



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/13

In the matter between:

ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD	First Applicant
ALLPAY FREE STATE (PTY) LTD	Second Applicant
ALLPAY WESTERN CAPE (PTY) LTD	Third Applicant
ALLPAY GAUTENG (PTY) LTD	Fourth Applicant
ALLPAY EASTERN CAPE (PTY) LTD	Fifth Applicant
ALLPAY KWAZULU-NATAL (PTY) LTD	Sixth Applicant
ALLPAY MPUMALANGA (PTY) LTD	Seventh Applicant
ALLPAY LIMPOPO (PTY) LTD	Eighth Applicant
ALLPAY NORTH WEST (PTY) LTD	Ninth Applicant
ALLPAY NORTHERN CAPE (PTY) LTD	Tenth Applicant
MICAWBER 851 (PTY) LTD	Eleventh Applicant
MICAWBER 852 (PTY) LTD	Twelfth Applicant
MICAWBER 853 (PTY) LTD	Thirteenth Applicant
MICAWBER 854 (PTY) LTD	Fourteenth Applicant
and	
CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	First Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY	Second Respondent
CASH PAYMASTER SERVICES (PTY) LTD	Third Respondent
EZIDLUBHEDU INVESTMENT HOLDINGS (PTY) LTD	Fourth Respondent
FLASH SAVINGS AND CREDIT COOPERATIVE	Fifth Respondent
ENLIGHTENED SECURITY FORCE (PTY) LTD	Sixth Respondent
MOBA COMM (PTY) LTD	Seventh Respondent
EMPILWENI PAYOUT SERVICES (PTY) LTD	Eighth Respondent
PENSION MANAGEMENT (PTY) LTD	Ninth Respondent
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MASINGITA FINANCIAL SERVICES (PTY) LTD	Tenth Respondent
SOUTH AFRICAN POST OFFICE	Eleventh Respondent
ROMAN PROTECTION SOLUTIONS CC	Twelfth Respondent
UBANK LIMITED	Thirteenth Respondent
AFRICAN RENAISSANCE INVESTMENT MANAGEMENT (PTY) LTD	Fourteenth Respondent
STANDARD BANK GROUP LIMITED	Fifteenth Respondent
NEW SOLUTIONS (PTY) LTD	Sixteenth Respondent
ITHALA LIMITED	Seventeenth Respondent
KTS TECHNOLOGY SOLUTIONS CONSORTIUM	Eighteenth Respondent
SOUTH AFRICAN RESERVE BANK	Nineteenth Respondent
PAYMENT ASSOCIATION OF SOUTH AFRICA	Twentieth Respondent
and	
CORRUPTION WATCH	First Amicus Curiae
CENTRE FOR CHILD LAW	Second Amicus Curiae
BLACK SASH TRUST	Third Amicus Curiae

Neutral citation: *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2015] ZACC 7

Coram: Mogoeng CJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J and Tshiqi AJ

Judgments: The Court

Heard on: 19 March 2015

Decided on: 24 March 2015

Summary: Review application in light of previous Court order — agreed order issued by the Court — judgment reserved on contested paragraph — Court retains supervisory jurisdiction — paragraph added to order to provide that further relief may only be sought in this Court — interests of the beneficiaries will be central to the exercise of the Court’s jurisdictional discretion

ORDER

1. CPS has only the following five remaining objections to the draft amended RFP (Annexure DDSA1 at page 620ff of the Record):
 - 1.1 Beneficiaries;
 - 1.2 Biometrics;
 - 1.3 Three free withdrawals;
 - 1.4 Functional evaluation criteria; and
 - 1.5 Home deliveries.
2. SASSA shall effect its proposed amendments to the RFP to address the issues in paragraphs 1.1-1.5 by 2 April 2015.
3. To the extent that CPS still has any remaining objections to the draft RFP as amended by SASSA in terms of paragraph 2:

- 3.1 CPS shall notify the parties and the Court by 16 April 2015;
- 3.2 The Court will issue directions for an urgent hearing to resolve CPS's notified issues.
4. Save in the event of any objections made in terms of paragraph 3:
 - 4.1 SASSA shall circulate the RFP to all the parties, the Court and the prospective bidders by 17 April 2015.
 - 4.2 All bids must be submitted by 17 May 2015; and
 - 4.3 SASSA shall award the new tender by 15 October 2015.
5. The parties may only approach this Court for further relief.

JUDGMENT

THE COURT

[1] This judgment deals with a very narrow issue,¹ but it needs an explanation on how it came about that only this issue needs to be decided.

[2] The matter stems from two earlier judgments of this Court.² In *AllPay 1*, this Court set aside a tender for the provision of social grants to approximately 15 million beneficiaries. In the subsequent judgment on the remedy (*AllPay 2*), the Court declared invalid the contract between the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Ltd (CPS) for the payment of social grants and ordered that the tender process be re-run. The declaration of invalidity of

¹ See [11].

² *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay 1*) and *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay 2*).

the contract was suspended to allow SASSA an opportunity to re-run the tender process and take a decision on whether to award a new tender.

[3] To ensure effective monitoring, accountability and impartiality the Court imposed a structural order requiring SASSA to report back to it at various stages of the new tender process and mandated that new members of the Bid Evaluation and Bid Adjudication Committees be appointed.³

[4] On 5 November 2014 the third respondent in the original application (*AllPay 1*), CPS, lodged a “Notice of Request by CPS for Ancillary Relief to Structural Interdict”. This was done on the basis that the matter was still “in progress” due to the supervisory order granted in *AllPay 2*. In the alternative, CPS sought direct access to this Court for the same relief.

[5] In its application, CPS sought an order declaring that the Request for Proposals (RFP) issued by SASSA in response to *AllPay 2* (contested RFP), does not comply with the previous judgments and orders of this Court in *AllPay 1* and *AllPay 2*, and is thus invalid. CPS sought to have the contested RFP set aside. It asked this Court to require SASSA to publish a revised RFP that complies with this Court’s previous order in *AllPay 2*.

[6] We then issued the following directions:

- “1. The first and second respondents must:
 - a) By no later than Monday 8 December 2014 issue a bidder’s notice extending the deadline for the submission of bids to 27 February 2015;

³ The order at para 3.3 reads:

“A new and independent Bid Evaluation Committee and Bid Adjudication Committee must be appointed to evaluate and adjudicate the new tender process. Their evaluation and adjudication must be made public by filing with the Registrar of this Court a status report on the first Monday of every quarter of the year until completion of the process.”

- b) Finalise its proposed amendments to the [contested] Request for Proposals (RFP) by 15 December 2014 and file a copy of the draft amended RFP with this Court by 20 December 2014;
- c) Circulate the draft amended RFP to all litigating parties and all the other bidders by 20 December 2014. The draft amended RFP must highlight all the changes made in response to this application and to the questions posed by those bidders who sought to obtain clarity through the written question and answer procedure contained in the [contested] RFP;
- d) Issue a bidder's notice calling upon all bidders who have objections or questions to the draft amended RFP, to furnish that to the second respondent by 15 January 2015.

2. The litigating parties may, if they so choose, file further short affidavits in the application itself by 20 January 2015.”

[7] After this was done the Court directed SASSA to confirm by Tuesday, 10 February 2015, that it did not wish to make further amendments to the draft amended RFP; alternatively, if it did, to file a revised version of the draft amended RFP by Friday, 13 February 2015. SASSA filed a request for an extension for the submission of the proposed amendments to the draft amended RFP. It sought an extension of the deadline for submitting a revised version of the RFP to 15 May 2015, and an extension of the deadline for the submission of bids to 15 June 2015.

[8] The matter was then set down for hearing on Thursday, 19 March 2015, with directions that the parties file short written submissions by Friday, 6 March 2015, on the following two issues:

- (1) whether an extension to allow for the further amendment of the draft amended RFP, arising from any legislative change to the legal regulatory framework existing when the remedial order granted by this Court in *AllPay 2* was made, is competent; and
- (2) if not, the parties' final submissions on the validity of the draft amended RFP.

[9] The Black Sash Trust subsequently sought and was granted leave to act as a friend of the court (*amicus curiae*). It sought to introduce evidence to the effect that the current service provider, CPS, is subjecting beneficiaries to unlawful deductions from their grants. It contended that the central concern is that there is a need for swift action to ensure that the new tender is awarded and implemented as soon as possible.

[10] At the hearing on 19 March 2015 the parties sought, and were granted, time to attempt to come to an agreement on the further conduct of the matter, and handed up a draft order in the following terms:

“IT IS ORDERED THAT:

1. CPS has only the following five remaining objections to the draft amended RFP (Annexure DDSA1 at page 620ff of the Record):
 - 1.1 Beneficiaries;
 - 1.2 Biometrics;
 - 1.3 Three free withdrawals;
 - 1.4 Functional evaluation criteria; and
 - 1.5 Home deliveries.
2. SASSA shall effect its proposed amendments to the RFP to address the issues in paragraphs 1.1-1.5 by 2 April 2015.
3. To the extent that CPS still has any remaining objections to the draft RFP as amended by SASSA in terms of paragraph 2:
 - 3.1 CPS shall notify the parties and the Court by 16 April 2015;
 - 3.2 The Court will issue directions for an urgent hearing to resolve CPS’s notified issues.
4. Save in the event of any objections made in terms of paragraph 3:
 - 4.1 SASSA shall circulate the RFP to all the parties, the Court and the prospective bidders by 17 April 2015.
 - 4.2 All bids must be submitted by 17 May 2015; and
 - 4.3 SASSA shall award the new tender by 15 October 2015.
5. Directing that parties may only approach this Court for further relief if it is necessary to protect the interests of beneficiaries.”

[11] We were informed from the bar that all the parties agreed to paragraphs 1 to 4 of the draft order, but that only CPS objected to paragraph 5. After hearing argument, an order was made in terms of paragraphs 1 to 4 and judgment was reserved on whether paragraph 5 should also form part of the order. That is the narrow issue referred to at the outset of this judgment.

[12] The argument in favour of the inclusion of paragraph 5 was grounded in the need for finalisation of the tender process in the interests of beneficiaries. The concern noted, in varying degrees, in the papers by all parties (except CPS itself) was that any delay in finalisation benefitted CPS both financially in relation to the period still to run under the invalid tender and in the allocation of a new tender.

[13] That is a legitimate concern, but it is addressed by a number of factors.

[14] The first is that the finalisation of the tender process is assured by the order agreed to by all in paragraphs 1 to 4. Paragraph 3 limits the circumstances under which CPS may pursue remaining objections. It must be remembered that CPS brought its application as one either for ancillary relief to the Court's structural order in *AllPay 2*, or for direct access. If CPS does not pursue any further objections, the purpose of its application has been achieved and can be pursued no further, except perhaps for the question of costs. If it does pursue further objections, the remaining merits of its application will be finally determined in an expedited hearing. Either way, the finalisation of the process, culminating in the award of the tender by 15 October 2015, will not be significantly delayed.

[15] If concerns about the alleged unlawful deductions from beneficiaries' accounts and the continued benefits that CPS is alleged to reap from the continuation of the invalid tender are to be introduced in these proceedings, it will have an adverse effect on the finalisation of the process. It should not be forgotten that our judgment in *AllPay 2* clearly stated that, despite the suspension of the declaration of invalidity of the contract, CPS (1) has the constitutional obligation to ensure that a workable

payment system remains in place until a new one is operational;⁴ (2) has no right to benefit from an unlawful contract;⁵ and (3) was ordered to account for its benefits under the invalid contract.⁶ These aspects may, if necessary, be pursued in the future.

[16] CPS brought the application to this Court on the basis that it was entitled to do so as ancillary relief to our supervisory order. The assumption that this Court retains supervisory jurisdiction to the exclusion of other courts until completion of the process is correct. To the extent that it is necessary to make this clear, an additional paragraph 5 should be added to the order already issued, but not on the terms suggested in the draft order.

[17] The request to make it explicit that parties may approach only this Court for further relief if it is necessary to protect the interests of beneficiaries cannot be granted. It is difficult, if not impossible, to imagine on what basis (other than those

⁴ *AllPay 2* above n 2 at para 66:

“Where an entity has performed a constitutional function for a significant period already, as [CPS] has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on [CPS] fulfilling its constitutional obligations. For this reason, [CPS] cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational.” (Footnote omitted.)

⁵ *Id* at para 67:

“It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to [CPS]. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit that it may derive should not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in [CPS’s] hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract. As noted earlier, the disclosure of this information does not require disclosure of information relating to [CPS’s] other private commercial interests. But its assumption of public power and functions in the execution of the contract means that, in respect of its gains and losses under that contract, [CPS] ought to be publicly accountable.” (Footnote omitted.)

⁶ *Id* at paras 4.2 and 4.3 of the order (at para 78) which read:

- “4.2 Within 60 days of the completion of the five-year period for which the contract was initially awarded, [CPS] must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.
- 4.3 SASSA must within 60 days thereafter obtain an independent audited verification of the details provided by [CPS] under paragraph 4.2 and file the audited verification with this Court.”

agreed to in paragraph 3 of the order already granted) any of the parties could approach this Court for further relief. But if that highly unlikely possibility materialises, the interests of beneficiaries will surely be at the heart of deciding whether it is in the interests of justice to entertain the application, not as a preliminary bar to access to this Court, but in exercising the jurisdictional discretion that belongs to this Court.

[18] The following paragraph is thus added to this Court's earlier order:

"5. The parties may only approach this Court for further relief."

[19] For the sake of clarity and convenience, the complete composite order is set out below.

Order

1. CPS has only the following five remaining objections to the draft amended RFP (Annexure DDSA1 at page 620ff of the Record):
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 - 4.3 SASSA shall award the new tender by 15 October 2015.
 5. The parties may only approach this Court for further relief.
-

For the Applicants:

G Marcus SC, D Unterhalter SC,
M Du Plessis, C Steinberg and
A Coutsooudis instructed by Nortons
Incorporated.

For the First and Second Respondents:

N Cassim SC, M Mostert and
M Mathaphuna instructed by the State
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For the Third Respondent:

J J Gauntlett SC, D Fisher SC,
F B Pelsler and J Bleazard instructed by
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G Budlender SC and M Bishop
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Centre.