



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/17

In the matter between:

FREEDOM UNDER LAW NPC

Applicant

and

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

MINISTER OF FINANCE

Fourth Respondent

NATIONAL TREASURY

Fifth Respondent

CASH PAYMASTER SERVICES (PTY) LIMITED

Sixth Respondent

INFORMATION REGULATOR

Seventh Respondent

RAIN CHARTERED ACCOUNTANTS INC

Eighth Respondent

KPMG SERVICES (PTY) LIMITED

Ninth Respondent

MAZARS INC

Tenth Respondent

BLACK SASH TRUST

Eleventh Respondent

and

CORRUPTION WATCH (NPC) RF

First Amicus Curiae

Neutral citation: *Freedom Under Law v Minister of Social Development and Others* [2021] ZACC 5

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ.

Judgments: THE COURT

Decided on: 1 April 2021

Summary: social grants — judicial supervision — continuing constitutional obligation

ORDER

On application to the Constitutional Court on an intervening basis:

1. Within 10 days from the date of this order, Rain Chartered Accountants Inc must submit to Cash Paymasters Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Inc the list of all outstanding documents relevant to the audit verification undertaken by Rain Chartered Accountants Inc under the order of 17 March 2017.
2. Cash Paymasters Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Inc must furnish Rain Chartered Accountants Inc with the listed documents in their possession, within 15 days from the date of receipt of the list of outstanding documents referred to in paragraph 1.
3. Within 30 days of receipt of the outstanding documents referred to in paragraph 1, Rain Chartered Accountants Inc must submit to the National Treasury, the updated verification report including:

- 3.1 all issues raised by the National Treasury in its letter of 28 November 2019; and
 - 3.2 all issues arising from the documents referred to in paragraph 1.
4. Within 20 days of receipt of the updated verification report, the National Treasury must allow Cash Paymasters Services (Pty) Limited and the South African Social Security Agency to make representations on the updated verification report, if they so wish.
5. Within 40 days of receipt of the updated verification report, the National Treasury must consider and approve the updated verification report and file its approval together with the updated verified report with the Registrar of this Court.
6. If the National Treasury is unable to approve the updated verification report, the National Treasury must file an affidavit setting out:
 - 6.1 reasons for not approving the updated verification report; and
 - 6.2 the National Treasury's own determination of the profit made by Cash Paymasters Services (Pty) Limited from the unlawful contract that was declared invalid; or
 - 6.3 alternatively, should the National Treasury be unable to make the determination referred to in subparagraph 6.2, it must set out in its affidavit what it requires to properly determine the profit made by Cash Paymasters Services (Pty) Limited.
7. Costs are reserved.

JUDGMENT

THE COURT (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ):

Introduction

[1] On 17 March 2017, this Court issued an order in which Freedom Under Law (FUL) was permitted to intervene in an application brought by Black Sash Trust. FUL became the second applicant in that matter while Black Sash Trust was the first applicant. The Minister of Social Development, the Chief Executive Officer of the South African Social Security Agency, the South African Social Security Agency (SASSA), the Minister of Finance, the National Treasury, Cash Paymaster Services (Pty) Ltd (CPS) and the Information Regulator were all cited as respondents.

[2] That application was a sequel to *Allpay II*¹ in which the declaration of invalidity relating to a tender that was awarded to CPS by SASSA was suspended for a fixed period to enable SASSA to remedy the defect. The suspension was subject to certain conditions which included periodic reports to this Court on progress made by SASSA. Indeed, SASSA gave an assurance that as from April 2017 it would take over the payment of social grants from CPS. As a result of this assurance, the supervisory order was discharged. But the assurance later turned out to have been false.

[3] SASSA was not ready to pay social grants from 1 April 2017. This became clear in the application by Black Sash Trust and FUL which was heard on 15 March 2017, 16 days before the expiry of the suspension of the declaration of invalidity. This Court was requested to render its decision, as a matter of urgency, to avoid non-payment of social grants to millions of recipients who rely on grants for survival.

[4] On 17 March 2017, this Court extended the suspension for a period of 12 months from April 2017. In addition, the order directed:

“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

¹ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (Corruption Watch and Centre for Child Law Amicus Curiae)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

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.
- 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 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.”

[5] Among other things, the order directed CPS to file an audited statement of “expenses incurred, the income received and the net profit earned” under the contract that was declared invalid but was allowed to operate as if it was valid. CPS was obliged to file this statement within 30 days from the date of termination of that contract. For its part, SASSA was required to obtain an independent audited verification of CPS’s statement and submit to the National Treasury for approval, the audited verification. For purposes of the verification exercise, CPS was required to afford auditors appointed by SASSA to conduct the verification free access to its financial statements. In addition, the Minister of Social Development and SASSA were ordered to file periodic reports every three months, setting out the plan adopted to ensure payment of social grants and steps taken to implement the plan.

[6] On 30 November 2019, SASSA filed an affidavit to which an independent verification report was attached. Also annexed to that affidavit was a letter from the National Treasury which approved the audited verification but listed shortcomings in the verification process. These documents were also served on the other parties. Having perused them, FUL held the view that the order of 17 March 2017 was not complied with in some respects. It directed a letter to this Court, setting out CPS’s failure to obey the court order. The Registrar of this Court informed FUL to institute a substantive application, if it so wished, hence the current application.

[7] The purpose of this application is to attain proper compliance with the order of 17 March 2017. FUL points out that Rain Chartered Accountants (RAIN), a firm of auditors that was appointed by SASSA to verify CPS’s audited statements, was denied access to some financial information by CPS. Despite this alleged lack of cooperation by CPS, FUL points out that the verification report reveals that CPS had under-declared its profits by an amount of approximately R800 million.

[8] FUL seeks an order directing CPS to furnish RAIN with all documents it requires for purposes of conducting a proper verification and updating its report, which must be submitted to National Treasury for approval. One of the objectives of FUL is to have the profit received by CPS from the illegal contract properly determined and that CPS be forced to repay the profit to SASSA.

[9] The order sought by FUL here is framed in these terms:

- “1. Within 10 days of this Order, Rain Chartered Accountants Inc (“Rain”) must provide Cash Paymaster Services (Pty) Limited (“CPS”), KPMG Services (Pty) Limited (“KPMG”), and Mazars Inc (“Mazars”) with a list of all the outstanding documentation relating to CPS’s financial information for the period April 2012 to September 2018 in relation to the unlawful social grants contract (including any relevant documentation in the possession of KPMG and/or Mazars, which would include their auditor working papers), which Rain requires for the purposes of completing its audit verification process.
2. Within 20 days of the receipt of Rain’s request for documentation, as provided for in paragraph 1 above, the documentation requested by Rain is to be provided to it by CPS, and by KPMG and Mazars, to the extent that such documentation is in their possession.
3. Within 40 days of the receipt of the documents provided in terms of paragraph 2 above, Rain must provide the South African Social Security Agency (“SASSA”) with an updated, supplemented and edited version of the Verification Report (originally filed with the Court by SASSA as annexure TC1 to its affidavit of 29 November 2019):
 - 3.1 In light of the additional documentation provided to it pursuant to paragraph 2 above, and
 - 3.2 In order to deal with and take account of all the issues raised by the National Treasury in its letter to SASSA dated 28 November 2019 (annexure TC2 to SASSA’s affidavit of 29 November 2019), including but not limited to, ensuring that the Verification Report includes a modified or unmodified audit opinion in relation to CPS’s audited statements.

(“the Updated Verification Report”)

4. Within 3 days of receipt of the Updated Verification Report, SASSA must provide National Treasury with a copy of the updated Verification Report.
5. Within 40 days of receipt of the Updated Verification Report from SASSA, National Treasury is required to consider the findings of the audit verification prepared by Rain and, to the extent it is able to, approve such Updated Verification Report (including its conclusions and findings).
6. In the event that National Treasury approves the Updated Verification Report, SASSA is required, by no later than 5 days after receipt thereof, to file the Updated Verification Report, together with Treasury’s written approval thereof, with this Court.
7. In the event that National Treasury does not approve the Updated Verification Report, National Treasury is required to file a report with this Court setting out:
 - 7.1 the reasons for not approving the Updated Verification Report;
 - 7.2 National Treasury’s own determination of the profit made by the CPS in respect of the unlawful social grants contract awarded to CPS;
 - 7.3 **alternatively**, to the extent that National Treasury is not able to make such a determination, it must set out what it requires in order for it to be able to make a final determination of the profits made by CPS in terms of the unlawful social grants contract, **or** it may request the Court to order a process as provided for in paragraph 8 below.
8. **In the alternative to paragraph 1 to 7**
 - 8.1 CPS, SASSA and National Treasury must, within 14 days from the date of this order, report to this Court whether they have agreed to a process in accordance with section 38 of the Superior Courts Act 10 of 2013, in order to determine the final profits made by CPS in respect of the unlawful social grants contract awarded to CPS.
 - 8.2 Failing agreement, the Court will issue directions determining the process.
9. It is declared that CPS is liable to repay to SASSA all profit it is found to have earned pursuant to the unlawful social grants contract as determined by (a) the audit verification by Rain and approval by National Treasury (as provided for in paragraph 1 to 6), alternatively (b) the National Treasury (as provided for in paragraph 7.3), or further alternatively (c) the process provided in paragraph 8 above.

10. Any party who opposes this application must pay the costs of this application, and in the event of opposition by more than one person, such persons are to pay the costs of this application jointly and severally, the one paying the others to be absolved.”

[10] Although RAIN, SASSA and its Chief Executive Officer have filed papers and have taken part in these proceedings, they do not oppose the relief sought by FUL. The only party that opposes part of that relief is CPS which resists the part set out in paragraphs 8 to 9 of the notice of motion. This is the part relating to the determination and repayment of profits plus costs.

[11] KPMG Services (Pty) Limited and Mazars Inc are identified by FUL in its papers as parties who have in their possession some of the documents relevant to the verification process undertaken by RAIN. It is alleged that these parties have declined to furnish RAIN with copies of those documents.

[12] The major part of the relief asked for by FUL, as set out in paragraphs 1 to 7 of its notice of motion, is not opposed. The matter was decided without hearing oral argument.

[13] Having considered all the affidavits filed in this matter and the parties’ written submissions, we have concluded that the part of the relief which is not opposed should be granted and that the determination of the opposed part be deferred. There can be no doubt that the updated verification report by RAIN would be material to an inquiry on the profits earned by CPS from the illegal contract. Consequently it would be proper to consider the issue of profits once all the necessary information is placed before this Court.

[14] In view of the position taken by the respondents in relation to the relief set out in paragraphs 1 to 7 of the notice of motion, it is not necessary to give detailed reasons for granting that relief. It was not opposed by all respondents. And a proper case has been made out for that part of the remedy.

Order

[15] In the result, the following order is made:

1. Within 10 days from the date of this order, Rain Chartered Accountants Inc must submit to Cash Paymasters Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Inc the list of all outstanding documents relevant to the audit verification undertaken by Rain Chartered Accountants Inc under the order of 17 March 2017.
2. Cash Paymasters Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Inc must furnish Rain Chartered Accountants Inc with the listed documents in their possession, within 15 days from the date of receipt of the list of outstanding documents referred to in paragraph 1.
3. Within 30 days of receipt of the outstanding documents referred to in paragraph 1, Rain Chartered Accountants Inc must submit to the National Treasury, the updated verification report including:
 - 3.1 all issues raised by the National Treasury in its letter of 28 November 2019; and
 - 3.2 all issues arising from the documents referred to in paragraph 1.
4. Within 20 days of receipt of the updated verification report, the National Treasury must allow Cash Paymasters Services (Pty) Limited and the South African Social Security Agency to make representations on the updated verification report, if they so wish.
5. Within 40 days of receipt of the updated verification report, the National Treasury must consider and approve the updated verification report and file

its approval together with the updated verified report with the Registrar of this Court

6. If the National Treasury is unable to approve the updated verification report, the National Treasury must file an affidavit setting out:

6.1 reasons for not approving the updated verification report; and

6.2 the National Treasury's own determination of the profit made by Cash Paymasters Services (Pty) Limited from the unlawful contract that was declared invalid; or

6.3 alternatively, should the National Treasury be unable to make the determination referred to in subparagraph 6.2, it must set out in its affidavit what it requires for properly determining the profit made by Cash Paymasters Services (Pty) Limited.

7. Costs are reserved.

For the Applicant:

G Marcus SC, A Coutsooudis and
M Lengane instructed by Nortons
Incorporated

For the Second and Third Respondent

M Mphaga SC and ME Manala
instructed by Renqe FY Incorporated

For the Eight Respondent

G Budlender SC instructed by Harris
Nupen Molebatsi Incorporated