *All Pay Consolidated Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security*

from 1 April 2017, when the suspension of invalidity would lapse. The Court then discharged its supervisory role in this regard.

6. SASSA is not able to take over the payment function on 1 April 2017. It appears that at this stage, a further or 'new' contract between SASSA and CPS is the only way to ensure that grant beneficiaries are paid on 1 April 2017.
7. SASSA now intends to enter into a further contract for CPS to continue this function for an unspecified period.
8. The Minister of Finance has stated that an extended, or new, contract with CPS will be unlawful and uncompetitive, contrary to the requirements of section 217 of the Constitution, and will constitute a deviation from prescribed procurement procedures. The Minister has stated that he will not sanction such deviation unless this Court accedes to this request.
9. SASSA announced that it would approach this Court for its approval of the proposal. It did not however make such an application. Last week, on 22 February 2017, the Minister of Social Development ("**the Minister**") and SASSA informed Parliament that SASSA will not make any application to this Court: it will merely report to this Court, at an unspecified time before 31 March 2017, on what it has done.

10. This is an urgent application for direct access, in the public interest and in the interests of all grant beneficiaries, most of whom are unable to litigate themselves, to seek the re-instatement of the oversight role of this Court for the payment of social grants in order:
  - 10.1 for this court to have oversight over the further/new proposed contract between SASSA and CPS for payment of social grants before it is a *fait accompli*;
  - 10.2 to ensure that grant beneficiaries continue to receive payment of grants from 1 April 2017;
  - 10.3 to protect the integrity of the social grant system; and
  - 10.4 to protect grant beneficiaries from harmful practices by, amongst others, CPS.
11. The Black Sash brings this application to ensure that SASSA complies with its Constitutional obligations to provide social assistance, to do so in a lawful manner, and to protect grant beneficiaries from unlawful depletion of their grants.
12. In brief, the Black Sash submits that, given the situation SASSA has created, the Court should compel SASSA and CPS to enter into a contract on terms designed to protect grant beneficiaries.

13. Black Sash submits that it would be appropriate for this court to re-instate its oversight role on the basis described below, to oversee SASSA's further management of its Constitutional obligations relating to the lawful and effective payment of social grants.
  
14. In what follows, I address:
  - 14.1 urgency;
  - 14.2 the parties;
  - 14.3 the granting of direct access in the interests of justice;
  - 14.4 events since the order of this Court in *AllPay 2*;
  - 14.5 recent litigation involving the Department of Social Development, SASSA and CPS;
  - 14.6 the obligation of the state to provide social assistance, to protect the social system from abuse and to protect social grant beneficiaries from exploitation; and
  - 14.7 the relief sought by Black Sash.

**URGENCY**

15. SASSA and the Minister have informed Parliament that despite their stated intention and preference, SASSA will not be ready to take over the payment function of social grants by 1 April 2017.
16. The SASSA CEO made a public statement that this Court would be approached in order for SASSA to obtain authorisation to do what it intended, so as to ensure that it was lawfully done.
17. It was the intention of the Black Sash to seek to intervene in such an application, in order to ensure that the rights of beneficiaries are adequately protected.
18. As I have stated, last week, on 22 February 2017, the Minister told Parliament that SASSA will simply present a report to the Court at some unspecified time before 31 March 2017, and by implication, SASSA will not ask the Court to authorise the contract it intends entering with CPS.
19. SASSA reported to the Court on 5 November 2015 that it would be in a position to take over the payment of social grants by 31 March 2017. It has failed to do what it told the Court it would do. Because it has inexplicably only acted upon this knowledge at the eleventh hour, there is no longer any alternative but for it to

contract with CPS. It has thus created a *fait accompli* in which there will be no effective oversight over what it does.

20. I respectfully submit that if SASSA had reported timeously and frankly to the Court on its inability to do what it had said it would do, the Court would not have abandoned the supervisory jurisdiction which it had established.
  
21. I submit that this application is urgent. SASSA now intends to contract with CPS in circumstances under which there can be little or no oversight over its conduct. I submit further that both its conduct during the previous litigation, and its more recent conduct, make it imperative that there be such oversight. The events indicate that whatever oversight the Minister is able and willing to provide cannot be relied upon to be adequate.
  
22. The conclusion of a contract between SASSA and CPS appears to be imminent. The contract will have to be concluded soon if it is to be carried into operation. On 27 February 2017 it was reported in the media that CPS's holding company, Net1 UEPS, made a mandatory Stock Exchange News Service (SENS) SENS announcement that negotiations between SASSA and CPS would commence on Wednesday 1 March 2017. Remarkably, South Africans have to learn what is happening on this critical issue through announcements made through the Stock Exchange.



23. The need for this application has only become apparent on 22 February 2017, when the Minister and SASSA finally informed Parliament of their intentions.
  
24. Black Sash submits that the application is critically urgent:
  - 24.1 for the beneficiaries of approximately 17 million social grants, to ensure that they receive same from 1 April 2017; and
  
  - 24.2 for oversight of the proposed new, and / or revised, contract between SASSA and CPS.
  
25. Black Sash accordingly requests the Court to condone the short notice given of this application, and the abbreviation of the periods prescribed by the Rules of Court. If Black Sash were to make this application in the ordinary course, it could not have effective recourse nor be able to secure effective relief.

## **THE PARTIES**

### ***The Applicant***

26. The applicant is the Black Sash Trust, a non-party political and non-profit organisation. A copy of the Deed of Trust is annexed as “**LM 2**”.

27. Black Sash seeks to ensure that the poor, vulnerable and marginalized people who are the recipients of social grants are treated with dignity, efficiency and with due regard to their constitutional and statutory rights. It does this through, amongst other methods:

27.1 working with advice offices and Community Based Organisation (“CBOs”) as partners, and assists these entities to provide free assistance and advice to people who are in need. It works with approximately 400 such partners nationally;

27.2 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 insights and ‘on the ground’ experience principally (though not exclusively) from the work of the advice offices and other CBOs;

27.3 with our advice office and CBO partners, communicating this experience and information to lawmakers, policymakers and administrative officials within government and advocating for appropriate changes; and

27.4 where necessary and having exhausted other options, litigating to ensure legality, dignity and efficiency and effectiveness in the provision of social security and social assistance grants.

28. The Black Sash has for 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 and corporate entities are fair and comply with the requirements of the Constitution, the Social Assistance Act 13 of 2004 (“**SAA**”), the “**Social Assistance Regulations**”,<sup>2</sup> the South Africa Social Security Agency Act 9 of 2004 (“**SASSA Act**”) and the Promotion of Administrative Justice Act 3 of 2000.
29. Black Sash operates a national office and four regional offices and is active in all nine provinces through partnership arrangements. Black Sash seeks to enable all, especially women and children, to recognize 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.
30. In furtherance of this aim, the Black Sash is a member of the Ministerial Task Team (“**MTT**”) that was formed in February 2014. The MTT includes representatives of DSD, SASSA, the Association for Community Advice Offices in South Africa and other civil society partners. The MTT has sought to stop unauthorized, unlawful and fraudulent deductions from and depletions of social

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<sup>2</sup> Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Conditions in Respect of Eligibility for Social Assistance, GN R898 in Government Gazette 31356 of 22 August 2008.

grants, to ensure that grant beneficiaries receive recourse, and to inform the Minister of grant administration practices negatively affecting grant beneficiaries.

31. The Black Sash was admitted as *amicus curiae* in *AllPay 2*. We raised concerns about deductions from social grants that are not sanctioned by sections 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 a repetitive cycle of poverty and hardship for social grant recipients.
  
32. The Black Sash also intervened as *amicus* in *Channel Life Limited and Another v South African Social Security Agency and Others* (NGHC case number 79112/15). In this matter, Black Sash advanced arguments to:
  - 32.1 describe and contextualize the current state of social assistance and social grant deductions and thereby demonstrate the necessity for a 'clean-up process' by SASSA;
  
  - 32.2 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;
  
  - 32.3 demonstrate the exploitative and harmful impact of funeral insurance deductions from child support grants and foster grants as well as the lack

of the need for funeral deductions from child support grants for funeral cover for children;

- 32.4 address the state's constitutional obligations to realize 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.
33. This matter was postponed *sine die* during May 2016 following the promulgation of new regulations under the Social Assistance Act by the Minister.
34. In *Lion of Africa Assurance Company Limited v The South African Social Security Agency and another* (NGHC case number 07/16), Lion of Africa sought to interdict SASSA from carrying out a "clean-up" process of the grant system that would prevent deductions for funeral policies from child support grants. This application was overtaken by the amended regulations of 6 May 2016 and subsequently settled. The Black Sash was admitted as *amicus curiae* to advance legal argument on:
- 34.1 the purpose of child support grants, foster care grants and care dependency grants provided for by the Social Assistance Act;

- 34.2 the proper interpretation of “beneficiary” in s20(4) of the Act;
- 34.3 if “beneficiary” in s20(4) includes the child, whether deductions for the funeral policies are necessary and in the interests of the child; and
- 34.4 relevant international law.
35. The Black Sash also intervened in the matters of *Net1 Applied Technologies South Africa (Pty) Ltd and Others v The Chief Executive of the South African Social Security Agency* (NGHC case number 43557/16); *Finbond Mutual Bank v Chief Executive Officer of the South African Social Security Agency* (NGHC 46024/16); the *Smart Life Insurance Limited v The Chief Executive Officer of the South African Social Security Agency* (NGHC 46278/16) and *Information Technology Consultants (Pty) Ltd v The Chief Executive Officer of the South African Social Security Agency* (NGHC 47447/16). I refer to these cases, which were heard together, collectively as the Net1 litigation.
36. The applicants in those four applications challenged the Social Assistance Regulations intended to protect grant beneficiaries from service providers who have *de facto* unrestricted access to the ‘SASSA bank accounts’ of grant beneficiaries to whom they market products. The applicants sought an order declaring that Regulations 21 and 26A of the Social Assistance Regulations do not operate to restrict beneficiaries in the operation of their bank accounts, in the

alternative, if such restriction does apply, that these provisions of the Regulations be declared unlawful. There was a further challenge to section 20 of the Social Assistance Act by Information Technology Consultants.

37. The Black Sash intervened together with six individual grant beneficiaries to support the position of the Minister and SASSA in these applications, so as:

37.1 to ensure that the state complies with its obligations under domestic and international law to provide social assistance, and its corollary obligation to protect the integrity of the social grant system from exploitation and abuse;

37.2 to protect the state's discretion (and obligation) to make and enforce policy decisions to protect social assistance from depletion; and

37.3 to ensure that corporate entities, including financial institutions, comply with their negative obligations in terms of international and domestic law, not to interfere with the state's compliance with its obligation to fulfil a human right in the Constitution.

38. Black Sash and the intervening grant beneficiaries sought an order that:

*"In the event that the Court finds that:*

- i. Regulations 21 and 26A of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in*

*Respect of Eligibility for Social Assistance, as amended in terms of Govt Notice R511 in Govt Gazette 39978 of 6 May 2016 do not operate to restrict beneficiaries in the operation of their SASSA bank accounts, or that*

- ii. Regulations 21 and/or 26A and/or section 20 of the Social Assistance Act are invalid,*

*Then the intervenors seek orders that –*

- i. It is declared that the State is under a constitutional and legal obligation to protect the beneficiaries of social grants from exploitation in a manner that prevents grant beneficiaries receiving full benefit from them;*
- ii. The Minister of Social Development is directed to make regulations under the Social Assistance Act that adequately protect social grants from exploitation in a manner that prevents grant beneficiaries receiving full benefit from them.”*

39. The applications were heard in the Pretoria High Court on 17 and 18 October 2016. Judgment was reserved, and has not yet been handed down.

40. The Black Sash brings this application in terms of section 38 of the Constitution:

40.1 in furtherance of its own interests in terms of section 38(a);

40.2 on behalf of and in the interests of the many beneficiaries of social grants who have an interest in the proper administration and protection of the



social grant system and who are unable to act in their own name as contemplated by section 38(b) or (c); and

40.3 in the public interest as contemplated by section 38(d).

41. The lawful administration of the social grants and protection of the integrity of the grant system and its beneficiaries is at the heart of ensuring the livelihoods of the most impoverished and marginalized in our society. The impact of improper and unlawful deductions is felt by many marginalized people, including the elderly, women and children, who through poverty or not knowing their rights or lack of access to legal services are generally unable to institute litigation in their own name to enforce their rights and are reliant on organisations such as Black Sash to assist them.
42. I respectfully submit that the Black Sash has the requisite *locus standi* to bring this application.

### ***The Respondents***

43. The First Respondent is **THE MINISTER OF SOCIAL DEVELOPMENT** cited in her official capacity as such. She and her Department are responsible for the management and oversight of social security, including the provision of social

assistance in terms of the Social Assistance Act. The address of the First Respondent is 137 Pretorius Street, Pretoria.

44. The Second Respondent is **THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY**", cited in his official capacity as the head of the South African Social Security Agency. The Second Respondent's address is SASSA House, 501 Prodinisa Building, cnr Steve Biko and Pretorius Street, Pretoria.
45. The Third Respondent is **THE SOUTH AFRICAN SOCIAL SECURITY AGENCY**", a juristic entity established in terms of section 2 of the South African Social Security Agency Act 9 of 2004 for the purpose of being the agent to ensure the efficient, effective management, administration and payment of the various social grants created by the provisions of the Social Assistance Act. The Third Respondent's head office and principal place of business is at SASSA House, 501 Prodinisa Building, cnr Steve Biko and Pretorius Street, Pretoria.
46. The Fourth Respondent is **THE MINISTER OF FINANCE**, cited in his official capacity as the head of National Treasury, the department in government responsible for managing South Africa's national government finances. The address of the Fourth Respondent is 40 Church Square, Pretoria.

47. The Fifth Respondent is **NATIONAL TREASURY**. Chapter 13 of the Constitution mandates the National Treasury to ensure transparency, accountability and sound financial controls in the management of public finances. It is situated at 40 Church Square, Pretoria.
48. The State Attorney, Johannesburg, has agreed to accept service for the First to Fifth Respondents. The State Attorney is situated at 12<sup>th</sup> Floor, North State Building, Cnr Market and Kruis Streets, Johannesburg.
49. The Sixth Respondent is **CASH PAYMASTER SERVICES (PTY) LTD** (“CPS”). It is the company which administers the payment of social grants in terms of the tender awarded to it by SASSA on 17 January 2012. CPS is situated at 4<sup>th</sup> Floor, North Wing, President Place, Cnr Jan Smuts Avenue and Bolton Road, Rosebank, Johannesburg, care of Smit Sewgoolam Inc Attorneys situated at 12 Avonwold Road, Saxonwold, Johannesburg.
50. The Seventh Respondent is **THE INFORMATION REGULATOR**, who is responsible for monitoring and enforcing compliance with the Protection of Personal Information (POPI) Act 4 of 2013 and the Promotion of Access to Information Act 2000 (PAIA). The Seventh Respondent is situated at 329 Thabo Sehume Street, Pretoria. The Seventh Respondent has agreed to accept service by email.

**THE INTERESTS OF JUSTICE FAVOUR THE GRANTING OF DIRECT ACCESS**

51. SASSA's present contract with CPS expires on 31 March 2017. SASSA is not in a position to take over the payment of social grants from this date. No other service provider has been engaged to do so.
52. SASSA has created the situation that only CPS is able to undertake the payment of social grants from 1 April 2017. It is now too late to engage another service provider which will be able to make payments to all beneficiaries from 1 April 2017. SASSA has not made any attempt to engage such service provider or providers.
53. If SASSA does not enter into a new and necessarily non-competitive contract with CPS, social grants will not be paid from 1 April 2017. The total number of grants that require payment, monthly, from 1 April 2017 is 17,143,635.
54. In *Allpay 1*,<sup>3</sup> this Court found that in 2012 SASSA had entered into an invalid contract with CPS. On 17 April 2014, in *Allpay 2*,<sup>4</sup> this Court made remedial orders to deal with the situation which had arisen. The Court's orders contemplated two possible situations, and made provision for them:

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<sup>3</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC)

<sup>4</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC)

- 54.1 SASSA might enter into a new contract for the payment of social grants with effect from not later than 1 April 2017, after an award had been made as a result of a tender process; or
- 54.2 SASSA might itself undertake the payment of grants with effect from 1 April 2017.
55. It is reasonable to assume that the Minister was informed some time ago that SASSA is not able to take over the payment system with effect from 1 April 2017. She will no doubt inform the Court of when and how she learnt of this.
56. Section 6(1)(b) of the SASSA Act provides that the Minister is responsible for the approval of SASSA's business and financial plan and reports in terms of the Public Finance Management Act 1 of 1999. Section 6(7) provides that she has the power to override any decision made by the Chief Executive Officer of SASSA.
57. As a result of the conduct of the Minister and SASSA, a situation has arisen which the Court had never contemplated, and could not reasonably have anticipated: that SASSA would award a new contract for the payment of social grants without first making an award through a competitive tender process. The result is that the Court's order did not make provision for such a situation.

58. I respectfully submit that it is in the interests of justice that this Court should be enabled to consider and deal with the unanticipated situation which has now arisen.
  
59. I respectfully submit that the Court's previous remedial order was designed to ensure that the payment of social grants in future was lawful, to ensure accountability in the decision-making process in that regard, and to ensure that beneficiaries were adequately protected in any new contract.
  
60. The Court specifically directed that if a tender were awarded, it must contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used in any manner or for any purpose other than payment of the grants or any other purpose sanctioned by the Minister in terms of sections 20(3) and (4) of the Act.
  
61. The achievement of those goals has been frustrated by the conduct of SASSA, which has acted in a manner which could never have been anticipated. Having told the Court in November 2015 that it would be ready to assume the duty to pay grants itself by 1 April 2017 and would do so, SASSA has failed to take the necessary steps to achieve this. It now says that it will need at least another year, or two, before it is able to take over this function. SASSA has known since at least October 2016, and presumably much earlier, that it will not be able to

make payment of social grants with effect from 1 April 2017. It has however not reported to the Court that what it said in its November 2015 is not correct.

62. The proposed contract will be an impermissible deviation from the constitutional requirements of a fair, equitable, transparent, competitive and cost-effective competitive public procurement. Treasury has the power to authorise such a deviation, but has stated that it will not do so without confirmation from this Court. However, SASSA and the Minister will not approach this Court in that regard.
63. I submit that it is in the interests of justice that this Court be enabled to determine how this situation should be dealt with, and to protect the interests of beneficiaries.
64. These events and SASSA's intended future conduct raise issues of the greatest public importance, which need to be resolved before 1 April 2017. There is great urgency in the matter. Approaching successive courts before the matter reaches this Court for decision is simply not practicable.
65. The matter can be disposed of without the hearing of oral evidence. It appears that most of the facts will be common cause.
66. There is no other procedural avenue open to the Black Sash which it could have taken. That is so both because of the urgency, and because it is in the interests

of justice that this Court should address what should now be done in the light of the circumstances which were unanticipated, and could not have been anticipated, when it made its remedial order in *Allpay 2*.

67. As I have stated, the conclusion of the contract appears to be imminent. The negotiations are about to commence. The contract will have to be concluded soon if it is to be carried onto operation. As I stated, it was reported in the media on 27 February 2017, that CPS's holding company, Net1 UEPS, has made a mandatory Stock Exchange News Service (SENS) SENS announcement that negotiations between SASSA and CPS will commence on Wednesday 1 March 2017. Remarkably, South Africans have to learn what is happening on this critical issue through announcements made through the Stock Exchange.
68. It is only in the past week, as the expiry of the CPS contract approaches, that SASSA's and the Minister's intentions have become public knowledge.
69. For all of these reasons, I respectfully submit that it is in the interests of justice that direct access be granted.



**EVENTS SINCE THE ORDER OF THIS COURT IN ALLPAY 2**

70. In *AllPay 1*, this Court found that the tender award to CPS was constitutionally invalid. The declaration of invalidity was suspended pending the determination of a just and equitable remedy. To assist the court in determining the content of a just and equitable remedy, the parties and *amici* were mandated to furnish the court with written submissions including the just and equitable arrangements that should be made for the payment of social grants until the implementation of a new system; data, costs and statistics on issuing and accepting a new tender and the costs and steps necessary in the initiation and completion of a new tender process for a national social grant payment system.
71. In *AllPay 2*, the Court made an order containing the remedy that it considered just and equitable. In essence, the Court's orders dealt with the following:
- 71.1 The contract for the payment of social grants between SASSA and CPS dated 3 February 2012 was declared invalid.
- 71.2 The declaration of invalidity was suspended pending the decision of SASSA to award a new tender after completion of the prescribed tender process.

- 71.3 Orders were made as to time frames for initiating and concluding the new tender process, safeguards in relation to the social grant system and grant beneficiaries, and the duration of the new tender.
- 71.4 In the event of a new tender not being awarded, the declaration of invalidity was further suspended until completion of the five-year period for which the contract was initially awarded. In that event, SASSA was to lodge a report with the court indicating whether and when it would be ready to assume the duty to pay the grants itself.
- 71.5 Within 60 days of completion of the duration of the initial tender, CPS was to file an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract. SASSA was required to obtain an independent audited verification of the details provided by CPS and file it with the Court.
72. All of this created a system of accountability to the Court, and through the Court, to the public.
73. The Court made its order in *Allpay 2* on 17 April 2014. Events since April 2014 demonstrate the need for a further structural order that will bind SASSA to milestones, timelines and regular reporting to this Court.

***The Tender Process***

74. SASSA's first report to the Court, which is undated, set out steps which had been taken to 26 May 2014. Various discussions had been held, and the Bid Specification Committee had been appointed. A copy is attached as "**LM3**".
  
75. In September 2015, SASSA filed its second report to the Court. It reported that members had been appointed to the Bid Adjudication Committee ('BAC') and Bid Evaluation Committee ('BEC'). SASSA's September 2015 progress report to the Court is attached as "**LM4**".
  
76. The CPS contract was to expire on 31 March 2017, just under 36 months after the Court had made its order in *Allpay 2*. The appointment of the members of the BAC and BEC was reported 16 months into this period.
  
77. In October 2015, SASSA made its third report to the Court "**LM5**". It stated that on the recommendation of the Bid Adjudication Committee, the Chief Executive Officer of SASSA had decided not to make an award under the bid. SASSA would comply with its obligations under paragraphs 4.1 and 4.3 of the Court's order.
  
78. Paragraph 4.1 required SASSA in these circumstances to provide the Court, within 14 days of the decision not to award the tender, with all the relevant

information on whether and when it would be ready to assume the duty to pay the grants itself.

79. In November 2015 SASSA filed its fourth report to the Court “**LM6**”. It said that it would assume the duty itself to undertake the payment of social grants. It set out, in a table, the “system deliverables” required for SASSA to do this, and the timeframes applicable to each of them. These timeframes provided that SASSA would be able to take over payment by the end of March 2017.
80. On 25 November 2015, the Court concluded that the Progress Report was compliant with the Court’s order, and discharged the Court’s supervisory jurisdiction.

### ***SASSA Takeover***

81. SASSA’s original intention, when it contracted with CPS in April 2012, was to take over the payment of social grants when the CPS contract expired in March 2017. This is reflected in para 13 of the *Allpay2* judgment, which states:

“SASSA pointed out that its contract with Cash Paymaster was intended to be the last time that it outsourced its obligation to pay social grants, since it intends to take over the system, by April 2017. .... Any delays attributed to a new service provider would also hamper SASSA’s own target of being self-sufficient by 2017.”

82. It appears from the fourth report, filed in November 2015, that during September 2014, the Minister appointed an Advisory Committee “to investigate and advise her on the appropriate system for payment of social grants”. This was five months after the judgment in *Allpay 2*, at a time when the new tender process had not been undertaken. SASSA also enlisted the assistance of the Council of Scientific and Industrial Research (CSIR) and the National Institute for Smart Government (NSIG) in New Delhi, India, to advise on payment systems and “other issues regarding the institutionalisation of the payment of social grants”.  
(Para 9)

83. The November 2015 progress report states further:

“3. In her 2012 budget speech the Minister of Social Development indicated that the contract for the payment of social grants, subsequently awarded to the third respondent and thereafter set aside by this Honourable Court, would be the final time that a third party was contracted to effect the payment of social grants on SASSA’s behalf, and that thereafter SASSA would perform in full its mandate in terms of the South African Social Security Agency Act 9 of 2004.

4. The impugned payment contract was designed to serve as a springboard for the future payment system for social assistance. The plan was for SASSA [to] take over the control, administration and management of payment of the social grants by 2017 when the contract with CPS expires. SASSA was further going to pilot its payment system during 2016. However, the finding of invalidity of the award of the tender to CPS and the new tender process ordered by this Court had the effect of re-directing SASSA’s immediate focus

and resources to the running and completion of the new tender process.”

84. From 14 October 2015 (the decision not to award the tender) to March 2017, SASSA had 17½ months to take over the payment of social grants.
85. In its November 2015 progress report, SASSA set out a plan as to what had to be done, and when, in order for it to take over the payment of social grants. That plan set out deliverables, timeframes and milestones and is repeated below:

No.	Deliverable	Timeframe	Milestone
1	Integration of systems through web – based application	March to June 2016 (pilot phase) August 2016 full implementation	Web based application integrated with mainframe application and other ICT applications at the back-end
2	Verification and authentication (biometric enrolment of beneficiaries & system users)	May 2016 biometric access by users October 2016	Bulk biometric for beneficiaries exist TOR: completed for both
3	Payment processing – control account	January 2017	Payment file
4	Payment reconciliation – real time reconciliation	January 2017	Data factory set up, Tender awarded during September 2015
5	Payment infrastructure	October 2016	Implementation
6	Cash distribution and security thereof	October 2016 Jan – March 2017	Outsource Contract with merchants

7	Card issuance and special bank accounts	October 2016 – March 2017	Consultation with SARB, PASA and Government Printers by February 2016
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86. I invite SASSA to state when each of the “system deliverables” referred to in the fourth report was in fact achieved, and the Minister to state when she became aware of the achievement or non-achievement of each “system deliverable”.

### ***Parliamentary Process***

87. Parliament (through the Portfolio Committee on Social Development (‘Committee’)) has called the Department of Social Development, the Minister and SASSA to two sessions in the last four months. These sessions were requested so that DSD, the Minister and SASSA could explain to Parliament what their plan was to ensure grants are paid after 31 March 2017.
88. The first session was scheduled for 16 November 2016 but was cancelled because senior SASSA officials would be in Panama for a conference on that day. The session ultimately took place on 30 November 2016. The Committee was briefed by SASSA and DSD officials. I attach the presentation which SASSA made to that meeting “**LM7**”.

89. A report on what transpired at that meeting, prepared by the Parliamentary Monitoring Group, (“**PMG**”) is available online at <https://pmg.org.za/committee-meeting/23795/> and is attached as “**LM8**”. It states, in the “Summary” section:

“SASSA assured the Committee that come 1 April 2017 the grant will be paid. SASSA through the Minister asked that the Committee does not push it to reveal its contingency plans in public as this might jeopardise the work it has done already. What matters is that by 1 April 2017, the grant will be paid.

Members all expressed dissatisfaction with the briefing. SASSA failed to confirm its state of readiness in implementing the grant payment. SASSA had only presented options and not the progress made by it. Members said that the parliamentary committee meeting is an open meeting and SASSA had to give the Committee the information it required from it. The Chairperson requested that SASSA prepare a document that speaks clearly to the plan, timelines and challenges.”

90. It also states that the SASSA CEO, Mr Thokozani Magwaza, assured the Committee that SASSA was ready for the takeover on 1 April 2017.
91. The truth, however, was quite different.
92. At least by October 2016, SASSA was aware that it would not be able to take over the payment of social grants by 1 April 2017. At that time, it sought and obtained advice from counsel as to what it should do under those circumstances.



93. I attach as “**LM9**” a copy of the Opinion given by Advocates Trengove SC, Cowen, Stubbs and Drake on 27 October 2016. That Opinion has come into the public domain, and has been widely reported in the media. It reflects that counsel were given the following factual instructions by SASSA:
- 93.1 SASSA would not be ready to take over the payment function when the CPS contract expired on 31 March 2017 (para 2);
- 93.2 SASSA required more time – “years rather than months” - to design a new system for the payment of social grants, to budget for it, to put in place the necessary infrastructure and to implement it (para 9).
- 93.3 SASSA had no choice but to enter into an interim arrangement with CPS, and proposed to do so. There was not enough time to run a competitive bidding process for the appointment of a new contractor in time to take over after March 2017, and there was nobody else who had the necessary infrastructure in place to perform the payments function or the core components of it by March 2017. It would also not be feasible for anybody else to create their own infrastructure without a long-term contract to recover its cost. (Para 12)
94. SASSA did not inform Parliament of this. Its presentation to the Portfolio Committee on Social Development omitted the crucial information, which it

already knew, that it would not be able to implement the new system by the end of March 2017. It did not tell Parliament and the public that SASSA had the previous month instructed its counsel that it would not be ready to take over at the end of March 2017, that the only body that would be able to make payments after the end of March 2017 was CPS; that an “interim arrangement” with CPS would be necessary; and that it proposed to enter into an “interim arrangement” with CPS. None of this was disclosed to the Committee or the public.

95. I expect that the CEO, pursuant to his duty of full disclosure to the Court, will tell this Court whether he knew, when he briefed the Committee on 30 November 2016, that SASSA would not be able to take over payment from the end of March 2017, and that it would be necessary to enter into a new contractual arrangement with CPS.
96. SASSA did not inform the Court of any of this. It has still not done so, notwithstanding its report of November 2015 which had stated that it would take over the payment function from the end of March 2017.
97. On 9 December 2016, SASSA put out a “Request for information from Service Providers for the Social Grant Payment and Banking Services” with a closing date of 10 February 2017. It also hosted a meeting with interested parties on 13 January 2017. A screen grab of SASSA’s request for information is attached as “**LM10**”.

98. By this time, SASSA could have been in no doubt at all that it would not be able to take over the payments from the end of March 2017. That much is clear from its Request of 9 December 2016, which contemplates a procurement and implementation process commencing well after March 2017. But it did not inform the Court or Parliament or (it seems) National Treasury of this. It also did not enter into negotiations with CPS to find out whether it would be willing to enter into an “interim” contract, and if so, on what terms.
99. In January 2017 the Committee called the Department of Social Development, Minister and SASSA back to another session. The meeting was to take place on 25 January 2017. It was cancelled.
100. The session ultimately took place a week later, on 1 February 2017. However, the Minister did not participate as she had to attend a Cabinet lekgotla. At this meeting SASSA accepted that it had failed in performing its mandate. PMG reported (annexure “**LM11**”, available online at <https://pmg.org.za/committee-meeting/23903/>) that at this session:

“Members of the opposition were dissatisfied with the briefing. SASSA has forced an emergency which will force the hand of the Constitutional Court to approve the extension of the contract as a matter of national emergency. Many questions were asked about the delays since the 2014 Constitutional Court ruling that the CPS contract should be suspended. Allegations were made about purposely causing this emergency so that the CPS contract could be extended.”

101. SASSA made a presentation at this session of the Committee. SASSA's presentations to the Committee are attached as "**LM 12**" and "**LM 13**".
102. SASSA did not inform the Court of the situation which had arisen. It still did not enter into negotiations with CPS.
103. On 22 February 2017 the Minister, SASSA and the Department of Social Development briefed the Committee on "the state of readiness regarding the implementing the Constitutional Court ruling". A copy of the presentation slides is attached as "**LM14**". At this briefing, which I attended, the Minister, the Department and SASSA informed Parliament that:
- 103.1 They intend reporting to this Court;
- 103.2 They intend approaching CPS to negotiate a new contract with them;
- 103.3 No negotiations with CPS had commenced;
- 103.4 They have asked National Treasury to condone their failure to comply with the requirement of a competitive tender, and National Treasury has said that it will not do this without approval from the Court;

103.5 They could not comment on the budget and increase price to CPS because it would pre-empt the negotiations.

104. The Minister further informed Parliament that the “back up” plan should CPS not contract with SASSA was:

104.1 that people who are already receiving grants into their bank accounts will be paid that way;

104.2 the Post Office would be approached to make cash payments, though the Minister then explained that the Post Office has insufficient reach to do so in rural areas;

104.3 there would be two-week testing periods for commercial banks to roll out these payments; and

104.4 there would be a short procurement process for cash transfers.

The PMG report is attached as annexure “**LM15**”, available online at: <https://pmg.org.za/committee-meeting/24008/>.

105. I submit that this “back-up plan” is self-evidently without substance:

- 105.1 There is no indication that SASSA has the infrastructure to make payments through commercial banks;
- 105.2 Even if it did have that infrastructure, this would only account for approximately 40 000 beneficiaries with their own private bank accounts and approximately 1,3 million beneficiaries with “Easypay” bank accounts linked to Grindrod Bank, the banking platform contracted to CPS.
- 105.3 There is no indication that there is any competent party willing to bid for a cash transfer tender;
- 105.4 Nothing has been done, a month from the time when the CPS contract will expire, to seek the services which will be necessary to operationalise the “back up plan”;
- 105.5 Nothing has been done, a month from the time when the CPS contract will expire, to prepare SASSA to implement the “back up plan”; and
- 105.6 There is simply insufficient time to roll out such a process and have it operational by 1 April 2017.
106. The Black Sash submits that these events demonstrate that SASSA cannot be relied upon to comply with commitments which it has made to this Court, to

Parliament, and to the public; that SASSA has breached its constitutional obligations of transparency and accountability to the public, to Parliament, and to the Court; that the Minister has not performed her constitutional and statutory oversight function in respect of SASSA to ensure that it meets its commitments; and that there is a very material risk that the fundamental rights of many millions of South Africans will be breached through a failure by SASSA to perform its constitutional obligations in respect of social assistance.

107. I respectfully submit that it is just and equitable that a structural order should be made by the Court, setting out deliverables, milestones, and timeframes; and requiring SASSA and the Minister to report on what they have done to comply with them.
108. SASSA has now placed CPS, a for-profit company, in the position that it is the only body which will be able to provide a service which will enable millions of South Africans to fulfil their most basic needs and rights. While SASSA stated to the Committee on 22 February 2017 that it will only contract within budget, CPS has stated publicly that it will not enter into any new contract unless there is a substantial increase in the fee which is paid to it.
109. This Court held, in *Allpay*, that CPS is the bearer of constitutional obligations arising from its position as the distributor of social grants. I submit that it would be appropriate at this stage for the Court to make clear that those constitutional

obligations continue to exist, and that CPS is obliged to act reasonably in its performance of its constitutional obligations.

#### **ADDITIONAL LITIGATION INVOLVING THE DEPARTMENT, SASSA AND CPS**

110. On 25 March 2015, Corruption Watch launched an application against SASSA and CPS in the Pretoria High Court (case number 2194/2015) for orders reviewing and setting aside the decision of the SASSA CEO to approve payment to CPS of R317m for the re-registration of beneficiaries, despite this being a requirement of the SASSA-CPS contract. This matter has not yet been heard.
111. Corruption Watch contends that the decision to pay R316m was irregular because the 2012 CPS contract covered the registration of beneficiaries, so there was no need for it to be paid extra for doing the same work.
112. Treasury first approved this payment, and later retracted the approval once new information came to light in the court papers. According to a media statement made by Treasury and published on 7 October 2016: "SASSA omitted material information on the pending court case when submitting their request for condonation. We were notified of the amendments to the court papers, which were confirmed by SASSA's submission of the papers when requested. The court papers classified the expenditure from irregular to fruitless, which led to the



retraction of the condonation." A copy of this article is attached as annexure "LM16".

113. In June 2016, SASSA laid criminal charges against CPS and Grindrod Bank for failing to comply with the then newly amended regulations in the Social Assistance Act, which prohibit deductions from the bank accounts held by grant beneficiaries. These charges have been held in abeyance pending the outcome of the Net1 litigation to which I have referred above, in which the validity of the regulations is challenged.

#### **OBLIGATION OF THE STATE TO PROVIDE AND PROTECT SOCIAL ASSISTANCE**

114. The Black Sash submits that a corollary to the state's Constitutional obligation under the Constitution to provide social assistance, is an obligation to protect the social assistance system from abuse, and to protect social grant beneficiaries from exploitation.
115. The right of access to social security and the provision of social assistance by the state has particular importance in South Africa because of the realities of poverty. Despite the fact that South Africa is internationally recognised as a middle-

- income country, it has among the world's highest Gini co-efficients (gap between the wealthy and the impoverished) at 63.1 in 2011.<sup>5</sup>
116. According to a Statistics South Africa ('Stats SA') report published in 2011, 45.5% (23 million) of people living in South Africa were living in poverty.<sup>6</sup> Poverty is feminised and racialised: 53.4% of the poor are women, and 94.2% of the poor are black people. While the Stats SA report does not show poverty at intersectional identities, extrapolated logic would find that black women make up the majority of impoverished people in South Africa.
117. At 53.2% women also make up the majority of social grant beneficiaries.<sup>7</sup> Stats SA reports that in 2015: 33.5% of Black People; 27% of Coloured People; 12% of Indian or Asian People and 6.3% White People received social grants.<sup>8</sup>
118. The feminisation and racialisation of poverty is a result of the Apartheid system. The provision of social assistance by way of social grants is an attempt at redressing that inequality. It is a measure designed to redress inequality based on race, gender, and intersectional race and gender.

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<sup>5</sup> United Nation Development Programme, *Income Gini-coefficient*, available at <http://hdr.undp.org/en/content/income-gini-coefficient>.

<sup>6</sup> Statistics South Africa, *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011*, available at <http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf>, at p12.

<sup>7</sup> Statistics South Africa, *General Household Survey, 2015*, available at [www.statssa.gov.za/publications/P0318/P03182015.pdf](http://www.statssa.gov.za/publications/P0318/P03182015.pdf), p131.

<sup>8</sup> *Ibid*, p28.

119. Any violation of the right to social assistance thus has both a gendered and racialised effect which results in a violation of the right to equality. Non-receipt of a grant, or any depletion of the amount which a social grant recipient receives, results in both a violation of the right of access to social assistance, and a violation of the right to equality.

***Safeguards Necessary for the Protection of the Social Grant System and Protection of the Interests of Beneficiaries***

**Protection of beneficiaries' personal data**

120. Section 7(3)(g) of the SASSA Act obliges the Minister to determine a code of conduct applicable to all staff members of SASSA for the protection of confidential information held by SASSA other than as contemplated in section 16.
121. Section 16 of the SASSA Act contains a far-reaching prohibition on the disclosure of confidential information held by SASSA.
122. This Court recognised, in para 3.1 (c) of its order in *Allpay 2*, the need to protect the personal data obtained in the payment process, so as to prevent unlawful or unauthorised deductions from or depletion of grants. The Court ordered that the contemplated new contract must contain adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used in any manner or 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 Act.
123. Because of the unexpected course which events have taken, that order does not govern the new contract which SASSA proposes concluding with CPS. I respectfully submit that it should be made applicable to any such contract.
  124. Section 14 of the Constitution guarantees everyone the right to privacy. The Protection of Personal Information Act 4 of 2013 (“**POPI**”) gives effect to this right, and includes within its ambit the protection of persons’ personal information processed by public and private bodies by prescribing minimum requirements for the processing of personal information and by establishing the rights of data subjects.
  125. The sections of POPI dealing with the Information Regulator have been brought into operation, and other sections will be brought into operation on a date determined by the President.
  126. POPI provides extensive protection of personal information. I refer in particular to section 2, which provides that the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information; section 5, which sets out the rights of data subjects to have their

personal information processed in a lawful manner; and section 4, which sets out the obligations of the responsible party.

127. POPI prohibits processing of personal information for the purpose of direct marketing by means of any form of electronic communication including SMS or email.<sup>9</sup> Such unsolicited marketing may only occur if the data subject has consented (upon being approached only once) to the processing or if the data subject is a customer of the responsible party.<sup>10</sup>

#### The Practice

128. In practice under the current SASSA-CPS contract, grant beneficiaries receive their grants into SASSA accounts and are issued with SASSA branded debit cards. The terms and conditions for the SASSA cards are attached marked “**LM17**”. Some grant beneficiaries have EasyPay cards operated by Grindrod Bank with similar terms and conditions.
129. The Black Sash facilitates workshops throughout the country with grant beneficiaries, to advise them of their rights. Through this, it learns of problems which beneficiaries experience in the grant system. The Black Sash, through its

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<sup>9</sup> S69, POPI.

<sup>10</sup> S 69(3), POPI. To qualify as a customer of the responsible party, the responsible party must have obtained the contact details of the data subject specifically in the context of the sale of a product or service; for the purpose of direct marketing of the responsible party’s own similar products or services and if the data subject has been given a reasonable opportunity to object, free of charge to the use of her electronic details when the information was collected.

staff and with its partners, has lodged numerous queries on behalf of beneficiaries concerning deductions and subtractions from their social grants.

130. At workshops conducted by Black Sash staff, there are grant beneficiaries who, while they understand that they can use their SASSA card at any shop or pay point to withdraw cash, are not aware that it operates as a bank account.
131. When Black Sash staff have referred grant beneficiaries to the terms and conditions of SASSA cards and their charges, grant beneficiaries are amazed. They have never seen these terms and conditions.
132. Many beneficiaries, shown the terms and conditions for SASSA cards, have said that this is the first time that they have ever seen these. This is in contrast to the consent and disclosure requirements stated in the terms and conditions of the SASSA cards, that a grant beneficiary must consent to sharing of their confidential data:

“6. CONSENTS AND DISCLOSURES

6.1. You consent to us –

6.1.1. carrying out identity and fraud prevention checks on you, and, in this regard, to collect information about you from third parties;

6.1.2. using your personal information, as defined in the Protection of Personal Information Act 3 of 2014, to render the banking services set out in these Terms and Conditions, and to send marketing

material from us and our affiliates to you, if you elected to receive same during enrolment;

- 6.1.3. providing your personal information to third-party service providers, subsidiaries and affiliates for the express purpose of providing you with the banking services referred to in these Terms and Conditions, and in this regard you also consent to CPS as well as the aforementioned parties storing and processing your personal information”.

[Emphasis added]

133. The same applies to the use of personal information, and providing of personal information to third party service providers. No grant beneficiaries who have consulted Black Sash have been aware of the conditions which apply in this regard, or gave actual consent for the sharing of their personal information, for marketing materials to be sent to them. The use of the SASSA Bank Card's terms and conditions were never known to SASSA beneficiaries. It is not clear how beneficiaries can give consent if they do not receive these terms and conditions, or have them explained to them. We have only seen them printed in English.

Supervising Protection of Personal Information of Beneficiaries: the Information Regulator

134. The impact of the protection afforded to beneficiaries by POPI may be undermined by contractual provisions that provide for the granting of consent to processing personal information by the beneficiary on signature, and lack of knowledge by beneficiaries of the provisions of POPI and of the content of contracts which they to sign.
135. The office of the Information Regulator (“**IR**”) is empowered to roll out education and advocacy campaigns to responsible parties, operators and beneficiaries within the social grant system for the purpose of understanding, promoting and accepting the conditions for lawful processing of personal information and the objects thereof.<sup>11</sup>
136. Both SASSA as the responsible public contractor and CPS as the contracted private agent are subject to the monitoring of the IR in relation to their compliance with provisions of POPI.<sup>12</sup>
137. For these reasons, the Black Sash submit that the IR may be able to assist in monitoring and enforcement of the provisions of the contract between SASSA

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<sup>11</sup> S39 and 40, POPI.

<sup>12</sup> S40(1)(b).



and CPS relating to the processing and safeguarding of beneficiaries' personal information

**CPS and affiliates' conflict of interest in selling supplementary goods and services to grant beneficiaries**

138. In the Net1 litigation, the South African Reserve Bank stated in an explanatory affidavit at paragraph 23.6 that:

“Debit order abuse may be symptoms [sic] of a larger design issue. From samples of cases of consumer complaints, as presented to SARB by Department [sic] of Social Development, issues may be related to Net1 being involved in payouts of grants as well of [sic] marketing and provision of products or services such as airtime, electricity and loans provided to grant beneficiaries. This may lead to possible conflict of interest and create perverse incentives which may increase the likelihood of abuses.”

139. Net1's organogram of its affiliated companies, attached as annexure “**LM 18**”, demonstrates the interconnectedness of the companies under Net1 that market goods and services to grant beneficiaries. They include Smartlife (one of the applicants challenging the new regulations). It has only existed since CPS was awarded the SASSA tender. It sells additional funeral policies to grant beneficiaries.

### ***The Responsibility of CPS***

140. CPS has, with the assistance of SASSA, built itself into an impregnable position with regard to the payment of social grants. The stark truth is that without the co-operation of CPS, social grants will not be paid. This is the situation which exists as negotiations between SASSA and CPS commence.
141. CPS is therefore in an extraordinarily strong position in those negotiations.
142. These are however not ordinary negotiations. They are negotiations between parties, both of which bear constitutional obligations.
143. This Court held in *Allpay 2*:
- “[52] That SASSA is an organ of state is clear. But, for the purposes of the impugned contract, so too is Cash Paymaster.....
- “[59] When Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs....
- “[66] .... Where an entity has performed a constitutional function for a significant period already, as Cash Paymaster has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution - because of constitutional invalidity - means that grant beneficiaries would have become increasingly

dependent on Cash Paymaster fulfilling its constitutional obligations. For this reason, Cash Paymaster cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational.”

144. The Black Sash respectfully submits that under these circumstances, CPS is not at large to hold SASSA and grant beneficiaries to ransom, by refusing to contract except on the most commercially favourable terms. It is obliged to perform its constitutional obligation in a reasonable manner.

#### **THE RELIEF SOUGHT**

145. The relief sought by Black Sash is directed at achieving the following outcomes:

145.1 First, it addresses the question of the new “interim” contract. It seeks to ensure that the parties act lawfully, in accordance with their constitutional obligations and in such a manner that the rights of grant beneficiaries are protected.

145.2 Second, it addresses the conduct of the Minister and SASSA going forward, as they address the question of the long-term arrangements for the payment of social grants. Again, it seeks to ensure that they act lawfully, in accordance with their constitutional obligations and in such a manner that the rights of grant beneficiaries are protected.

146. The Black Sash respectfully submits that the actions and inaction of the Minister and SASSA demonstrate the critical need for this Court to reinstate and retain a supervisory role over Department of Social Development and SASSA in respect of both the “interim” and long-term payment of social grants.

***The “interim contract”***

147. The Black Sash submits that the Court should make an order incorporating the terms of paragraph 3.1 (c) of its order in *Allpay 2*, to deal with the question of the use of personal data of grant beneficiaries in order to achieve deductions from or depletion of the accounts of beneficiaries. The Court intended that such protection should form part of what at that time was contemplated as the “new” long-term (five-year) contract. The same should apply to the “interim” contract which is now proposed.
148. The Black Sash submits further that a declaration should be made that CPS is under a duty to act reasonably, with due regard to its constitutional obligations arising from the history of this matter and the fact that grant beneficiaries are dependent on it for the achievement of their constitutional rights, in negotiating and contracting with SASSA for the purpose of making payments to grant beneficiaries.

149. The Black Sash submits further that in the light of the non-transparent and misleading conduct of SASSA, it should be ordered to file reports with the Court, on affidavit. Further, if any material change arises in relation to circumstances referred to in a report which has been filed, SASSA should be required forthwith to report accordingly to the Court and to explain the reason for such change.

150. The Black Sash submits further that SASSA should immediately be required to file a report on how it proposes to award the “interim” contract in a lawful manner, having regard to the provisions of section 217 of the Constitution and the relevant statutory provisions in that regard.

151. We submit that the interim contract and future contracts must make provision for the protection of the rights of grant beneficiaries with regard to the storing, ownership and use of their private information.

151.1 CPS maintains the confidentiality of all beneficiaries’ personal information;

151.2 such personal information shall remain the property only of SASSA and shall at the end of the extended contract be given to SASSA;

151.3 such personal information shall also be removed from CPS and its affiliates’ possession unless there is a continuing contractual relationship between the beneficiary and the CPS affiliate;

151.4 CPS is precluded from offering ‘options’ to beneficiaries to ‘opt in’ to the sharing of their confidential information for the marketing of their goods and services.

***The long-term payment of social grants***

152. The Black Sash submits that we cannot afford the risk that when the “interim” contract with CPS draws to a close, a similar crisis arises, and SASSA and grant beneficiaries are again held to ransom as a result of SASSA’s or the Minister’s failure to comply effectively with their obligations.
153. The Black Sash submits that the Minister and SASSA should be ordered to submit periodic reports, on affidavit, on their plans with regard to the long-term payment of social grants, the applicable time-frames for the various “deliverables” which form part of the plan, whether such time-frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.
154. The Black Sash seeks relief that requires SASSA to take positive actions to ensure that it is in a position to insource the payment of social grants by 1 April 2018, alternatively, to seek a new lawful service provider and to do so without delay by:

154.1 directing SASSA to prepare and submit a comprehensive report under oath, describing in detail the action plan for remedying SASSA's breach, which reports must be filed monthly;

154.2 all interested parties may comment on the reports.

155. Notwithstanding SASSA's discretion to determine how it intends to comply with its constitutional obligations, in order to comply with its constitutional obligations, it must ensure that the payment of social grants:

155.1 protects confidential information of grant beneficiaries;

155.2 protects grant beneficiaries from ambush marketing;

156. The Black Sash accordingly seeks an order in terms of the Notice of Motion. It seeks an order for costs against the Minister and SASSA, and any other Respondent who or which opposes this application.

**WHERE** I pray for an order in terms of the Notice of Motion.

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**LYNETTE MAART**

SIGNED and SWORN to BEFORE ME at \_\_\_\_\_ this the \_\_\_\_\_ day of FEBRUARY 2017, the deponent having acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers the said oath to be binding on her conscience.

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**COMMISSIONER OF OATHS**