

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 48/2017

In the matter between:

BLACK SASH TRUST

Applicant

FREEDOM UNDER LAW NPC

Intervening Party

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

and

CORRUPTION WATCH (NPC) RF

First Amicus Curiae

SOUTH AFRICAN POST OFFICE SOC LIMITED

Second Amicus Curiae

SUPPORTING AFFIDAVIT

I, the undersigned,

ZANE DANGOR

do hereby make oath and state:-

1. I am an adult male, the erstwhile Director-General of the Department of Social Development ("the Department"). I resigned on 3 March 2017 and attach a copy of my letter of resignation which gives context to my thinking and motive in resigning and which has bearing on the subject matter of this application as Annexure "A" hereto.
2. Save where the context indicates to the contrary, the facts set out herein are within my personal knowledge and are to the best of my belief both true and correct.



3. The affidavit of the First Respondent, the Minister of Social Development, my erstwhile direct employer, has been brought to my attention and at the request of the Second Respondent, the CEO of SASSA, I considered it necessary to make this affidavit subject to the Court admitting the affidavit as part of the papers before the Court.

4. The purpose of making this affidavit is to deal with the contents of the Minister's affidavit insofar as it relates to me and to bring material facts to the attention of the Court concerning the subject matter of the application, in particular because of public interest. I was a public servant responsible in many ways for the administration of social grants and accordingly deem it necessary to contribute to an understanding of matters as they stood when I took the decision to leave office.

Brief background in taking up employment as D-G

5. I was in the forefront of establishing a number of organisations which had as its object the improvement of civil society. One such society was the Alliance for Children's Access to Social Security. This ultimately led to my recruitment as a Consultant in the office of the D-G of the Department. I became intricately involved in developing a social security system to give effect to the values of section 27 of our Constitution.

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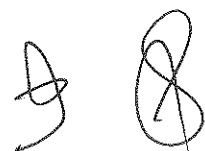
6. I served as a general manager in strategy and governance at SASSA. Thereafter, I served in a number of senior positions *inter alia*, general manager, chief operations officer, special adviser to Minister Molewa, special adviser to the current Minister until my appointment as D-G in November 2016.

**SASSA's undertaking and inability to meet the deadline of 31 March 2017 –
my views**

7. In what follows below, I set out my understanding of the reasons as to why SASSA could not meet its deadline to implement direct payments of social grants. In so doing, I am mindful of different views and I must emphasise that the object of setting out my understanding is an endeavour to assist the Court.

Work Streams

8. In or around July 2016, it came to my knowledge that the Minister had instructed the erstwhile CEO of SASSA, Ms Virginia Peterson to establish work streams comprising of independent consultants under the leadership of Ms. Zodwa Mvulane ("Mvulane"). These work streams were responsible for planning direct payments of social grants by SASSA and Ms. Mvulane and the individual work stream leaders reported directly to the Minister.



9. The aforementioned work streams differed from the governance protocol insofar as it by-passed the SASSA executive committee including the acting CEO by giving Ms. Mvulane and the independent consultants direct access to the Minister. This created parallel reporting structures.

Ministerial Task Team

10. In or around 2014 the Minister had established the Ministerial Task Team (MTT) co-chaired by the Black Sash. I was appointed as co-chair of the MTT.
11. I first raised my concerns in September 2016 about SASSA's readiness to engage in a payment process by April 2017. I did this in the context of my participation as co-chair of the MTT to deal with the unsavoury practice of deductions made by financial services companies related to Net1 from social grants. To clarify, the Sixth Respondent is wholly owned by Net1.
12. On 12 September 2016, Lynnette Maart, from Black Sash and my co-chair of the MTT addressed a letter to the Minister asking for a report on the process to insource the payments of Social Grants to be tabled at the next meeting of the MTT that was due to be held on 26 September 2016. A copy of the letter is attached as Annexure "B" hereto.



13. MTT received a response from Ms. Mvulane declining the request to present a progress report at the meeting to be held on 26 September 2016. This is apparent from Annexure "C" hereto.

14. The apparent lack of progress prompted me and my colleague Siphon Shezi in his capacity as Special Adviser to the Minister, to request an urgent meeting with Ms. Mvulane and the then Acting CEO of SASSA, Ms. Rapaahle Ramakgopa to find out the status of the work done to in-source the payment processes. This meeting took place on 11 October 2016. Present at this meeting was myself, Rapaahle Ramakgopa and Siphon Shezi. At this meeting the Acting CEO confirmed to myself and Mr Shezi that she had very little knowledge of the work done by the work-streams as they reported to Ms. Mvulane who reported directly to the Minister. Mr. Shezi and I directed that this governance anomaly be corrected and that the SASSA Executive Committee and the Acting CEO be informed of the work of the work-streams and that accepted governing protocols related to reporting and communication be followed.

15. I was already concerned about the leadership and communication protocols around this matter within SASSA following a meeting called and chaired by the Minister on 5 October 2016. At this meeting, the work-stream leaders presented the work that was being done. At this stage, due to the parallel



reporting structure, it was clear that Acting CEO of SASSA had very little details on the work of that was being led by Ms. Mvulane.

16. At a follow up presentation by the work-stream independent consultants held on 22 October 2016, the difficulties created by the parallel reporting structures were evident. At this meeting I again made the point that the governance and communication structures within the management of the project needed to be regularised. That is, that Ms. Mvulane should report to the Minister through the Acting CEO (Ramakgopa) and the SASSA Executive.

17. In the process of seeking to address the looming crisis, I held discussions with the DG of National Treasury, Lungisa Fuzile. During our telephonic discussions and through two bi-lateral meeting we had in November and December 2016, the idea of setting up a Technical Team emerged. The technical team was only formalized though on the 19 January 2017 at a meeting chaired by the DG of National Treasury. At this meeting we tasked the technical team to develop the most viable options to enable SASSA to pay Social Grants by 01 April 2017. The technical team was to be guided by the various legal opinions SASSA had in its possession and also by the relevant procurement laws and processes in developing proposed solutions. The Technical team included senior managers from all of these institutions and also included Ms. Zodwa Mvulane in her capacity as project leader of the work streams.

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18. The parallel decision making and communications processes were again evident as the work of the technical team comprising senior officials from DSD, the SARB, National Treasury and SASSA.

19. The technical team was working on 'emergency' solutions to ensure that the grants were paid on 01 April 2017 and also on the suggestions for what the long term plan would be for the grants payment systems. The idea of using what is now referred to as the Open Architecture plan was being mooted as possible solution for the short term and long term in terms of paying social grants. The technical team was due to present its proposals to myself as the DG of Social Development, the DG of National Treasury (Lungisa Fuzile), the Deputy Governor of the Reserve Bank, (Mr. Francois Groepe) and the CEO of SASSA on the 24 January 2017.

20. On the 23 January 2017, both the then Minister of Finance, Mr. Pravin Gordhan ("Mr. Gordhan") and I were speakers at a meeting of the NEDLAC labour constituency. As I was leaving the meeting venue, Mr. Gordhan arrived and whilst in the car park area, he informed me that the Minister of Social Development presented him with a document earlier that day that appeared to have little or no correlation between the discussions that were taking place by the technical team. Mr. Gordhan indicated that he would get his senior managers to give me and the other Accounting Officers the document at the report back meeting scheduled for the following day (24 January 2017). The

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document entitled ***“Briefing Notes For the Minister of Social Development to the Minister of Finance”*** which was made available to me appeared to offer solutions highly critical of the idea of using the banks through the mooted Open Architecture model. The CEO of SASSA indicated to me that he had no knowledge of this document and who had prepared it as speaking notes for the Minister of Social Development. It was suggested that Ms. Zodwa Mvulane had prepared these briefing notes. I attach my copy of this document which has my handwritten notes as Annexure “D” hereto.

21. The report back meeting took place on 24 January 2017. The DG of National Treasury was not available but Mr. Dondo Mogajane – Deputy Director General for Public Finance, represented him. The meeting was chaired by the Deputy Governor of the Reserve Bank, Mr. Francois Groepe. After intensive discussions on the options presented by the technical team, the meeting agreed that the option wherein CPS would be engaged for an additional twelve months offered the least risk from an operational perspective. The meeting also agreed that this extension would be undergirded by an agreement that this extension was predicated on the long term ‘firm plan’ being that grants would be paid on the Open Architecture model. This involved getting all banks including the Post-Bank and others to pay grants in the future. The meeting further agreed that the government technical team would continue to work realise this longer-term objective. Cognisant of the parallel forms of decision-making and communication channels to the Minister of Social Development I wrote her an

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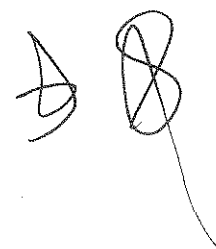
email informing her of the decision and also to caution against alternative options that be communicated by the work stream leaders. This email was sent on the 25 January and is attached as Annexure "E" hereto.

22. The issues raised above serves to confirm the points raised in Mr. Magwaza's affidavit that the Executive of SASSA and himself could not be blamed for not keeping the Minister informed of the looming crisis pertaining the payment of social grants, as suggested in paragraph 31 of the Minister's affidavit. It appeared to me that the SASSA Executives were excluded from the key decision-making process and that the Minister relied on information and strategic direction given to her by the work-streams under the leadership of Ms. Zodwa Mvulane.

Duty to inform this Court of the developments:

'Firm Plan' and discussions on informing the Constitutional Court about Sassa's inability to comply by 1 April 2017

23. Paragraph 39 of the Minister's affidavit correctly indicates that I was present at a meeting of that included the Minister, Ms. Mvulane, Advocates Susannah Cohen and Hannine Drake and Tim Sukazi. Mr. Magwaza was connected telephonically. The Minister is correct in her assertion that Mr. Magwaza was reluctant to agree with a proposal that SASSA submits a report to the Concourt on its intention to engage with CPS around a new contract. Mr. Magwaza's

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reluctance to accede to this request cannot be delinked from a number of processes that took place before this meeting. An important factor in this was the absence of a 'firm plan' by SASSA that would make a plausible case to the Constitutional Court for continuing a contractual relationship with CPS beyond 31 March 2017.


24. As indicated earlier in this affidavit, I became concerned when the Project Manager Ms. Mvulane was reluctant to brief the Ministerial Task Team on SASSA's progress with respect to insourcing the payment of social grants. This anxiety was heightened at on 5 October 2016. The Minister chaired this meeting and the work stream leaders presented progress in relation to insourcing the payment of social grants. The presentation indicated that very little work was done. The most significant element of their proposal was the recommendation that CPS be given a new contract for a period of two years. At this meeting I raised concerns that in given that the fact that there was very little progress towards insourcing the payment process, it would very likely appear to the public that there was an element of self-created delay so as to ensure that CPS continues to pay social grants. In fact, I had the distinct impression that there was indeed an element of self-created delay. I raised my concerns based on two issues: One; that any attempt at contracting CPS for a new contract could be subject to legal challenges which may jeopardise SASSA's ability to pay grants on 01 April 2017 and two; that in the context of emerging evidence that CPS was involved in immoral and/or illegal deductions from the accounts of

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grant recipients, that this may be a political mine-field and immoral. At this meeting Tim Sukazi, the legal work-stream leader appeared to agree with me on the problems related to the lack of a 'firm plan'. At the end of the meeting he handed me a copy of a legal memorandum prepared by Susannah Cohen, Mkhululi Stubbs and Hannine Drake. This document reaffirmed my concerns about the legal pitfalls associated with seeking a new non-competitive contract with CPS in the absence of a firm plan that would justify such an approach. This document also reaffirmed my concerns about that at least legally, the lack of a firm plan could be seen as self-created delay. This legal memorandum is attached to this affidavit marked as annexure "F" hereto.

25. The follow up meeting on 22 October 2016, similarly did not present a firm plan for the insourcing of payments and again, I was concerned that there was indeed an element of self-created delay to facilitate an on-going relationship with CPS.

26. Based on the fear of possible legal challenges based on the work-streams approach to an on-going relationship with CPS and also the moral and political hazards of continuing with CPS beyond March 31 2017, myself, Sipho Shezi and Brenton Van Vrede, the Deputy-Director General for Social Security in the Department of Social Development sought to ascertain whether there were options to develop and implement a solution that would exclude CPS and if we had to use them, it would have to be for a limited period and in conformity with



the requirements of the constitutional court and the legal procurement procedures.

27. We met with Cas Coovadia of the Banking Association of South Africa to ascertain whether the banks could be mobilised to be part of an emergency solution for the payment of grants without the participation of CPS. This meeting took place on 02 November 2016. We also met senior managers of Master Card to ascertain whether MasterCard could extend the validity of the SASSA cards without the biometric components of the cards, which were linked, to CPS, if we needed to continue to pay through Grindrod and the Banks without the involvement of CPS. This meeting took place on 10 November 2016.
28. Mr. Brenton Van Vrede, Mr. Francois Groepe (Deputy-Governor of the Reserve Bank) and I also had meetings with Grindrod Bank to ascertain whether we could use the fact they held the bank accounts of all the grant recipients as a platform for using all the banks, including the Post Bank as an alternative means of payment without having CPS as the lead partner. I instructed Mr. Brenton van Vrede to summarize these discussions in an e-mail which is attached and marked annexure "G" hereto.
29. These recommendations found no traction within the work-streams and as discussed earlier, the technical team finally resolved to propose that a 12-month



extension based with CPS was perhaps the least risky emergency option. This option was predicated on (1) that consent is sought from the Constitutional Court (2) that it is based on a 'firm plan' based on the Open Architecture Model.

30. It is on this basis of this approach that was finally agreed to where there was a 'firm plan' in place beyond extending the contracting that the CEO of SASSA had requested Nazeer Cassim to produce a document that would be presented to the Constitutional Court for guidance.

31. On the evening of 14 February 2017 I met with the Minister as well as the CEO of SASSA, Siphon Shezi and Mr. Wiseman Magasela the newly appointed Special Adviser to the Minister. The Minister raised some concerns with the document produced by Advocate Cassim SC. On 15 February 2017, I met with the SASSA Lawyer Ms. Busisiwe Mahlobogoana where we made some minor changes to the Advocate Cassim's document. On the evening of 15 February 2017, I met with the Minister and Mr. Magasela. At that stage, Mr. Magasela was of the view that we cannot make minor changes to Advocate Cassim's document and that some radical changes needed to be made to align it with the intentions of the Minister. Based on these discussions the Minister instructed that an urgent meeting be held on 16 February 2017 to discuss and refine the document if necessary.

32. The meeting took place on 16 February 2017, as instructed. Mr. Siphon Shezi chaired the meeting, In attendance was Mr. Wiseman Magasela, Ms. Busisiwe



Mahlobogoana, Ms. Zodwa Mvulane and two members of the work streams. The most senior members of the Department of Social Development and SASSA were thus in attendance at this meeting. At this meeting we made some changes that we thought were in line with some of the Minister's concerns. The most important discussion revolved around the time frame. We confirmed the legal basis for limiting the proposed extension to 12 months and confirmed that the future long-term payment model would be based on the firm plan premised on using the National Payment System. At the end of the meeting the chair, Mr. Shezi checked with all the participants whether they were happy with the revised document. All the participants agreed and the SASSA legal team was instructed to file the document on that day.

33. Later that evening, I was informed by Ms. Busisiwe Mahlobogoana that the Minister had instructed her to not to file the document as the Minister needed to do further consultations over the week-end. I was not informed of the decision not to file, and Mr. Magwaza and Mr. Shezi also stated that they were not informed of the decision not to file Advocate Cassim's document to the Constitutional Court.
34. On the evening of 21 February 2017, in preparation for a progress report on the SASSA payment system, Ms. Mvulane presented a document wherein it was revealed that a new approach had been agreed upon. The new approach was premised on the notion that the Constitutional Court had discharged its



supervisory role and therefore SASSA did not need to get 'consent' to enter into negotiations with CPS from the Constitutional Court. SASSA would instead, file a supplementary report to the Constitutional Court outlining the outcomes of the negotiations with CPS. The time frame for the proposed new contract would be for proposed period of 24 months. Both Mr. Magwaza and I heard of this decision for the first time at that presentation. As indicated in the report presented to the Portfolio Committee, the new approach was based on new legal advice. There is no written legal opinion that supports the new decision, so I assume that it was verbal advice obtained over the weekend consultations.

35. At the end of the presentation to the Portfolio Committee I had asked the Minister whether SASSA could still file a document to the Constitutional Court before the negotiations commences with CPS, wherein SASSA at least states its intended outcomes such as negotiating on the basis of limiting the opportunity for deductions from the accounts of grant recipients and also that the contract would be within the budget for this function as allocated by National Treasury. The Minister agreed but on the basis that this document was prepared by Mr. Tim Sukazi. I agreed as at this stage I was desperate for some level of compliance with my understanding of what SASSA constitutional duties were in regards to engaging CPS. My understanding of SASSA's constitutional duties was premised on the written opinions by Advocates Cassim, Trengove and Sikakhane. We had engaged on numerous occasions with the Minister and


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the leaders of the work-stream leaders on the need to be guided by these written and considered legal opinions.

36. Between the 23 of February and 27 of February 2017 I had called numerous both Ms. Mvulane and Ms. Mahlobogoana on whether SASSA had filed the then 'statement of intent' to the Constitutional Court. Ms. Mvulane would respond that work was in progress and that she was in ongoing consultations with the Minister around the matter. On the afternoon of the 27 February 2017, I had a meeting with the Director General in the Presidency Dr. Cassius Lubisi and the Director General of the Department of Monitoring and Evaluation (DPME), Mr. Tshediso Matona. All three us were concerned about the non-compliance with SASSA's legal duties in relation to the filing the required documents to the Constitutional Court and the potential impact that may have on SASSA's capabilities to pay grants on 1 April 2017. During the course of this meeting Mr. Van Vrede telephoned and official from SASSA to ascertain whether SASSA had filed with the constitutional court. The answer he received was that they had not.
37. After this meeting with my colleagues I called Ms. Mvulane about when SASSA would be filing, she informed me that they were still consulting with the Minister. Later on the same day I called Ms. Mahlobogoana and she informed me that Mr. Magwaza who was at this stage on sick leave had just signed the necessary documentation to file to the Constitutional Court.



38. The document that Mr. Magwaza had signed was subsequently filed with the Constitutional Court on 28 February 2017. This is the same document that the Minister later instructed SASSA to recall. As far as I was concerned the document that the CEO of SASSA had filed was the official document and assumed that the necessary consultations were made done with Ms. Mvulane. To date I have not seen a document that Ms. Mvulane had said that she and the work stream legal team had been working on.
39. The fact that I had encouraged SASSA to file to the constitutional court to comply with legal advice SASSA had received from three senior advocates served to further break down my relationship with the Minister of Social Development.
40. The rather long narrative is necessary to indicate the nexus between the development of a firm plan and the need to request consent from the Constitutional Court to engage in any continued relationship with CPS, whether through an extension of the existing contract or a new contract.
41. These processes serve to confirm that Mr. Magwaza cannot be blamed for non-compliance with filing a document with the Constitutional Court as suggested in the Minister's affidavit.

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42. It further serves to strengthen the views that Mr. Magwaza, others and I held that the parallel decision-making structures in the form of the work-streams may have been deliberate to ensure a continued relationship with CPS under conditions favourable to CPS, through a self-created emergency.

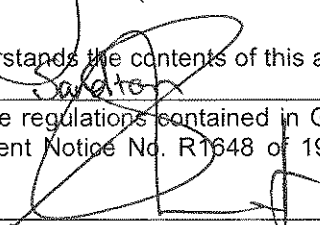
Conclusion

43. The debacle surrounding the payment of social grants on 01 April 2017 defied my principles around social protection for the poor and prevented me from my primary duty as a public servant to provide quality services to the South African public within the ambits of prevailing law and policies.
44. In conclusion, I have deposed to this affidavit, despite potential repercussions to my personal career and notwithstanding veiled physical violence to my own as well as my family's security. I do so, to shed a brighter light on the assertions that the SASSA and Magwaza are to blame for the crisis that unfolded.



ZANE DANGOR

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Soweto on this the 10th day of April 2017, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS
 NAME: **COMMISSIONER OF OATHS**
 ADDRESS: **EX OFFICIO**
 CAPACITY: **PRACTISING ATTORNEY RSA**
1 PROTEA PLACE, SANDOWN, JOHANNESBURG

Without Prejudice

03 March 2017

Ms. Bathabile Dlamini, MP
Minister of Social Development

Dear Minister Dlamini

The manner in which you chose to express your disagreements with me on the processes towards ensuring that Social Grants are paid on 1 April 2017 and in particular, in the aftermath of the events at SCOPA, forces me to tender my resignation as the Director-General of the Department of Social Development.

The manner in which you addressed me in front of staff members of SASSA and the DSD, albeit telephonically diminished me as a person and also, undermined my continued abilities to provide leadership and guidance in the Department and SASSA. This was followed up by two sms messages that essentially claimed that I had been party to shaping the National Treasury's ideas on the payment of social grants going forward, that I was mucho and racist in that I was undermining the work and advancement of African women in particular.

The allegations of being racist and sexist are without any basis whatsoever and are allegations that I find deeply insulting and injurious to my person.

With regards the assertion that "from the start that I had my own agenda" on the payment of the Grants system, which ultimately led to what I regard as an engagement by yourself that has led to an irredeemable breakdown in our working relationship; that forces me to step down from position as Director-General. It is therefore necessary to outline what that agenda was both as a Special Adviser and as Director-General.

The 'agenda' you allude to, was to constantly remind SASSA and the Minister of the constitutional court ruling pertaining to the CPS contract and to ensure that whatever solution was embarked upon were within the confines of the law. This was out of the fear that any action outside of the law may result in legal action that could adversely result in grants not being paid on 01 April 2017 or result in further and costly legal action if CPS is retained in an irregular manner.

Furthermore, my engagements together with Siphoshezi, with the Banking Council, National Treasury, the Reserve Bank and other stakeholders were with a view to finding a solution to an interim payment solution that would not involve CPS, given the legal and political risks attendant to involving them. This engagement later shifted to ensure that extending the services of CPS is



compliant with the constitutional court ruling and government procurement rules.

The parallel decision making processes that essentially excluded both accounting officers of SASSA and the DSD and a trusted Special Adviser like Siphon Shezi from key decisions regarding this matter have given rise to the kinds of tensions that have emerged.

These actions and the subsequent communications on 28 February and 1 March 2017, between us, forces me to resign from my role as Director General. I am hereby giving 3 (three) months notice. My last day in office will be on 31 May 2017. I will be taking the leave days due to me starting on 3 March 2017. I will liaise with Human Resources on the exact number of days due to me, as this will provide me with the date that I am due back at work before the end of my notice period.

Regards

Zane Dangor
Director General Social Development



12 September 2016

Honorable Minister Bathabile Dlamini
 Minister of Social Development
 HSRC Building, North Wing, 134 Pretorius Street,
 Pretoria, Gauteng
 0001

cc Ms. Raphaahle Ramokgopa Acting CEO, SASSA - RaphaahleR@sassa.gov.za
 cc Mr. Zane Dangor, Special Advisor to DSD Minister Dlamini - zane@dsd.gov.za
 cc Mr. Thokozani Magwaza, Acting Director General DSD ThokozaniM@dsd.gov.za

Dear Minister Dlamini,

**Re: Concerns around the delays SASSA is experiencing in taking over the grant payment system by
 1 April 2016**

As part of the Ministerial Task Team for stopping unauthorized and unlawful deductions (MTT), we have a mandate to monitor the progress made by SASSA towards taking over the grants payment system.

Abuse of deduction facilities have largely come about as the result of the 2012 tender issued to Cash Paymaster Services Pty (Ltd) (CPS). While progress has been made in developing a recourse mechanism, deductions abuses continue unabated and manifests in new ways. Based on many requests to civil society for assistance, the current recourse mechanism appears not to be working and is hampered by the continual attempts of financial service providers to thwart the mechanism at every turn.

The only hope of solving this problem is for SASSA to take over and control the grant payment system. We note the commitment made by the Department of Social Development and SASSA to address and stop these deduction abuses. We are however gravely concerned with the pace at which SASSA is currently moving.

In April 2014, the Constitutional Court suspended the declaration of invalidity of the payment contract awarded to CPS in 2012, giving SASSA the opportunity to re-run the tender process for the payments of social grants. The tender specifications developed by SASSA would have successfully brought the problems with deductions under

Trustees: Sibongile (Bongi) Mkhabela (Chairperson), Yasmin Turton (Deputy Chairperson), Woineshet Elschoff, Maria (Mary) Burton, Jennifer De Tolly, Margaret (Dolly) Khumalo, Mary Kleinenberg, Thembi (Nyami) Mphela, Mary-Jane Motifi, Diana (Di) Oliver, Yasmin Sooka, Hilary Southall

control. However, in October 2015, SASSA announced that it could not award the tender and in November 2015 it presented an 8-page document to the Constitutional Court outlining its intentions to in-source the payment system by March 2017.

The MTT has asked SASSA on numerous occasions to provide an update on the process and timeframes to insourcing the social grant payment system. While representatives for SASSA did attempt to address this request, it is quite clear from our engagements that SASSA seems to be falling behind alarmingly.

Furthermore, SASSA has also not met many of the deadlines provided to the Constitutional Court. Civil society within the MTT is concerned that there is now a real risk in them not being able to insource payments by the end of March 2017. Without a clear sight of a new payment system including a protected bank account, being in place, social grant beneficiaries will continue to be vulnerable to deduction and debit order abuses and other violations. It seems as if Net1 and its subsidiaries, and other financial service providers are getting away with impunity.

Civil society within the MTT thus formally requests the Minister to intervene, to ensure that:-

- the plan with clear timeframes is delivered by the next meeting MTT on 26 September 2016
- SASSA develop and implements a new payment system by the end of the CPS contract by March 2017 to ensure the protection of social grant beneficiary's accounts.

Honorable Minister Dlamini, for the reasons provided above, we need you to respond within 7 working days, by 21 September 2016.

Kind regards,



Lynette Maart

Black Sash National Director

Co-chair of the MTT – writing on behalf of civil society



C



sassa
SOUTH AFRICAN SOCIAL SECURITY AGENCY

Eng: Ms Zodwa Mvulane
Tel: 012 400 2362
E-mail : ZodwaMv@sassa.gov.za
Date : 23/09/16

Ministerial Task Team Co-Chair
Ms Lynette Maart
Elta House
3 Caledonian Road
Mowbray
7700

Tel: 0215865952
Fax: 0216860971

Dear Madam

Re: Concerns around the delays SASSA is experiencing in taking over the grant payment system

With due respect and regards, this letter serves as a request to decline a request to present at a meeting scheduled to take place on the 26 September 2016.

Please be informed that the Ministerial workstream's were appointed and started on the 28/07/16, effectively now eight weeks on the job.

The first draft document in relation to multiple innovative models is near completion and not yet ready as a number of due process have to be followed including verification of facts and alignment with key SASSA stakeholders especially with regards to the grant chart developed.

Please accept my sincere regrets but the committee is reassured that it is listed among the major stakeholders that will be consulted once the document has gone through due and the Minister has concurred to the proposed models in principle.



paying the right social grant, to the right person, at the right time and place. NJALO!

South African Social Security Agency
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Tel: +27 12 400 2000 • Fax: +27 12 400 2257
www.sassa.gov.za

Yours sincerely,



Ms. Zolwa Mvulane
Executive Manager: Special Projects
Date: 23/09/2016



*paying the right social grant, to the right person,
at the right time and place. NJALO!*

South African Social Security Agency
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23rd Jan
2017.

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Give Note

D
Fully commit ✓
Technical Team
Jovenana, RB,
DSD; SASSA.

BRIEFING NOTES FOR THE MINISTER OF SOCIAL DEVELOPMENT TO THE MINISTER OF FINANCE

1. PURPOSE

The purpose of this note is to brief Minister on the areas of engagement required with the Minister of Finance for discussing both the immediate and medium-term requirements of SASSA in terms of acquisition of Banking & Payment Services in support of Social Assistance.

2. SASSA Objectives & Mandate

SASSA intends as part of its mandate to ensure that over the MTEF period 2016/17 to 19/20 that it is both ready and able to take on its responsibility to perform integrated grant administration and payments functions. SASSA intends to provide beneficiaries with a new SASSA payment card that independent of banks and service providers will achieve the following strategic objectives:

2.1 IMPROVED BENEFICIARY EXPERIENCE:

SASSA aims to provide a "one stop" service point model for significantly improving the efficiency and effectiveness with which SASSA manages the "Application to Payment" value chain. SASSA seeks to achieve this through a transition from the currently disparate SASSA grant application and CPS payment operating silos to an integrated value chain.

IMPLICATIONS: If this process were to be handed to the banks or otherwise not managed according to the planned SASSA approach the following implications exist:

1. Beneficiary experience will continue to be fragmented and poor
2. SASSA management of Risk & Compliance will be impaired

2.2 CUSTOMER RELATIONSHIP OWNERSHIP & INTEGRATED CUSTOMER CARE

2.2.1 SASSA aims to provide an improved and fully-integrated Customer Relationship Management & Customer Care capability within SASSA.

IMPLICATIONS: If this process were to be handed to the banks or otherwise not managed according to the planned SASSA approach the following implications exist:

1. Beneficiary experience at multiple call centres and support numbers will continue to prevent Customer Support in a measured and professional manner as per Bahto Pele principles and SASSA values.
2. SASSA ownership of crucial contact data and single view of beneficiary interaction/service fulfilment will be lost with risk of no recovery in future.

2.3 VALUE CHAIN TRANSPARENCY & COST EFFICIENCY

2.3.1 SASSA MUST Provide performance management, compliance management and risk management that is measurable and transparent - ushering a new level of service provider accountability and service level fulfilment assurance.

IMPLICATIONS: If this process were to be handed to the banks or otherwise not managed according to the planned SASSA approach the following implications exist:

1. The necessary controls for assuring outcomes in terms of SASSA compliance, Improved Risk Management & Performance will be significantly limited or otherwise hindered.
2. Poor risk management controls as a result of restricted SASSA management of the grant administration and payment value chain could result in the loss of billions of rands over the MTEF.
3. Management of Section 26a (Regulated Funeral Insurance Deductions) and other deduction related problems will be severely hampered if this function

2.4 SASSA CYBER ASSURANCE

2.4.1 As SASSA moves to a digitised Grant Administration & Payment future, it **MUST** Provide new levels of fraud mitigation to align to the new digital era while at the same time providing a new level of cyber assurance that ensures that SASSA can do so, without exposing the beneficiary and agency to existing and new cyber threats and risks.

2.4.2 As SASSA undertakes to insource certain payment functions over time it must be able to Comply to the Payment Card Industry Data Security Standards (PCI DSS), Europay, Visa, MasterCard (EMV) Payment Standard and Biometric Standards in the same way banks must.

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IMPLICATIONS: If this process were to be handed to the banks or otherwise not managed according to the planned SASSA approach the following implications exist:

1. The necessary controls for assuring Information and mitigation/effective response to Cyber threats, will be severely limited and could lead to significant losses and reputation damage.
2. SASSAs ability to meet industry standards will be severely limited and result in limited options in the future for SASSA participation in the value chain to meet its intent and obligations to do so.
3. Suppliers who otherwise will pass such liabilities back to SASSA may not be sufficiently motivated to mitigate such risks where mitigation cost is involved.

2.5 ACHIEVING STRATEGIC DATA OWNERSHIP FOR SASSA

2.5.1 In order for SASSA to benefit from its legal ownership of data, it must provide the necessary infrastructure, hosting environment and support to personnel and management. Furthermore, it must be able to own and consume all the Beneficiary related data in a secure and cost effective manner.

IMPLICATIONS: If this process were to be handed to the banks or otherwise not managed according to the planned SASSA approach the following implications exist:

1. SASSA will be forced to start from scratch (at significant cost and impact on service delivery) to build an accurate and complete data set for performing its core functions.
2. SASSA's ability to communicate with beneficiaries and perform routine beneficiary maintenance will be severely hindered.
3. SASSA's ability to perform vital risk management functions including data matching for means testing and grant entitlement will be limited if not totally compromised – resulting in potential loss of billions over the MTEF.

DO AWAY

Firm Plan

3

Emergency

With Cost

2.6 Business Continuity & CPS Card Life Extension

2.6.1 Card Life Extension is necessary to ensure that payments are met beyond December 2017 (April 2017 is a NON-Issue) as there is NO viable/realistic alternative.

New Contract extension

2.6.2 The Current CPS Payment Network (Acquiring Aspect) is required. Further challenges in this respect include the fact that this payment network is a "closed loop" network proprietary to CPS. As part of the continuity, some of the beneficiaries withdraw payments at these locations only. As such, the "Open Loop" network will not meet their requirements in the interim.

Handwritten signature or mark

Contract Assured
BEE

Firm Plan: → Must be firm

Firm Plan. Must be Rationale.

closed Bid

emergency

Accountability

(*)

Commit to open architecture with the necessary Accountability / Control & ... Required to

D

2.6.3 SASSA MUST as part of its customer commitment ensure the current Cash Distribution & PayPoints continue to operate without disruption.

IMPLICATIONS: If this process were to be handed to the banks (even in part) or otherwise were not managed according to the planned SASSA approach, the following implications exist:

1. SASSA will be forced to disrupt and change the existing arrangement with our most vulnerable customers.
2. SASSA would have to develop at a later date all such investment from scratch (at significant cost and impact on service delivery) to ensure future fulfilment of its commitment to these beneficiaries.
3. Biometric enabled cash PayPoints will disappear in the immediate term, introducing issues of significant fraud and the challenge of getting millions of elderly beneficiaries to remember PIN numbers (Not Advisable/Possible)

2.7 Biometric Validation & Verification

2.7.1 The introduction of biometric as a means of beneficiary validation (against Home Affairs NPR and SASSAs current/future One-to-Many Biometric Matching) and ultimately, authentication before payments are released - has proved to be one of the most effective mechanism for reducing fraud within the grant system. Recently for example, the current payment system and re-registration process saved the state approximately R3 billion.

SASSA

2.8 **Opening of Special Accounts (Ring-fenced Account) for SASSA beneficiaries**

2.8.1 From the lessons learned operating in the open market, it has become apparent that government needs to protect social grant benefits against exploitation and abuse. Furthermore, it has been established that social concepts such as "banking the unbanked" have unforeseen negative socio-economic impacts that conflict with effective social assistance outcomes. These include unlawful collateralisation of grants for loans with high fees/interest rates that leave beneficiaries with little remaining of their grant after fee/interest

IMPLICATIONS: If this process were to be handed to the banks (even in part) or otherwise were not managed according to the planned SASSA approach the following implications exist:

1. ALL such benefits and infrastructure would cease to exist in the immediate future and may take anything between 18 months and 3 years for the Banks to replace/re-introduce.
2. SASSA risk management would be set back at least 5 years leading to multiple billions of rands of previously mitigated fraud being re-introduce as losses to SASSA.

repayments and render social assistance impact on poverty infective.

2.8.2 It is therefore suggested that should the decision to operate in the NPS market be continued, there should

be agreed restrictions on the kind of account opened for the beneficiaries.

2.8.3 The following restrictions and benefits are captured in the current RFI to which we expect favourable responses from a competitive market that does not include banks only:

2.8.3.1 To open a single "corporate account" with ring-fenced individual accounts (much like a petrol card model) for each of the Social Assistance Beneficiaries.

2.8.3.2 The account be restricted to the payment of social grants benefits only - allowing only the duly approved section 26a compliant deductions for funeral insurance.

2.8.3.3 No EFT debits or stop orders shall be allowed on the account.

2.8.3.4 No other financial product or service may be introduced or marketed to Beneficiaries (other than Section 26a compliant).

2.8.3.5 The account must enjoy an acceptable level of free benefits limiting the cost to beneficiary for grant payment. Such costs to beneficiary have in the past not been included in the total cost of social assistance payment which only takes into account transaction cost to SASSA. It is the intent of SASSA to view total cost of payment to be cost to SASSA as well as beneficiary in the form of banking/payment fees and charges.

*vide of.
? Annex*

therefore an additional 2 years (for business continuity assurance, effective CPS exit and Transition to an optimal Future State).

3.3 SASSA has an obligation to the constitutional court and to its own staff and stakeholders (including parliament) to communicate its updated strategic plan. In line with paragraph 8.5 of National Treasury Instruction 3 of 2016/17, SASSA seeks National Treasury approval/concurrence with the required deviation from the normal bidding process on the basis of the exceptional circumstances SASSA is currently facing. Without such support and commitment all such communications are not possible.

3.4 Furthermore, SASSA requires NT to support both the new approach and subsequent budgetary requirements (over the MTEF period 2016/17 to 19/20) and approval thereof to negotiate with suppliers along these lines. SASSA would also benefit from the technical/financial support of an NT appointed representative to form part of the forthcoming negotiations with both the outgoing and future incoming service providers.

From: Zane Dangor <zanedangor@me.com>
Subject: Summary of Agreement on Payment of Social Grants (CONFIDENTIAL)
Date: 25 January 2017 at 12:09:58 AM SAST
To: Bathabile Dlamini <dlaminibatha@gmail.com>
Cc: Abram Phahlamohlaka <AbramP@dsd.gov.za>, Siphoshezi <shezis@sirius.org.za>

CONFIDENTIAL

Dear Minister

I hope all is going well in Addis.

This email is to give Minister a summary of decisions reached by the government technical team on the payment tender. A more detailed report that will be used for submission to the Concourt will be completed by the latest on Friday this week, by the SASSA team. This document would need to be presented to Minister and then the Minister of Finance before anything is submitted to the Concourt.

The government technical team was set up last week, comprising senior representatives from SASSA, DSD, National Treasury and the SARB. The technical focused on developing an approach to ensure that grants are paid on 1 April 2017. Their brief was to develop a solution that offer the least risk to non-payment. This meant also ensuring that a payment file is ready by 15 March 2017. It is important to note that NT included its Head of Procurement in the technical team. The technical team developed 6 scenarios and used various variables to assist in the decision - making process. The technical team presented this to the DGs of National Treasury and DSD, the CEO of SASSA and the Deputy Governor of the Reserve Bank.

In the end and after robust discussions on the merits of each approach it was decided that the best way forward was to extend the existing contract with CPS by 12 months. This means that as a matter of urgency, we need to inform the Constitutional court of this decision. This decision is only possible if it is accompanied by a firm plan that will allow us to end the contract with CPS after 12 months. The meeting concluded that the firm plan must unequivocally state that we would use the national payment system as the bedrock for future payments. In the Consolidated Government Document on Social Security we had committed to use the National Payment System as a means to cut administrative costs. The use of the National Payment System would be based on the open architecture model that would use all the institutions that have banking licenses and part of the national payment system. This includes the Post Bank and even banking cooperatives that may emerge in the future.

The next 12 months would be used to develop the tools that SASSA requires to ensure that it is in control of the process. This would include work done to set up



a special account that would run across all the payment institutions, the establishment of a corporate account and regulations to limit deductions. During this time a separate tender would be done to ensure that cash payments are done for beneficiaries that get paid through cash. This will include assessment of the Post Office to be a key institutional partner in the payment of cash. The use of the NPS and open architecture would over a short period of time result in the numbers accessing their money through cash being reduced. The details of this will worked out over the next 16 months, from now till end of March 2018.

In order to ensure the continued support and partnership of the NT and the SARB, the technical team set up last weak will continue to lead the work in towards this solution. The government partners will also defend the decision made and ensure that the necessary deviations are done to ensure that we can extend the contract with CPS for the next 12 months. However, this partnership and buy-in is based on the firm plan being as I have outlined above and the continued government technical task team led by SASSA.

In the meeting I stressed that we cannot go and explain this decision to the ConCourt and also parliament if SASSA continues to be ambivalent on using the National Payment System (NPS) and the Open Architecture model. I had to work hard to persuade the SARB and NT to continue their support when it emerged that SASSA had provided Minister with briefing notes for a discussion with the Minister of Finance that was quite hostile to the idea of using the National Payment System and the Open Architecture model, despite the work that was being done by the technical team comprising senior staff of the NT, SARB, DSD and SASSA. Hence in the meeting I needed to raise that fact that we could not use the kind of arguments used by the SASSA work-streams that compiled that briefing notes. The NT impressed on all of us, but particularly SASSA to ensure that the only document that was produced for consideration by Minster is the one that was worked on by the technical team and as agreed by all 4 institutions today. There is a sense that at times parallel documents prepared by the work streams were being produced and that this was not helpful.

The need to retain the participation and support of the SARB and NT is important as we manage the process over the next few weeks. Getting them to support us and even agree to negotiate with CPS on the financing issue for the extension was not easy and we need to maintain that support as we go forward.

I am writing this email to Minister and including only Sipho and Abram in the mail, as I am of the view that Mr. Shezi, myself and Minister must in the first instance meet as soon as possible to discuss the political management of this, now that we gotten to the point that even the SARB and the NT have agreed that the best way forward for 1 April 2017 is through a 12 month extension to CPS.

Regards

Zane



*PAYMENT OF SOCIAL GRANTS BY THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY*

MEMORANDUM

SUSANNAH COWEN

MKHULULI STUBBS

HANNINE DRAKE

Instructed by

TIM SUKAZI OF TIM SUKAZI INC.

CHAMBERS, JOHANNESBURG

5 OCTOBER 2016

INTRODUCTION

1. We are instructed to advise our client, the South African Social Security Agency (“SASSA”), on matters relating to the lawfulness of SASSA’s plan for the provision of social grants after 31 March 2017. In *Allpay 2*,¹ SASSA was ordered to run a new tender process with certain conditions attached, but was permitted to continue to receive the relevant services from its current nationwide grant administrator, Cash Paymaster Services (Pty) Ltd (“CPS”), in the interim. During this period, the declaration of invalidity of the agreement with CPS was suspended. It was envisaged that a new service provider would be in place or that SASSA itself would provide the service by the time that SASSA’s five-year contract (“Contract”) with CPS came to an end. SASSA ultimately opted for the latter route after no compliant tenders were received. However, we are instructed that it has now become clear to SASSA that it is not possible to achieve this plan, especially not by 31 March 2017.

2. We have been requested, together with Wim Trengove SC, to furnish an opinion on various issues. This opinion will follow in due course. Amongst the issues that we have been asked to consider are the following:
 - 2.1. ~~First, whether SASSA can extend its agreement with CPS and to that end, approach the Constitutional Court with a view to enabling the lawful continuation of the relationship. As we understand it, this would entail extending the agreement with CPS~~

¹Full order at *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (6) BCLR 641 (CC) par 78.



~~and seeking an order from the Court varying its order in *Allpay 2* by extending the suspension of invalidity of the Contract for a further – as yet unknown² – period;~~

2.2. Second, whether SASSA is in any event obliged to report to or otherwise approach the Constitutional Court; and

2.3. Third, on the assumption that it is not possible to pay social grants after March 2017 without concluding an interim arrangement with CPS, how to approach negotiations and the conclusion of an agreement with CPS for services after 31 March 2017 in a lawful manner.

3. The purpose of this memorandum is to provide preliminary advice pending the provision of the opinion referred to above. The purpose of this advice is to emphasise the urgency and priority with which SASSA should be attending to adequate and detailed planning for the post March 2017 regime. In short, SASSA will very soon be facing the real likelihood that it can neither comply with crucial constitutional obligations nor provide social grants lawfully. The legal consequences are, for obvious reasons, serious and threaten the state's ability to pay grants and thereby the state's ability to realise the important constitutional rights that it is enjoined to give effect to.

4. ~~We are providing this advice before any opinion is supplied for two reasons. First, in our current assessment and on the information supplied to us to date, SASSA needs to proceed at this juncture in the awareness that it will not be possible to apply to the Constitutional Court for a dispensation that would enable the lawful extension of the CPS contract. This~~

²~~Our most recent instructions suggest that SASSA is contemplating a protracted and possibly indefinite period of about three years or longer.~~



leaves SASSA with the option of entering into a new transitional non-competitive agreement with CPS. The legality of that agreement will depend in part on the cogency of the reasons why SASSA is in the position it currently finds itself: not least insofar as its position is self created, as it appears to be, such an agreement will be vulnerable to successful legal challenge. Second, it has become apparent to us, at least on the information to hand, that SASSA does not appear to have planned adequately and in a manner that will sufficiently limit the scope and duration of any extended relationship with CPS on an interim basis. The solutions that need to be arrived at are solutions of a technical and business nature rather than a legal nature and require urgent and serious attention.

5. While we express preliminary views in this memorandum, nothing should be treated as a final view on the issues at this stage, which will be provided when the opinion referred to above is supplied and is subject to our further instructions.³

6. This memorandum deals with the following issues:

6.1. First, we shall briefly set out certain relevant information provided to us.

6.2. Second, we shall comment on information provided to date relating to SASSA's proposed way forward which in our view, and on the information supplied, lacks the necessary detail and urgency to satisfy a court that SASSA is acting lawfully. We

³ We point out too that the authors of this memorandum are apprised to a different extent of the underlying factual position. Only Cowen and Drake have attended the consultations. Stubbs came on brief subsequently and only on 30 September 2016, and has yet to receive a full set of papers. Accordingly, whilst he agrees with the broad conclusions set out herein, his knowledge and understanding of the facts and prior consultations held with SASSA and its legal representatives is necessarily attenuated.



highlight the importance of SASSA's urgent prioritisation of information gathering, more detailed planning, tender design and negotiations with CPS.

6.3. Third, in the light of our instructions that practical constraints now facing SASSA mean that a non-competitive agreement will need to be concluded with CPS, we shall briefly set out our *prima facie* view that such an agreement will - at least on our instructions to date - be vulnerable to legal challenge. We also point out the likely need for further good faith disclosures to the Constitutional Court.⁴

6.4. Fourth, we shall address the serious concern that SASSA is facing a breach of its constitutional obligations and the importance of avoiding, alternatively limiting, conduct that carries significant legal exposure. In doing so, we discuss the urgency with which a technical and business solution must be finalised and the importance of acknowledging limitations that are apparently impeding SASSA's ability to implement a reasonable plan.

6.5. Finally, we shall summarise our conclusions in respect of the matters that SASSA needs to prioritise in the circumstances.

7. We point out at the outset that, despite several requests and consultations,⁵ we have not yet received a sufficiently detailed, approved plan on SASSA's intended procurement and provision of grant payment and administration services after 31 March 2017.

⁴ Our final views on these issues, and the legal reasoning therefor, will be traversed in our forthcoming legal opinion.

⁵ On 6 September 2016 (Rangewave, technical advisors and project management company and T Sukazi), 7 September 2016 (Z Mvulane, SASSA project manager and T Sukazi) and 26 September 2016 (Z Mvulane, Rangewave and T Sukazi). We have not all been involved in these consultations.

("Firm Plan").⁶ Any legal solution can only follow from a detailed technical and business solution, approved by SASSA in giving effect to its statutory objects. The urgency with which a Firm Plan must be finalised, approved and implemented cannot be overstated. Until we are provided with such a Firm Plan, we are unable to advise in material ways on important aspects of the legal advice as requested. Further, the longer this is delayed the vulnerability to ongoing legal challenges to the grant payment system that SASSA already faces will increase.

FACTUAL BACKGROUND

8. We limit the factual background to this memorandum for the sake of brevity:

8.1. Our advice, as we have said, is required in light of the developments since the Constitutional Court's order in *Allpay 2*. In the latter decision, SASSA was ordered to run a new tender process with certain conditions attached.⁷ The order in *Allpay 2* further provided for the following:

8.1.1. Suspension of Invalidation: The declaration of invalidity of the Contract was suspended pending SASSA's decision to award the new tender. Should no tender be awarded, the suspension would be extended to 31 March 2017; and

⁶ We do not mean to suggest by using the descriptor 'Firm Plan' that there is no room for flexibility in such a plan. A constitutionally compliant plan does have room for a reasonable amount of flexibility. In our view however the current plans lack sufficient determinacy.

⁷ This order followed upon the Constitutional Court's prior finding that the Contract was invalid.



- 8.1.2. Supervision Order: SASSA was ordered to file quarterly reports with the Court until the end of the tender process. Should the tender not be awarded, SASSA was to file a report with the Court setting out "*all the relevant information on whether and when it will be ready to assume the duty to pay grants itself*". At the time, representations were made to the Constitutional Court to the effect that SASSA intends to take over or 'in-house' CPS' functions from 1 April 2017.
- 8.2. SASSA conducted the new tender process ordered by the Constitutional Court and submitted its quarterly reports to the Constitutional Court. No compliant bids were received, placing SASSA back on the road to 'self-administration' and having the effect that the suspension order now extends to the end of the initial Contract period, 31 March 2017.
- 8.3. The decision not to award the tender was made by the CEO of SASSA on 15 October 2015.
- 8.4. On 5 November 2015, SASSA filed the required report with the Constitutional Court, setting out its plan to assume the duty to pay grants itself at 31 March 2017 ("the Progress Report"). The Constitutional Court issued an order in response, which states that the Constitutional Court had considered the Progress Report, found that it complied with its order in *Allpay 2*, and discharged the Court's supervisory jurisdiction ("*Allpay 4*").⁸

⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* (Order dated 25 November 2015).



8.5. Our advice is sought in light of SASSA's inability to abide by the Progress Report.

Although the Progress Report contemplated that compliance with the time frames would depend on various consultations, as we understand our instructions, the inability to abide by the Progress Report does not arise, or at least does not solely arise, from the issues identified as being contingent on the outcome of further consultations.

8.6. We are instructed, and we assume, that the timelines in the Progress Report, though

they were furnished in good faith, did not take proper account of technical difficulties and of an absence of capacity and skills within SASSA. As a result, we understand that the timelines are unrealistic and cannot be met. Per our instructions, no person (whether SASSA, another service provider, or a combination thereof) will be in a position to take over CPS' functions on 31 March 2017, when the suspension period ends. SASSA is now seeking to revise and implement the plan in the Progress Report but while it has a reasonable sense of what its end-goal is, it is yet to commit to a clear way forward and how to get there. Our difficulties in providing the specific legal advice requested from us stem from the undetermined and still vague content and status of these revised plans which, in particular, lack specificity as to what is practically possible in terms of which timeframes. Further, it does not appear that planning has ensued with a view seriously to limiting the scope and duration of an interim arrangement with CPS.

HIGH LEVEL COMMENT ON THE DRAFT REPORTS

9. As stated, the decision not to award the court-ordered tender was made on 15 October 2015. Almost a year later, SASSA has no finalised and approved plan for the payment of grants after 31 March 2017, and it is even further from operationalising such a plan in the remaining six months before the guillotine falls on the current Contract.

10. We have made several requests for a Firm Plan. In response to this, two draft reports that remain in draft form have been prepared and supplied to us. These reports differ from one another. Both draft reports furthermore lack the specificity required not only for the reasonable implementation of such a plan, but also for an adequate explanation to the Constitutional Court, or indeed any other Court that may scrutinise SASSA's conduct in the next period. The latter is important for reasons to which we shall return below.

11. We briefly deal with certain aspects of each of the draft reports ("the First and Second Draft Reports").

12. We were provided with the First Draft Report on 20 September 2016. The First Draft Report is styled the "BIS and B&P Work Stream Report addressing the: Progress Report in terms of Paragraph 4.1 of the order made by the Constitutional Court on 17 April 2014". The First Draft Report is unsatisfactory and insufficiently clear in several respects. Without conducting any comprehensive analysis thereof, we point out the following:

12.1. The explanation for the change of plan from the Progress Report in the first two pages of the First Draft Report obscures, rather than clarifies, the reasons for the delay. An adequate explanation has to contain far more specificity than what has

been supplied to us to date in respect of the causes and responses to delays as they have arisen.

12.2. The First Draft Report also lacks detail on what the proposed plan in fact entails and how the proposed plan is to be implemented. It further identifies a number of potential constraints but does not explain sufficiently what these constraints might be or how contingencies are to be catered for.

12.3. Dates and time periods are important markers in an explanation of the specifics of a plan, including detailing the steps taken (if any) to date to implement the plan as well as the steps taken (if any) to accelerate the design, approval and implementation of SASSA's new plan with reference to the looming 31 March 2017 deadline. The First Draft Report does not demonstrate the required specificity in this regard.

13. In sum, the First Draft Report does not explain adequately either the reasons for the delay or the proposed way forward. Although dedicated consultations on the issue may clarify matters, to date, we have further received no additional instructions that serve to clarify the reasons for the delay.⁹ The absence of clear explanations for the delay create a strong impression that there are no adequate reasons which point to a likely inference of delay that is, at least in material measure, self-created delay. Self-created delays are at the heart of what would expose a non-competitive agreement with CPS to contractual uncertainty and legal challenge. Such delays contribute in important ways to what appears to be an imminent breach by SASSA of its constitutional duties to pay grants pursuant to lawful

⁹ We are instructed that it took longer than expected to bring the current work streams on board. It is unlikely that this explanation will serve to justify delays in planning of the sort that have ensued.

contractual arrangements that are compliant with section 217 of the Constitution. We revisit this concern below.

14. We were furnished with the Second Draft Report on 28 September 2016. The Second Draft Report contains headlines with projected time frames and, according to our understanding, is meant to represent a scenario whereby SASSA goes out on 'full tender' through ten different tenders over a number of years. Similarly to the First Draft Report, the Second Draft Report, among other things, lacks specifics, does not contain adequate descriptions of what is envisioned, does not adequately address variables and contingencies that may impact on the plan and importantly, does not explain why the plan cannot be rolled out within a shorter timeframe. The latter issue is important not only because of the importance of the constitutional duty to pay social grants but because of the additional legal exposure SASSA faces if it does not seriously seek to limit the scope and duration of its intended non-competitive agreement with CPS.

15. In sum, it appears at least on the information supplied to us that the Second Draft Report is less a 'plan' (which meets the requirements that a Court scrutinising it would expect) and more a 'plan to create a more detailed plan'. What is required at this stage is the detailed plan itself.¹⁰ The urgency of this cannot be overstated.

16. It is a Firm Plan, and thus an understanding of what is and is not practically possible from a technical and business perspective, that should drive SASSA's process in resolving this procurement transition. What is apparent *inter alia* from both the First and Second Draft Reports is that SASSA will not be in a position to implement any handover from CPS on

¹⁰ We are mindful that such a plan may exist but has not been provided to us yet or fully reduced to writing.

31 March 2017. We are instructed that SASSA as a result views an interim, non-competitive agreement with CPS as being unavoidable.

AN INTERIM, NON-COMPETITIVE AGREEMENT WITH CPS WILL BE VULNERABLE TO LEGAL CHALLENGE

17. We have mentioned that it is premature, at least in certain measure, to advise SASSA on the proposed way forward from a legal perspective, absent a Firm Plan. Furthermore, we will furnish our views and reasoning therefor as far as is possible on the information to hand in the opinion referred to above. For present purposes, however, and in light of SASSA's intention to enter into a non-competitive agreement with CPS, we furnish our prima facie view, based on the information supplied to date, that SASSA's intended agreement with CPS will be vulnerable to legal challenge and will probably not be capable of being regularised by approaching the Constitutional Court. The vulnerability arises from the fact that, on the information supplied, SASSA has created its own impracticality and urgency.¹¹ The legal position may be different if it can be demonstrated that SASSA did not create its own impracticality and urgency and to this end, further consultations will likely be necessary at the appropriate time. In any event, it is incumbent on SASSA to curtail both the scope and duration of any non-competitive contract with CPS. This is important not only because of SASSA's constitutional obligations but so as to decrease exposure to legal challenge and minimise contractual uncertainty that will only serve to prejudice beneficiaries.

¹¹ See Treasury Regulation 16A6.4 to the Public Finance Management Act 1 of 1999, which permits Schedule 3A public entities to follow a non-competitive process if it is "impractical" to invite competitive bids and provided that the reasons therefore are recorded.

18. SASSA should further and at this stage proceed on the assumption that it will at the very least be advisable (and possibly necessary) to file a supplementary progress report with the Constitutional Court, as soon as possible, in order to clarify to the Court –

18.1. that the Progress Report cannot be implemented;

18.2. the reasons for this and for a change in plan;

18.3. the detail of the new, Firm Plan; and

18.4. the parameters of the new agreement with CPS, including steps taken to limit the duration and scope of such an agreement.

19. It is imperative that SASSA as an organ of state must be in a position to provide a good faith explanation for its current position. The explanation, in turn, will have ramifications for the extent of legal risk SASSA is exposing its entire grant payment system.

SASSA IS AT RISK OF BREACHING ITS CONSTITUTIONAL OBLIGATIONS

20. SASSA bears a constitutional obligation to ensure that grant payments continue to be paid uninterrupted. On the instructions we have, SASSA is at imminent risk of breaching this obligation. The absence of any certainty about what will happen after March 2017 is a matter for serious concern. The issue of the imminent expiry of beneficiaries' SASSA cards is but one example that highlights this risk.



Card Expiry and Issuance

20.1. The card expiry issue can be summarised as follows: The cards were issued in 2012 by CPS, which contracts in this regard with Grindrod and Mastercard.¹² The expiry date on the cards is December 2017. CPS currently holds the keys to the cards (the keys being necessary in order to enable the use of the cards) until the end of the Contract, on 31 March 2017. CPS can extend the life of the keys as part of a new agreement until 31 December 2017, which is the expiry date enabled by Mastercard as well as the date printed on the cards. CPS has advised SASSA that it is possible, in principle, to extend the life of the existing cards for up to two years beyond December 2017 (i.e. December 2019), with Mastercard's consent. CPS further advised that Mastercard will in turn require consent from the South African Reserve Bank ("SARB").

20.2. SASSA currently has no agreement in place with a service provider to replace the cards by or before its expiry in December 2017, let alone the expiry of the agreement with CPS in March 2017. No tender or other procurement process has been initiated to date to ensure that new cards will be distributed before December 2017. SASSA also does not have confirmed and updated market information on how much time it would take to distribute new cards to all beneficiaries. Based on historical experience, however, we are instructed that SASSA estimates that the physical production and rollout of the cards alone could take about a year, tender process aside. On this basis, SASSA's understanding is that it is now probably too late to

¹² It is not clear to us whether the contract with Mastercard is with CPS or with Grindrod.



20.4.2. The second possible practical solution is for SASSA to seek to extend the keys of the existing cards on agreement with CPS, Mastercard and the SARB for up to two more years, notwithstanding the stated expiry date on the card itself. We understand that SASSA is still investigating the viability of this option, and again have no instructions regarding whether CPS would do this and on what contractual terms.¹⁵

21. We have not been provided with an explanation as to why the issue of the card extension was not adequately addressed earlier, for example, a year ago when the decision was made not to award the tender. The issue appears to be foreseeable, and it seems likely if not inevitable that reasons for this will have to be provided in due course. The absence of a Firm Plan to address the replacement and/or extension of the cards seriously threatens SASSA's ability to pay beneficiaries on time and in line with its constitutional obligations.

The Road to Minimising Legal Exposure through Technical Solutions

22. It is imperative that SASSA limits its legal exposure to all extents possible. Legal exposure invites legal challenge, creates contractual uncertainty, threatens the fulfilment of constitutional obligations to the serious detriment of beneficiaries and will in turn generate significant adverse political consequences for SASSA. While it may (or, on present instructions more likely) may not be possible to avoid the conclusion of an interim agreement with CPS that is vulnerable to legal challenge, all reasonable steps must be taken to limit the scope and duration of such an agreement. There will be different ways of achieving this practically and once the practicalities are clear, contractually.

¹⁵ We are instructed that CPS will be co-operative.

23. In this regard, SASSA's finalisation and approval of a Firm Plan to procure grant administration and payment services for its beneficiaries should primarily be driven by technical and business, not legal, solutions. It is only once a technical and business solution and its planned rollout is finalised that we shall be in a position to provide advice about how best to approach procurement decisions and any reporting to the Constitutional Court.

24. What is clear, however, is that the answers to these technical and business questions are urgently required and are not currently to hand. Insofar as anyone responsible entertains the belief that due to the importance of paying social grants one way or another, illegality will be condoned by the courts, this view should be jettisoned. This is not in our view the way that SASSA must proceed in view of its constitutional obligations to pay social grants and to comply with section 217 of the Constitution.

Acknowledging Limitations

25. The First and Second Draft Reports illustrate the need for SASSA to assess and revise frankly what is and is not practical with respect to implementation at this late stage. As SASSA finalises its plan, it is also important to assess whether the message given to the Constitutional Court and the public that SASSA intends to take grant payments 'in-house' is legally accurate. On the information to hand it appears that what is contemplated is that SASSA will have greater control over data, beneficiary account systems and key relationships. However, SASSA will still be embarking on very extensive procurement

processes and for this purpose, will conclude agreements with third parties in respect of core grant payment and related functions.¹⁶

THE WAY FORWARD

26. In our view, SASSA needs to prioritise, as a matter of extreme urgency, the necessary processes before we can provide important aspects of the legal advice requested. This includes:

26.1. Updated information on what potential service providers may be able to provide in an interim period need to be collected and confirmed.

26.2. SASSA's Firm Plan must be finalised and tender specifications must be drafted as a matter of priority with a view to commencing tender processes as soon as possible.

26.3. Negotiations with CPS on the terms of an interim agreement, if truly unavoidable, must start as soon as possible and must be conducted with a view to limiting its duration and scope as much as possible. In this regard there are apparently different ways of achieving this that should be explored.

27. It should be borne in mind that any aspect of the finalisation and implementation of the Firm Plan and any non-competitive CPS agreement will reach the public, whether through disclosure to the Constitutional Court, as part of future litigation by or against SASSA and/or as part of journalistic investigations.

¹⁶ Reference has been made to the idea of co-sourcing. This does not alter the legal position that extensive outsourcing is required and material features of the delivery of social grants are not being bought inhouse.




28. The importance and urgency of a clear, practical and realistic Firm Plan and rapid implementation thereof cannot be overstated. While we will proceed in the interim to prepare the opinion referred to above to the extent possible, it is only once the processes above are further down the line and there is a Firm Plan that we will be in a position to provide specific advice on how to engage with the Constitutional Court and to proceed with tender processes relating to any interim arrangement with CPS.

SUSANNAH COWEN

MKHULULI STUBBS

HANNINE DRAKE

Chambers, Sandton
5 October 2016



From: Brenton Van Vrede <BrentonV@dssd.gov.za>
Subject: Fwd: Fw:
Date: 18 January 2017 at 1:07:05 PM SAST
To: Zodwa Mvulane <zodwamv@sassa.gov.za>
Cc: Raphaahle Ramokgopa <RaphaahleR@sassa.gov.za>, 'Dumisa Magwaza' <tkzie@yahoo.com>

Good morning,

The DG asked me to send you this proposal to consider as an alternative to contracting CPS for the interim period. While we support SASSA's plan, we are of the view that directly contracting CPS in any form will bring the entity into disrepute. We thus request that you consider this option and how it can be aligned to the long term objectives of SASSA's payment plan.

Regards Brenton

This email was sent using a cellphone and may contain shorthand, strange auto corrects and typos. If anything doesn't make sense, please clarify with the sender.

From: Brenton Van Vrede Sent: Wednesday, 18 January, 13:03
Subject: Fw: To: Brenton Van Vrede

Sent from Windows Mail

From: Brenton Van Vrede
Sent: Wednesday, 18 January 2017 09:17 AM
To: brentonv@dssd.gov.za

Sent from Windows Mail

Emergency plan for ensuring social grant payments in a cost effective manner at the end of the current contract.

Background

A Ministerial Advisory Committee was appointed by the Minister of Social Development to interrogate the shortfalls of the current system, investigate the most suitable payment system and recommend options that can be adopted for South Africa. A report was developed and shared with SASSA.

The Committee recommended that the payment system be developed in-house. It was further recommended that the work streams be established by SASSA to facilitate the insourcing process.

Some of these work streams were appointed towards the end of 2016. The work streams have since then fleshed out the advisory committee's proposal and developed a project plan and preliminary costing for the project. Unfortunately it has now become clear, that due to the late start of the work streams, it will not be feasible for SASSA to insource the payments function by 1 April 2017.

In November 2016, the Director General of the Department of Social Development, noting the enormous risk to Government, if SASSA were able to meet the publically announced deadline for insourcing by 1 April 2017; undertook to consult with the National Treasury, the South African Reserve Bank, the banking industry, etc., to develop a backup plan that would have minimal disruptions, should SASSA not be able to insource the payment function by 1 April 2017. This document seeks to outline this proposal.

Key to the proposal are the following:

1. The Constitutional Court declared the current payment tender awarded to CPS invalid; however suspended this invalidity to 31 March 2017.
2. Legal advice suggesting that any extension of the invalid contract, in whichever form, will be adverse.
3. Utilising the emergency provisions of the PFMA will require severe consequence management to avoid bringing the Institution, and the executive

head, into disrepute. SASSA had 5 years to plan for this, and not being ready cannot be classified as an emergency, unless management incompetence is declared and the necessary steps are taken. New management would then be able to treat the situation as an emergency.

4. SASSA cannot afford a fee increase. Any fee increase will result in the organisation going into overdraft and negatively hamper their other programs, as cuts will need to be made to fund the higher fees.
5. Utilising the open architecture of the NPS is preferable
6. Moving towards the biometric standard approved by the SARB, as opposed to a proprietary system is preferred; however the current use of biometrics need to be maintained (i.e. not abandoned).
7. The Post Office will play a key role in the new payment system

Proposal: Using the banking infrastructure to pay grants

It may not be the ideal model for SASSA, however given that SASSA does not have much leverage or time to negotiate, it may be their only option left. When the current tender was issued, it explicitly stated that it wanted to expand banking services by developing these services for the unbanked. This proposal suggests that SASSA should use the system they developed to pay grants on 1 April, independent of CPS whom they contracted to develop the system. While the contract with CPS may be found to be invalid, the system that was developed is still there, and can be used.

At present, all Social Grant beneficiaries have bank accounts (albeit the majority are at one bank). Whether they withdraw cash at a pay point managed by CPS, or at a merchant, atm, etc., these withdrawal take place from a bank account. Thus all SASSA needs to do is transfer beneficiaries grant money into their bank accounts every month. This function is currently performed by CPS but can easily be taken over at minimal cost by SASSA. SASSA performed such a function before, and can easily do it again. There is thus no need for extending an invalid contract or procuring emergency payment provisions. The obligation to ensure that beneficiaries can access their money in their bank accounts, even in remote areas, will thus shift to the banks. (If any bank fails in this obligation, SASSA will then be able to step in, and utilise emergency provisions).

Considering that 99.9% of grant beneficiaries currently hold bank accounts at Grindrod Bank, both the Deputy Governor of the SARB and the DG of DSD met with the Directors of Grindrod Bank to assess their readiness to perform this function, which includes servicing remote areas. Grindrod will have to ensure that they have infrastructure, or a service provider who can supply the infrastructure, so that their clients can access their accounts. Grindrod Bank has expressed their ability to do this in writing. Further discussions will however be needed, to ensure that social grant beneficiaries are protected. Given that there is only two months left, these will have to begin immediately, if this option is pursued.

The SARB's preferred model is to have all banks participate in the payment system, however given the immediate challenge they are open to the idea of using one bank (the current bank) and then, within a short space of time, bringing in other banks.

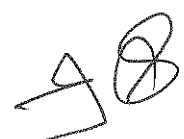
Subsidising banking fees

SASSA will need to subsidise the bank fees for social grant beneficiaries. Two options can be used to subsidise bank fees. We can simply add the subsidy to the Grant, and beneficiaries will then pay their own fees. However we'd then have no influence or control over these accounts. Existing legislation may also not allow us to do this.

Alternatively, SASSA could issue an expression of interest for banks to participate in providing banking services to SASSA beneficiaries from 1 April (or at any point in the future.) Grindrod being the most ready will continue providing banking services, and other banks will join when they ready.

Deductions will continue to be a challenge, and we will need to introduce a "limited banking service account". However this will probably have to be in a phased manner, for example, all new accounts with immediate effect, and 1-2 year transition for existing accounts. Banks will have to integrate their services with SASSA to allow for a common entry point for opening and querying accounts.

The SARB supports the notion of a limited account and is willing to use their influence to ensure that it happens. These accounts will also need to adopt the new biometric standard of the SARB and be phased in over a period of about two years. The biometric standards used on the current Grindrod account will continue to be used in



the interim, but will need to be adapted to the approved biometric standard for banks within the same time period. Subsidy levels may have to be different for rural and urban areas, given the lack of infrastructure in rural areas.

For urban areas, competition should be enough amongst banks to keep them in line. For rural areas though, Grindrod will have a monopoly and could exploit beneficiaries (or government). It will thus be important for Government to support a competitor as an alternative for rural areas (in particular). The post office, as a government institution, with a mandate to service all areas (as a matter of public interest), is best positioned to provide this competition. It will be important for SASSA to have this alternative up and running in about a year.

SASSA will lose control over the payment system (as it is now in the open space of the NPS) and will have to maintain good working relations with the SARB to ensure that they act in best interest of social grant beneficiaries. Litigation and adversity is still likely, however given the limited need for contracts, there is less chance of it being successful.

This option will provide SASSA with the time it needs to continue developing its ideal payment system. It will prepare the NPS to adopt and roll-out biometrics which will enable SASSA, and other social security institutions to interface with. It will also expand the infrastructure of the NPS to remote areas allowing other social security institutions and other government and non-government transactions to take place in these areas, which may have a positive spin off on local economic development.

Risks that need to be managed.

The payments contract ends on the 31 March 2017, however the actual cheque cards expire in December 2017 – making them useable on any system linked to the NPS. MASTERCARD has given their assurance that on the 1 April 2017 all cards will still be operable. They've even suggested that this date can be extended further, however communication with vendors need to be managed (as the expiry date physically printed on the card may be different from the extended date).

For the biometric system, predominantly used at cash pay points, these cards will expire on 31 March 2017. Approximately 3 to 4 million people make use of this system,



and may not have the alternative pin activated on their card (thus they will not be able to use the NPS infrastructure). These encryption keys too can be extended automatically over the next few months when beneficiaries draw their cash, however an agreement needs to be reached with CPS as their proprietary system is used for these payments. These keys can be extended quite simply when the beneficiary inserts their card into the machines at the cash pay point. CPS however may want to charge an additional fee for this service.

For Grindrod Bank to be able to service all their clients, they will have to rely heavily on their relationship with NET 1 and their existing infrastructure. Without NET 1, Grindrod Bank would not have the capacity to provide services to its clients and Government (including the SARB) will need to step in to prevent a national crisis as well as to ensure the stability of the NPS.

The current court case may have an impact on this proposal, depending on how the judge lays out his judgement. DSD has made arguments that Grindrod was nothing more than a sub-contractor of CPS and that their bank accounts are part of the payment tender. A judgement may impact the validity of this proposal. Judgement has not yet been made, and we may be able to approach the court with a settlement. Considering that criminal charges may be pursued pending the outcome of this case, the directors of both NET1 and Grindrod Bank may be eager for a settlement. To some extent this could mitigate some of the risk raised in the paragraph above.

Given the limited time left, it may not be possible for SASSA to successfully issue and expression of interest or for the banks to respond in a meaningful way. Any further delays need to be avoided.

