



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/17

In the matter between:

CASH PAYMASTER SERVICES (PTY) LIMITED (IN LIQUIDATION)	First Applicant
PULENG FELICITY BODIBE N.O.	Second Applicant
CHOSANE NTLOANE ANDRONICCAH N.O.	Third Applicant
and	
FREEDOM UNDER LAW NPC	First Respondent
MINISTER OF SOCIAL DEVELOPMENT	Second Respondent
CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	Third Respondent
SOUTH AFRICAN SOCIAL SECURITY AGENCY	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent
NATIONAL TREASURY	Sixth Respondent
INFORMATION REGULATOR	Seventh Respondent
RAIN CHARTERED ACCOUNTANTS INCORPORATED	Eighth Respondent
KPMG SERVICES (PTY) LIMITED	Ninth Respondent
MAZARS INCORPORATED	Tenth Respondent
BLACK SASH TRUST	Eleventh Respondent
SOUTH AFRICAN REVENUE SERVICE	Twelfth Respondent

and

CORRUPTION WATCH (NPC) RF

First Amicus Curiae

SOUTH AFRICAN POST OFFICE SOC LIMITED

Second Amicus Curiae

Neutral citation: *Cash Paymaster Services (Pty) Ltd and Others v Freedom Under Law NPC and Others* [2022] ZACC 2

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: THE COURT

Decided on: 11 February 2022

Summary: Joinder — direct and substantial interest — such not shown

Variation of order — provisional liquidators — section 359(1)(a) of Companies Act 61 of 1973 — company remains bound to comply with previous order despite the fact that final liquidators not yet appointed

ORDER

Application for joinder and for variation of this Court's order of 1 April 2021:

1. The application is dismissed.

JUDGMENT

THE COURT:

Introduction

[1] This is an application, brought by the provisional liquidators of the sixth respondent in the main case, Cash Paymaster Services (Pty) Limited (CPS), to vary this Court's order of 1 April 2021 (April 2021 order) and to join the South African Revenue Service (SARS). The only party which has responded to the variation application is Freedom under Law NPC (FUL), the applicant in the main case. FUL, while abiding this Court's decision on the variation application, has filed an affidavit setting out various circumstances said to militate against the granting of the relief claimed by the provisional liquidators.

[2] The variation application, though dated 11 May 2021, was filed on 23 May 2021. Due to a regrettable administrative lapse, the application did not find its way onto this Court's weekly agendas, and it lay unprocessed until a letter dated 16 November 2021 from attorneys representing the provisional liquidators brought the omission to light.

Litigation background

[3] The April 2021 order gave effect to earlier judgments of this Court which required a determination to be made of the profits earned by CPS from the payment of social grants on behalf of the South African Social Security Agency (SASSA) over the period 1 April 2012 to 30 September 2018. On 17 April 2014 this Court declared the initial five-year contract between SASSA and CPS invalid, but suspended the declaration of invalidity on certain terms.¹ The suspension of invalidity was twice extended, by orders dated 17 March 2017² and 23 March 2018,³ to ensure that social

¹ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay*).

² *Black Sash Trust v Minister of Social Development (Freedom Under Law Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash*).

³ Reasons handed down on 30 August 2018: *South African Social Security Agency v Minister of Social Development* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC).

grants would continue to be paid, such extensions being on the same terms as the initial contract.

[4] The orders of 17 April 2014, 17 March 2017 and 23 March 2018 required CPS to file with the Court an audited statement of the expenses incurred, income received and net profit earned in the relevant periods (profit statements); and required SASSA to obtain and file with the Court an independent audited verification of the profit statements. The second and third orders added a requirement that the audit verification be approved by National Treasury before it was filed with the Court. These provisions were informed by the statement in the judgment of 17 April 2014 that, while the invalidation of the contract should not result in any loss to CPS, the company also had “no right to benefit from an unlawful contract”, so that any benefit CPS derived “should not be beyond public scrutiny”.⁴

[5] CPS filed profit statements audited by KPMG Services (Pty) Limited (KPMG) in respect of the initial five-year period and by Mazars Incorporated (Mazars) in respect of the two extensions. SASSA engaged RAIN Chartered Accountants Incorporated (RAIN) to verify the profit statements. In October 2019 RAIN furnished its review report. National Treasury issued a letter approving the report but noted certain shortcomings. In November 2019 SASSA filed the RAIN report and the National Treasury letter with the Court.

[6] In its report, RAIN explained that there was a crucial outstanding issue, namely whether CPS had engaged in cost-shifting and profit-shifting. RAIN said that it needed more information to get to the bottom of this. In April 2020 FUL launched an application to ensure that RAIN was given the necessary information. The only opposition was from CPS, and the only relief which it opposed was an order declaring that it was liable to repay all profits to SASSA. On 1 April 2021 this Court granted,

⁴ *Allpay* above n 1 at para 67.

with some modifications, the relief which was unopposed.⁵ In summary, the April 2021 order required the following steps to happen in accordance with a timetable: RAIN to submit lists of required documents to CPS, KPMG and Mazars; the latter to supply the listed documents to RAIN; RAIN to submit an updated verification report to National Treasury; National Treasury to permit CPS and SASSA to make representations on the updated report; and National Treasury to approve the updated report and file such approval with this Court, alternatively to file an affidavit explaining why it could not approve the updated report.

The variation application

[7] The provisional liquidators seek relief based on two circumstances, namely that CPS is in liquidation, and final liquidators have not yet been appointed; and that SARS is engaged in an audit of CPS' tax affairs which involves similar issues (particularly a potential over-statement of expenses) to those involved in the updated RAIN verification. The relief claimed is in summary the following: (a) that SARS be joined and that the April 2021 order be varied to align SARS' audit process with the updated RAIN verification process; (b) that the description of CPS in the April 2021 order be amended to add "(in liquidation)"; and (c) that the rights and obligations contained in the April 2021 order in so far as CPS is concerned (i.e. the obligation to supply documents to RAIN and the right to make submissions to National Treasury) be varied so as to refer not to CPS but to the company's final liquidators.⁶

⁵ *Freedom Under Law v Minister of Social Development* [2021] ZACC 5; 2021 (6) BCLR 575 (CC). The full terms of the order appear in n 6 below.

⁶ The April 2021 order as varied would read as follows, insertions being given in square brackets and bold text and deletions in strike-through text:

"1. Within 10 days from the date of [**the appointment of the final liquidator(s) of Cash Paymaster Services (Pty) Ltd (in liquidation)**] ~~this order~~, Rain Chartered Accountants Inc must submit to [**the liquidator so appointed**] ~~Cash Paymasters Services (Pty) Limited,~~ KPMG Services (Pty) Limited and Mazars Inc the list of all outstanding documents relevant to the audit verification undertaken by Rain Chartered Accountants Inc under the order of 17 March 2017.

[**1B. Within 10 days of the appointment of the final liquidator(s) of Cash Paymaster Services (Pty) Ltd (in liquidation), the South African Revenue Service ("SARS") must submit to the liquidator so appointed the list of documentation required to finalise the SARS audit.**]

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2. ~~Cash Paymasters Services (Pty) Limited~~, KPMG Services (Pty) Limited and Mazars Inc must furnish Rain Chartered Accountants Inc with the listed documents in their possession, within 15 days from the date of receipt of the list of outstanding documents referred to in [Order] paragraph 1. **[The final appointed liquidator(s) of Cash Paymaster Services (Pty) Ltd (in liquidation) must furnish RAiN Chartered Accountants Inc and SARS within 30 days of the date of the receipt of the lists referred to in paragraph 1 and 1B with the listed documents in his/her/their possession together with an explanation in respect of the documentation that the liquidator(s) is(are) not able to furnish.]**
 3. Within 30 days of receipt of the outstanding documents referred to in paragraph 1, Rain Chartered Accountants Inc must submit to the National Treasury, the updated verification report including:
 - 3.1 all issues raised by the National Treasury in its letter of 28 November 2019; and
 - 3.2 all issues arising from the documents referred to in paragraph 1.
 - [3A. RAiN Chartered Accountants Inc must simultaneously furnish SARS with furnishing the updated verification report to the National Treasury.]**
 - [3B. Within 40 days of the receipt of the documentation in accordance with paragraphs 2 and 3A, SARS must furnish the final appointed liquidator of Cash Paymaster Services (Pty) Ltd (in liquidation) with an audit findings letter.]**
 4. Within 20 days of receipt of the updated verification report, the National Treasury must allow **[the final liquidator of]** Cash Paymasters Services (Pty) Limited **[(in liquidation)]** and the South African Social Security Agency to make representations on the updated verification report, if they so wish.
 - [4A. Within 20 days of the receipt of the audit findings letter the final appointed liquidator of Cash Paymaster Services (Pty) Ltd (in liquidation) must furnish SARS with any representations it wishes to make.]**
 5. Within 40 days of receipt of the updated verification report, the National Treasury must consider and approve the updated verification report and file its approval together with the updated verified report with the Registrar of this Court.
 - [5B. SARS must within 10 days of the National Treasury's approval of the updated verification report or the affidavit contemplated in paragraph 6 below and with reference to any representations the final appointed liquidator of Cash Paymaster Services (Pty) Ltd (in liquidation) made in respect of the audit findings letter, issue the final assessment, if any, alternatively if it (is) unable to make a final assessment file an affidavit setting out why a final assessment cannot be made and what is required to make a final assessment.]**
 6. If the National Treasury is unable to approve the updated verification report, the National Treasury must file an affidavit setting out:
 - 6.1 reasons for not approving the updated verification report; and
 - 6.2 the National Treasury's own determination of the profit made by Cash Paymasters Services (Pty) Limited **[(in liquidation)]** from the unlawful contract that was declared invalid; or
 - 6.3 alternatively, should the National Treasury be unable to make the determination referred to in subparagraph 6.2, it must set out in its affidavit what it requires to properly determine the profit made by Cash Paymasters Services (Pty) Limited **[(in liquidation)]**.
 7. Costs are reserved."

[8] CPS was placed in final liquidation on 16 October 2020. This was at SASSA's instance, which had an unsatisfied judgment against CPS for R316 447 361. The present applicants were appointed as CPS' provisional liquidators on 30 October 2020. On 23 December 2020 FUL's attorneys, Nortons, wrote to the Registrar to notify this Court of the liquidation and the appointment of the provisional liquidators. Nortons stated that the liquidation had heightened the need for this Court to deliver judgment in FUL's application. Nortons added that they had, to the extent necessary, notified CPS' joint liquidators in terms of section 359(2)(a) of the Companies Act⁷ (Act or 1973 Act) of FUL's intention to continue with the application. Nortons added that SASSA supported the continuation and determination of FUL's application.

[9] Although the Nortons letter was written deep into this Court's long recess, it was brought to the attention of the member of the Court tasked with preparing the judgment in FUL's application. On 30 December 2020 the Registrar was directed to reply that the matter was before Court and that Nortons would be notified once judgment was ready. This reply was sent to all the parties on record as well as the two provisional liquidators.

[10] No further word was heard from any of the parties before judgment was delivered on 1 April 2021. The judgment does not mention CPS' liquidation. This is unsurprising, given Nortons' statement that FUL had given the requisite notice in terms of section 359(2)(a) and the absence of any response from the liquidators. It turns out, however, that the provisional liquidators had tried, in a letter dated 18 January 2021, to communicate with this Court in response to the Nortons letter. Unfortunately, the

⁷ 61 of 1973. In terms of item 9 of Schedule 5 to the Companies Act 71 of 2008 (2008 Act), Chapter 14 of the 1973 Act continues to apply with respect to the winding-up and liquidation of insolvent companies under the 2008 Act, as if the 1973 Act had not been repealed. Section 359 of the 1973 Act is part of Chapter 14. Section 359(1)(a) provides, in relevant part, that when a court has made an order for the winding-up of a company, "all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator". Section 359(2)(a) reads in relevant part:

"Every person who, having instituted legal proceedings against the company which were suspended by a winding-up, intends to continue the same, . . . shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings."

provisional liquidators' letter was sent to an email address of a registrar who left this Court's service at the end of December 2020. The Court was thus left in ignorance of the provisional liquidators' position. Although more than two months passed before delivery of judgment on 1 April 2021, the provisional liquidators seemingly took no steps to make sure that their letter had been received.

[11] In the letter of 18 January 2021, which is attached to the founding affidavit in the variation application, the provisional liquidators stated that FUL's notice in terms of section 359(2)(a) was premature because CPS' final liquidators⁸ had not yet been appointed. The provisional liquidators contended that in terms of section 359(1) all proceedings against CPS were suspended until the appointment of final liquidators. They promised to notify Nortons and this Court as soon as final liquidators were appointed.

SARS' joinder and associated variations

[12] The present applicants allege that SARS has a direct and substantial interest in the matter. On analysis, however, the applicants' case amounts to no more than an assertion that it would be convenient for the RAIN verification and the SARS audit to proceed in parallel in accordance with a common timetable. This does not show that SARS has a direct and substantial interest in the relief which FUL was seeking or in the relief which this Court granted in the April 2021 order.⁹ The April 2021 order does not affect SARS' rights, obligations or duties in any way, and effect can be given to the order as it stands without any cooperation from SARS.

⁸ To avoid confusion, we refer throughout to a "final liquidator", though the 1973 Act refers simply to a "liquidator". Section 1 of the 1973 Act defines "liquidator" as including a provisional liquidator. This definition applies unless the context indicates otherwise. There are certain provisions in Chapter 14 of the 1973 Act in relation to which it has been held that "liquidator" does not include a provisional liquidator. A provisional liquidator is appointed by the Master in terms of section 368 as soon as a winding-up order has been made. The (final) liquidator is appointed by the Master in terms of section 369(2) in accordance with nominations adopted at the first meeting of creditors held in terms of section 364.

⁹ *South African Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC) at para 9, stating that a direct and substantial interest is a "legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court", a test requiring it to be shown that the party in question "has a right adversely affected or likely to be affected by the order sought".

[13] Although SARS has consented to its joinder, it has not said that it agrees to the relief which the provisional liquidators seek against it in the varied order. This Court has no jurisdiction in the tax dispute between CPS and SARS. If SARS and CPS' liquidators find it convenient for the SARS audit and the RAIN verification to proceed in parallel, SARS can of its own accord submit a timeous list of required documents to the liquidators, and the liquidators can provide SARS with a timeous response. If SARS would benefit from seeing the updated RAIN report, the liquidators will be at liberty to furnish it to SARS.

[14] It follows that the prayer for SARS' joinder must be refused, and with it those variations of the April 2021 order making reference to SARS.

Variation in respect of CPS' description

[15] CPS' final liquidation is a fact. The addition of the words "(in liquidation)" wherever its name appears in the April 2021 order would have no substantive effect. CPS as a company has not ceased to exist because it is in final liquidation nor has it been divested of its assets and liabilities.¹⁰ The provisional liquidators have not sought to have themselves joined *nomine officii* (in their official capacities). The proposed variation does not involve a substitution of parties as envisaged in this Court's rule 7(1).¹¹

[16] If there are further proceedings in the main case, the addition of the words "(in liquidation)" after CPS' name might be desirable, but there is no justification for an application to vary the April 2021 order in this respect. Section 49(5) of the 1973 Act provided that if a company was being wound up by the court, the statement

¹⁰ *Secretary for Customs and Excise v Millman N.O.* 1975 (3) SA 544 (A) at 552G and *Millman N.O. v Koetter* 1993 (2) SA 743 (C) at 756J-757A. See also Blackman et al *Commentary on the Companies Act* (Juta & Co Ltd, Cape Town 2002) vol 3 at 250-3 and 251 (Blackman).

¹¹ Rule 7(1) reads:

"If a party dies or becomes incompetent to continue any proceedings, the proceedings shall thereby be stayed until such time as an authorised representative or other competent person has been appointed in the place of such party, or until such incompetence ceases to exist."

“in liquidation” should be included in and be subjoined to its name, but this provision has not been carried forward into the 2008 Act.¹²

Variations in respect of CPS’ final liquidators

[17] In their founding papers the applicants submit that the word “liquidator” in section 359 refers to a final liquidator, not a provisional liquidator. This contention is supported by authority¹³ and can be accepted as correct for present purposes. If the applicants’ letter of 18 January 2021 had reached the Registrar, this Court’s attention would have been directed to this issue. Arguably the proceedings would have needed to be stayed, at least as against CPS, until final liquidators were appointed.

[18] We say arguably, because FUL has advanced submissions in support of a contrary view, contending that in the particular circumstances of this case, section 359(1)(a) would have not been operative. The circumstances include: (a) that the April 2021 order merely provided additional machinery to ensure compliance with orders made before CPS’ liquidation; (b) that the orders were made against CPS not as an ordinary commercial entity but as an organ of state;¹⁴ (c) that all affidavits and submissions had been filed by the time CPS was placed in liquidation, and that CPS had not opposed the relief granted in the April 2021 order; and (d) that on 1 February 2021 the Master of the High Court, Pretoria, granted the provisional liquidators extended powers in terms of section 387(2) of the Act, including the power to institute and defend proceedings in the name of and on behalf of the company.

¹² Item 2(3) of Schedule 5 to the 2008 Act provides that, despite the repeal of the 1973 Act, sections 49(5) to (7) continue to apply to a pre-existing company that was, immediately before the coming into force of the 2008 Act, engaged in any circumstances contemplated in those provisions. This saving provision does not apply to CPS, which only went into liquidation in October 2020. Section 49(5) does not form part of Chapter 14 of the 1973 Act, and is thus not given extended life, at least not expressly, by item 9 of Schedule 5, though the authors of Yeats et al *Commentary on the Companies Act of 2008* (Juta & Co Ltd, Cape Town 2018) vol 2 at Sched-164 write that “[p]erhaps an argument can be made that the provision [section 49(5)] is incorporated by implication”.

¹³ See, among other cases, *Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (In Liquidation)* [2009] ZASCA 103; 2010 (2) SA 517 (SCA) at para 2, approving the decision on this point in *Strydom N.O. v MGN Construction (Pty) Ltd: In re Haljen (Pty) Ltd (In Liquidation)* 1983 (1) SA 799 (D) at 806B-807H.

¹⁴ *Allpay* above n 1 at paras 52-9 and *Black Sash* above n 2 at paras 41, 53 and 79.

[19] It is idle to speculate what course the matter would have taken if the liquidators had taken care to ensure that this Court was aware of their position as set out in the letter of 18 January 2021. It is also unnecessary to decide whether or not section 359(1)(a) would have been operative. As a fact, the April 2021 order was issued. The applicants do not assert that because of section 359(1)(a), the April 2021 order either was a nullity or should be rescinded. Instead, they seek a variation, which presupposes the binding force of the April 2021 order. Stated differently, they accept that if they have not made out grounds for a variation, the April 2021 order stands and remains binding.

[20] In our view, the applicants have not made out a case for a variation. Section 359(1)(a) is not a legal basis for varying a valid order; it is a basis for staying civil proceedings. The applicants are not seeking a stay of the FUL proceedings. What they are seeking is a variation which will defer CPS' obligation to furnish documents to RAIN, and CPS' right to make submissions to National Treasury, until final liquidators are appointed, and to impose the obligation and confer the right in question not on CPS but on its final liquidators. The effect of the variations they seek would also be to defer the obligations of KPMG and Mazars.

[21] The applicants have not pointed to any statutory provision which renders compliance with the April 2021 order beyond the competence of provisional liquidators. Although they say that it is not possible for them to comply with the April 2021 order, they have not identified any relevant statutory competence which final liquidators will have but which they lack. They allege that compliance will be daunting because RAIN's list of required documents is extensive. If this is true, it will also be daunting for final liquidators, but this has no bearing on the legal competence of either the provisional or the final liquidators to comply. The applicants say that they have already started the process of locating the relevant documents in conjunction with CPS' directors, which refutes the notion that compliance is something beyond their statutory powers. In terms of their extended powers, they are entitled to engage professional assistance reasonably required to perform their duties.

[22] The proposed variations are objectionable for another reason. The provisional liquidators are seeking to impose obligations on final liquidators. The present applicants may or may not receive appointment as final liquidators. This Court cannot grant orders against absent persons.

[23] The true position is that the April 2021 order is directed at CPS, the company. Those in control of CPS' affairs from time to time are required to ensure that the company complies. At the present time, those persons are the provisional liquidators. In terms of section 361(1) they have custody and control of all CPS' property.¹⁵ This includes its books, records and documents. If any directors, members, agents or officers of CPS have such items in their possession and refuse to surrender them voluntarily, the provisional liquidators have the power in terms of section 362(1) to compel delivery to themselves of any such property to which CPS is *prima facie* entitled.¹⁶ We should add that the applicants do not claim a lack of cooperation from those formerly in control of CPS' affairs.

[24] The primary function of an insolvent company's final liquidator is to realise the company's assets and distribute the proceeds to those entitled to them. In relation to these functions, the provisional liquidator may be viewed as a temporary caretaker of the company's affairs, preserving the status quo until the appointment of the final liquidator. But the compliance required from CPS in terms of the April 2021 order has

¹⁵ Section 361(1) reads:

“In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.”

This necessarily implies that upon the appointment of the provisional liquidator the latter has custody and control of the company's property (Delpont and Vorster *Henochsberg on the Companies Act 71 of 2008* (LexisNexis, Durban 2021) vol 1 at 764 and Blackman above n 10 at 14-251).

¹⁶ Section 362(1) reads:

“The Court may at any time after making a winding-up order . . . order any director, member, trustee, banker, agent or officer of the company concerned to pay, deliver, convey, surrender or transfer to the liquidator of the company forthwith, or within such time as the Court directs, any money, property or books and papers in his hands to which the company is *prima facie* entitled.”

In Blackman above n 10 at 14-255, the authors state that clearly a provisional liquidator may bring an application in terms of this provision.

nothing to do with the winding up of the company in this sense. The April 2021 order is the last in a series of just and equitable orders made against CPS in the exercise of this Court's constitutional jurisdiction under section 172(1)(b) following upon the declaration of constitutional invalidity issued on 17 April 2014. If provisional liquidators needed special statutory powers in order to cause CPS to comply with the April 2021 order, the same would be true of final liquidators, because even final liquidators only exercise special statutory powers if they have the authority of creditors or directions from the Master.¹⁷ Yet it is unthinkable that CPS' compliance with the this Court's order should depend on whether creditors or the Master are willing to authorise the liquidators, provisional or final, to comply with the order. Liquidators may be entitled to elect whether or not they will cause the company to perform an executory contract. Compliance with this Court's April 2021 order, however, is not optional, and there is thus no reason to delay compliance.

Conclusion

[25] The application stands to be dismissed. There being no formal opposition, no order as to costs will be made.

Order

[26] The following order is made:

1. The application is dismissed.

¹⁷ See sections 386(3) and 387 of the 1973 Act.