

**SOUTH AFRICAN SOCIAL SECURITY AGENCY**

**RE:  ADVICE ON FULFILING THE CONSTITUTIONAL  
OBLIGATION OF PAYING SOCIAL GRANTS**

**OPINION**

**BY**

**ADV. MUZI SIKHAKHANE SC**

## INTRODUCTION

1. My advice is sought by the South African Social Security Agency (“SASSA”) regarding the contract it has with a service provider, which contract/tender was declared unlawful and comes to an end soon. As I understand it, SASSA is concerned about the precise import of the AllPay judgment as it considers various options to pay social grants to deserving beneficiaries.
2. SASSA is considering various options to ensure that it continues to meet its constitutional obligation and pay social security grants to the registered beneficiaries in line with its constitutional duty beyond the expiry of its contract with Cash-Pay Master Service (Pty) Ltd (“CPS”).
3. The aforesaid agreement is due to expire in March 2017. SASSA must then explore its options in order to ensure that the payments are not interrupted. Meeting this obligation is dependent upon a plethora of factors, including the lawfulness of the extension of the current agreement or insourcing the capacity to make the social security payments or commencing, in time, new tender procedures.

4. In this context, the precise issues upon which my advice is sought are the following:
  - 4.1. if there are legal methods which SASSA can utilize to ensure the continued payment of social grants after the expiration of the agreement with CPS;
  - 4.2. whether or not SASSA can use the provisions of section 238 of the Constitution to contract other state institution for the provision of the social grant payment services;
  - 4.3. whether or not the Constitutional Court is the correct forum to approach in order to seek leave for the intended approach (considering that it has discharged its supervisory function). If so, would SASSA be expected to serve its report including the intention / application to conclude a new contract with CPS to the other parties cited in the ALLPAY / SASSA et al matter.

## SYNOPSIS OF THE OPINION

5. The synopsis or summary of my opinion is as follows:
  - 5.1. There are various methods which SASSA can utilize to continue to pay social grants. I advise that the best option would be for SASSA to perform the ancillary services *alternatively* delegate the said functions / services to another organ of state in terms of section 238 of the Constitution.
  - 5.2. SASSA is bound by the procurement framework and cannot only seek services from one supplier, namely CPS.
  - 5.3. It is advisable for SASSA to report to the Constitutional Court on its chosen option or solution for the payment of social grants. This report should also be served on the other relevant parties. In the event that SASSA seeks to extend the agreement, it may have to approach the Constitutional Court in this regard.
6. This opinion is provided on an urgent basis and without the benefit of a consultation and other relevant documents such as the SASSA-CPS contract. If so required, I will supplement this opinion on receipt of further

instructions.

## **RELEVANT BACKGROUND AND CONTEXT**

9. Approximately 16 (sixteen) million South Africans are dependent on the payment or are recipients of some form of social grant or the other in terms of the Social Assistance Act. I am instructed that about eleven million of the social grant beneficiaries receive their grants through the agreement with CPS
10. SASSA was established to administer the payment of social grants under a unified, single national authority, and in so doing unite fragmented provincial payment systems.
11. When SASSA inherited its responsibilities there were serious shortcomings and flaws in the methods of payment, with many grants paid in cash by contracted service providers appointed by the provincial departments. The system was therefore decentralized and vulnerable to fraudulent conduct, which was widespread and common place. Further, there were some concerns relating to the procurement of the service providers.

12. There was a need for a new payment system, which would enhance rather than compromise and undermine the very object of the grant system. When SASSA implemented the new payment system for social grants, its intention was to ensure that the poor and vulnerable in our society access their constitutional entitlements with dignity. The new payment system sought to facilitate financial inclusion so that social grant recipients had access to banking facilities that would allow them to access their funds safely within the framework of the financial infrastructure of the National Payment System that all South Africans enjoy.
13. While payments were largely electronic before, beneficiaries could only access their funds through the infrastructure SASSA provided as the system was not interoperable with the NPS. The new system was also geared towards closing the short comings and leakages associated with the old payment system and rooting out fraud and corruption.
14. In April 2012 SASSA appointed CPS to pay or disburse social grant to qualifying social grant beneficiaries on its behalf. The contract is for five years and ends in March 2017.
15. The SASSA-CPS agreement was challenged by AllPay Consolidated Investment Holdings (Pty) Ltd ("AllPay"). On 29 November 2013 the

Constitutional Court declared that “*the award of the tender to CPS to provide services for payment of social grants over a period of five years for all nine provinces is constitutionally invalid.*”

16. The Constitutional Court ordered that the declaration of invalidity be suspended pending the determination of a just and equitable remedy. In this regard, the Constitutional Court ordered the parties to submit information / reports to it regarding a just and equitable remedy and/or arrangements.
17. Pursuant to the Constitutional Court’s order, the parties to the aforesaid litigation including SASSA submitted the information and reports.
18. On 17 April 2014 the Constitutional Court then made the remedy, having received submissions from the relevant parties. It is apposite for me to quote the Constitutional Court in this regard:

“1. *The Contract for the Payment of Social Grants between the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Ltd (Cash Paymaster) dated 3 February 2012 is declared invalid.*”

2. *This declaration is suspended pending the decision of SASSA to award a new tender after completion of the tender process ordered in paragraph 3 below.*
  
3. *SASSA must initiate a new tender process for the payment of social grants within 30 days of this order:*
  - 3.1. *The request for proposals for the new tender must, in addition to any other requirements that SASSA is entitled to prescribe, contain adequate safeguards to ensure that—*
    - (a) *if any re-registration process is required, no loss of lawful existing social grants occurs;*
    - (b) *the payment of lawful existing grants is not interrupted; and*
    - (c) *personal data obtained in the payment process remains private and may not be used in any manner for any purpose other than payment of the grants or any other purpose*



*sanctioned by the Minister in terms of section 20(3) and (4) of the Social Assistance Act 13 of 2004.*

3.2 *The new tender must be for a period of five years.*

3.3 *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.*

4. *If the tender is not awarded, the declaration of invalidity of the contract in paragraph 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded:*

4.1 *Within 14 days of the decision not to award the tender SASSA must lodge a report with the Registrar of this Court setting out all the relevant information on whether and when it will be ready to assume the duty to pay grants*

*itself.*

- 4.2 *Within 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster 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 Cash Paymaster under paragraph 4.2 and file the audited verification with this Court.*
5. *The applicants must pay SASSA and Cash Paymaster's costs in relation to the application, brought in the main application on the merits, to lead further evidence.*
6. *There is no further costs order."*

19. It is apparent from documentation with which I have been furnished that SASSA has advised the Constitutional Court that it does not intend to award a tender for the payments of social grants.<sup>1</sup>

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<sup>1</sup> Progress Report of 15 October 2015

20. In the report of 5 November 2015 SASSA has advised the Constitutional Court that “SASSA is now in a position to against direct its focus on taking over the payment of social grants.”<sup>2</sup> SASSA indicated that it was already performing the main functions in the payment chain save for the actual payment of social grants to beneficiaries and related functions. However, it is intended that when the time comes (March 2017) SASSA will be able to take over the payment of social grants.<sup>3</sup>
21. SASSA also reported to the Constitutional Court that it intends to outsource some ancillary services. These include card issuing, cash distribution and cash security.<sup>4</sup>
22. I now turn to discuss the legal framework and principles.

## **THE CONSTITUTIONAL AND LEGISLATIVE SCHEME**

### **SASSA Legislation**

23. Section 27 of the Constitution guarantees to everybody the right to social

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<sup>2</sup> Progress Report of 5 November 2015

<sup>3</sup> Progress Report of 5 November 2015 para 13

<sup>4</sup> Progress Report of 5 November 2015 para 14

security. Section 27(1) provides in relevant part that:

“(1) *Everyone has the right to have access to –*

...

*(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”*

24. The Social Assistance Act 13 of 2004 (“the Act”) was enacted to give effect to section 27(1)(c) and in acknowledging the State’s obligation to take reasonable measures –within its available resources to achieve the progressive realisation of the rights to access social security.<sup>5</sup>

25. The objects of the Act are thus to:

25.1. provide for the administration of social assistance and payment of social grants;

25.2. make provision for social assistance and to determine the qualification requirements in respect thereof;

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<sup>5</sup> Preamble to the Act

- 25.3. ensure the minimum norms and standard are prescribed for the delivery of social assistance; and
- 25.4. provide for the establishment of an inspectorate for social assistance.
26. In terms of section 2(2) of the Act, SASSA is responsible for the administration of social assistance in terms of chapter 3 (of the Act) and any function delegated to it. This is important to note. In other words, SASSA is legislatively obliged to administer social assistance.<sup>6</sup> It has the primary responsibility to ensure the provision of comprehensive social security services. These services are provided to give effect to section 27 of the Constitution and protect qualifying beneficiaries against vulnerability and poverty within the constitutional and legislative framework
27. SASSA is established in terms of section 2 of the South African Social Security Agency Act No.9 of 2004 (“the Agency Act”). Section 2(2) of the

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<sup>6</sup> The administration process is as set out in Chapter 3 of the Act and regulates the: application for social assistance; appointment of procurators; discontinuation of benefits; recovery of overpaid monies; reconsideration of decisions made in relation to social grants; abuse of social grants; restrictions on the transfer of rights to social assistance; false representations; handling of information furnished to the agency by third parties; and SASSA’s investigative powers.

Agency Act further provides that SASSA is subject to the Public Finance Management Act No.1 of 1999 (“the PFMA”).

28. The Agency Act is among other objects aimed at giving effect to section 27 of the Constitution; assisting in securing the well-being of people of the Republic and to provide effective, transparent, accountable and coherent governance in respect of social security in the Republic.
29. SASSA’s objects (as set out in section 3 of the Agency Act) are to:
  - 29.1. act as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance;
  - 29.2. serve as an agent for the prospective administration and payment of social security; and
  - 29.3. render services relating to such payments.
30. It is also important to have regard to the functions of SASSA as set out in section 4 of the Agency Act.

#### **4. Functions of Agency.**

- (1) *The Agency must—*
- (a) *administer social assistance in terms of Chapter 3 of the Social Assistance Act, 2004, and perform any function delegated to it under that Act;*
  - (b) *collect, collate, maintain and administer such information as is necessary for the payment of social security, as well as for the central reconciliation and management of payment of transfer funds, in a national data base of all applicants for and beneficiaries of social assistance;*
  - (c) *establish a compliance and fraud mechanism to ensure that the integrity of the social security system is maintained; and*
  - (d) *render any service in accordance with an agreement or a provision of any applicable law as contemplated in subsection (4).*
- (2) *The Agency may—*
- (a) *with the concurrence of the Minister enter into an agreement with any person to ensure*

effective payments to beneficiaries, and such an agreement must include provisions contemplated in subsection (3).

(b) do anything necessary for the realisation of the Agency's objects.

(3) *The agreement contemplated in subsection (2) (a) must include provisions to ensure—*

(a) the effective, efficient and economical use of funds designated for payment to beneficiaries of social security;

(b) *the promotion and protection of the human dignity of applicants for and beneficiaries of social security;*

(c) *the protection of confidential information held by the Agency other than as is contemplated in section 16;*

(d) *honest, impartial, fair and equitable service delivery;*

(e) *mechanisms to regulate community participation and consultation; and*

(f) *financial penalties for non-compliance with the provisions of the agreement.*



*(4) The Agency may in terms of any applicable law or any agreement between itself and any other relevant authority responsible for the provision of forms of social security, other than social assistance, administer, evaluate and verify any application for such forms of social security and effect payment in respect thereof.*

[Own Emphasis]

31. It is therefore important that SASSA is aware of its obligations both in terms of the Act and the Agency Act and the Constitution. It is for that reason that SASSA must avoid the inability to fulfil its obligation –mainly the payment of social assistance either by itself or through another person.<sup>7</sup>
37. Sections 3 and 4 of the Agency Act provides SASSA is the sole agency responsible for the administration and payment of social assistance. In this regard, SASSA must see to it that it fulfils its obligations.
38. Section 4(2) of the Agency Act permits SASSA to enter into an agreement

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<sup>7</sup> Section 4(2) of the Agency Act

with any person to ensure that it (SASSA) fulfills its obligation –stated in section 3. In other words, while SASSA is the sole agent it is contemplated by the Agency Act that SASSA may outsource its functions to any person. This would be in the form of an agreement entered into with the concurrence of the Minister.

39. I now turn to discuss the general principles relating to the aforesaid outsourcing, mainly relating to procurement.

### ***Procurement in General***

40. It is unnecessary to traverse all the applicable principles relating to the procurement of goods and services by organs of State save to state that it is subject to a very stringent process.
41. It is trite that SASSA is an organ of state as defined in section 239 of the Constitution. I need not traverse that aspect.
42. The starting point is the Constitution. Section 217 (1) of the Constitution provides that when organs of state contract for goods and services, they must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217 of the Constitution provides as follows:

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.**
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –**
  - (a) categories of preference in allocation of contracts; and**
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.**
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.**

43. The Preferential Procurement Policy Framework Act 5 of 2000 (“the PPPFA”) was then enacted to give effect to section 217 of the Constitution and providing a framework for the implementation of procurement policy.

44. Organs of State, such as SASSA, are then expected to have a procurement policy (the SCM Policy) that is consistent and implemented in accordance with the procurement framework in the PPPFA.<sup>8</sup>

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<sup>8</sup> See also section 38 of the PFMA

45. The second statute providing for procurement principles is the PFMA which provides for the general system for public procurement and financial management accountability for organs of state.
46. The Treasury Regulations issued in terms of section 76(4)(c) of the PFMA (“Regulations”), provide for various matters including supply chain management in Regulation 16A.
47. Regulation 16A3.1 obliges an accounting officer or authority of an organ of state to develop and implement an effective and efficient supply chain management institution for the procurement of good and services. Regulation 16A3.2 provides further that the supply chain management system must be *fair, equitable, transparent, competitive and cost effective*; consistent with the PPPFA and the Broad Based Black Economic Empowerment Act 53 of 2003.
48. It is therefore impermissible for an organ of state to procure goods and services in breach of the procurement framework –especially without going on open tender for competitive bids. This was confirmed by the High Court in a case involving the provision of grant payment services by private banks on the instruction from SASSA.

49. In that case of **Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others**<sup>9</sup> the Eastern Cape provincial department – before SASSA took over the obligation to administer the payment of social grants -entered into oral agreements with banks to provide payment of social grants. These contracts were entered into without following the procurement process. When SASSA took over the obligation, it did not correct the situation but carried on to implement the oral agreements. CPS then challenged the oral agreements. The High Court set the oral agreements aside on the basis that they “*flew in the face*” of the procurement framework (the Constitution, the PFMA, the PPPFA, Treasury Regulations) as well as the Supply Chain Management Policy of SASSA itself.<sup>10</sup>

### **Deviation**

50. Regulation 16A6.4 of the Treasury Regulations provides for deviation from the normal procurement processes.<sup>11</sup> The regulations provide:

*“If in a specific case it is impractical to invite competitive*

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<sup>9</sup> (20067/2010) [2010] ZAGPPHC 268 (25 June 2010)

<sup>10</sup> See paras 37-41

<sup>11</sup> See Treasury Instruction Note 8 of 2007/2008

*bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.*”

51. The circumstances for deviation should not be taken lightly. Cases where deviation may be permitted would be in cases of emergency, where the goods or services are from a sole supplier.<sup>12</sup> This is made clear by the Treasury Instruction Note 6 of 2007/2008. In other words, there are very limited circumstances when deviation from normal procurement processes would be permitted. This is understandable considering that procurement principles stem from the Constitution.
52. The accounting authority is then required to report to the relevant (provincial) treasury and the Auditor General in the cases of deviation. This is provided for in paragraph 3.4.3 of the Treasury Instruction Note 8 of 2007/2008 which reads as follows<sup>13</sup>:

**“Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or**

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<sup>12</sup> See paragraph 2 of Treasury Instruction Note 6 of 2007/2008

<sup>13</sup> See also paragraph 3 of Treasury Instruction Note 6 of 2007/2008

**services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his / her delegate.**

**Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.**

53. When deviation (from normal procurement) is sought to be employed, it is important that it is done in accordance with the requirements stated above. This is to avoid the suspicion which the Constitutional Court warned of.<sup>14</sup>

### **Intra-State Procurement / Delegation**

54. Section 238 of the Constitution provides that an organ of state may delegate any function that it is empowered to perform to another organ of state.

#### **238. Agency and delegation—**

**An executive organ of state in any sphere of government may—**

- (a) delegate any power or function that is to be exercise or performed in terms of legislation to**

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<sup>14</sup> AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC) para 27

**any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or**

- (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.**

55. This delegation was endorsed by the Supreme Court of Appeal in the case of **CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd.**<sup>15</sup> In that case the CEO of SASSA appealed the decision of the North Gauteng High Court where that Court held that when SASSA contracts with another organ of state, such as the South Africa Post Office Ltd normal procurement process apply. That Court held as follows<sup>16</sup>:

**“No matter that the Agency and the Post Office are both organs of state, the fact remains that they are two separate juristic persons each created by its own statute. As such their minds met and they decided to enter into a contractual relationship in terms whereof the Post Office is supplying services to the Agency at agreed fees and costs. It can further not be overlooked that the Post Office, through its division of the Postbank, is competing in the open market with other financial institutions. In terms of sec.51(2) of the Postal**

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<sup>15</sup> 2012 (1) SA 216 (SCA)

<sup>16</sup> Unreported: as Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of South African Social Security Agency NO and Others (53753/09) [2009] ZAGPPHC 169 (10 December 2009) para 21



**Services Act, 1998 the Post Office "must undertake such activities as are customary for a financial institution carrying on the business of accepting deposits". I have already alluded to the stance adopted by the Agency and the Post Office that they were merely striving to achieve cost-effectiveness by entering into the MOU and the Letter Agreement, However, cost-effectiveness is not the only requirement of Section 217(1). The process or system must further also be transparent and competitive."**

56. The SCA disagreed with the High Court in this regard. It held instead, that the contract between the Post Office and SASSA was one subject to deviation principles from normal procurements processes. The SCA did not find it necessary to rule with certainty whether or not in future or in general intra-state procurements are subject to normal procurement process. In this regard, the SCA *at para 16* held as follows:

**"The question debated at length in the court below, and before us, whether s 217(1) applies if an organ of State wishes to procure goods or services from another organ of State consequently appears to me to be beside the point. The first inquiry ought to be to determine the meaning of the consequent legislation."**

57. In relation to section 238 of the Constitution, the SCA held as follows:<sup>17</sup>

**"[23] It might in this context be noted that the provisions of s 238(b) of the Constitution permit an executive organ of State to exercise any power**

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<sup>17</sup> CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd para 23

or perform any function for any other executive organ of State on an agency or delegation basis. Although the rendering or procuring of banking services for beneficiaries is not a function of SASSA, its function is payment of grants, not only manually but also electronically, into their banking accounts. This is exactly the function that SASSA has delegated to SAPO. This function could not be delegated in isolation and the fact that SASSA was able to procure additional and ancillary advantages for beneficiaries from SAPO, which strictly speaking falls outside of SASSA's functions, does not mean that the agency or delegation is not covered by s 238(b).

[24] This fits in with the evidence of SASSA in the answering affidavit where it was stated that its transaction with SAPO was not a purely an economic transaction; its object, instead, was to achieve the constitutional goal of providing social assistance to the needy. It further stated that it chose SAPO as another government entity because SASSA was experiencing financial difficulties.”

58. In that case, much depended on the facts. The SCA took into account the fact that:

58.1. SASSA was facing practical and financial difficulties regarding the payment of social grants;

58.2. No other entity could provide access and services which the Post Office could provide to SASSA; and

58.3. The SASSA-Post Office agreement was to achieve economic efficiency.

59. In my view, it would seem that whether an organ of state can rely on deviation and section 238 of the Constitution (to contract with another organ of state) would depend on the facts. It is also critical that the formal requirement relating to deviation are scrupulously adhered to.

#### **DISCUSSION / OPINION**

60. SASSA bears the ultimate responsibility to ensure the efficient and effective management, administration and payment of social grants to the millions of beneficiaries.

61. Section 4(2) of the Agency Act permits SASSA to enter into an agreement with any person (private or public) to ensure that it fulfils its functions. However, this must be with the concurrence of the Minister. In other words, the Minister must be consulted and agree to the “outsourcing”.

62. Given that the invalid agreement with CPS is coming to an end in March

2017, SASSA has undertaken to take over the payment of social grants.<sup>18</sup>

However, SASSA intends to outsource some of the ancillary services.<sup>19</sup>

63. In terms of section 4(2) of the Agency Act, SASSA is allowed to outsource any of its functions –provided that it is in terms of the applicable framework.

### **SASSA's Options**

#### SASSA

64. In my view, SASSA should attempt to perform the ancillary services internally if it has the capacity or if that capacity exists within government. This would be in line with the undertaking to administer the payment of social grants by itself. It would also avoid the dynamics surrounding the procurement –which in more than one occasion has been found by the Courts to fall short.

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<sup>18</sup> Progress Report of 5 November 2015 para 13

<sup>19</sup> Progress Report of 5 November 2015 para 14

65. In this regard, SASSA would have to capacitate itself for providing the (ancillary) services. Whether SASSA would be able to do that within time is a question of fact.
66. If SASSA would be unable to provide the ancillary services, then it can either procure the services externally or from another organ of state. I discuss these options in turn below.

#### External Procurement and Deviation

67. SASSA is obliged by the Constitution, as an organ of state, to procure goods and service in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.<sup>20</sup> This means that SASSA cannot procure the ancillary services without following the procurement framework.

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<sup>20</sup> Section 217 of the Constitution, the Treasury Regulations and the applicable procurement framework

68. In this regard, SASSA should go on open tender and invite bids for the provision of the ancillary services. As such, SASSA may not enter into private negotiations for the provision of these ancillary services with CPS – even in relation to ancillary services only.<sup>21</sup>
69. Any procurement for a service provider should therefore follow a competitive process.
70. The current contract with CPS has less than six months to run. The question is whether or not the ancillary services are strictly necessary for the payment of social grants. If they are, SASSA then faces a situation where at the end of the CPS contract then it would not be able to fully carry out its functions.
71. From that perspective, it may be impractical at this stage to invite bids for ancillary services sought by SASSA by 1 April 2017. Further, SASSA cannot afford not to be able to carry out its functions. That could be catastrophic for the millions of beneficiaries. However, I am of the view that the principle of deviation cannot assist SASSA.

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<sup>21</sup> See *Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others*

72. The law allows deviation from the competitive / normal processes. As stated above, Treasury Regulation 16A6.4 permits deviation if is impractical to invite bids or the services are needed on an urgent basis or they are only available from a sole supplier.<sup>22</sup>
73. In such a case, strict processes (regarding recording the reasons) must be followed and reasons must be clear. Further, National Treasury must be consulted.
74. However, I am also of the view that if the Court would take a dim view and contend that SASSA created the urgency. In other words, the Court might opine that SASSA should have fully capacitated itself as soon as it was of the view that the tender process would not be undertaken for a service provider for the payment of social grants.
75. Furthermore, and as stated above, Courts view deviations with some suspicion.<sup>23</sup>
76. If SASSA cannot on its own provide all the services, then it should best

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<sup>22</sup> Treasury Instruction Note 6 of 2007/2008

<sup>23</sup> AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC) para 27

follow normal procurement process. If the time left would not permit the running of the procurement / tender process, then SASSA must explore other options.

77. I am of the view that SASSA cannot successfully rely on the principle of deviation. There appears to be no exceptional circumstances that warrant deviation. For example, it is highly unlikely that the ancillary services are only available from one supplier. Secondly, it is not strictly true that there is urgency given the fact that SASSA has had sufficient time to know whether or not it would fully take over the functions for the payment of social grants.
78. This is also strengthened by the Constitutional Court's pronouncements on deviation and also in the light of the various cases against SASSA regarding procurement.

### **Extension of the Current CPS Contract**

79. The SASSA-CPS contract was found by the Constitutional Court to have been invalid. However, the declaration of invalidity was suspended by the Constitutional Court pending the decision of SASSA to award a new



tender after a new tender process.<sup>24</sup>

80. The Constitutional Court further ordered that “*If the tender is not awarded, the declaration of invalidity of the contract in paragraph 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded*”.<sup>25</sup>

81. This means that when the SASSA-CPS contract “ends” in March 2017, the suspension of the order of invalidity also ends. The contract then reverts back in status to being an invalid contract. As such, by law it falls to be set aside on that date. Any attempt to extend it without leave of the Court, may be viewed as perpetuating an illegality.

82. In those circumstances, SASSA may not seek to extend some of the terms of the contract on a purely contractual. That would be unlawful and in contempt of the Constitutional Court’s order.

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<sup>24</sup> AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (4) SA 179 (CC) para 78

<sup>25</sup> Further, the Court ordered that: “*Within 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster must file with this Court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract. SASSA must within 60 days thereafter obtain an independent audited verification of the details provided by Cash Paymaster under paragraph 4.2 and file the audited verification with this Court.*”

83. However, SASSA may approach the Constitutional Court to seek to extend the suspension of the declaration of invalidity in order to allow SASSA more time to procure the ancillary services from a service provider.
84. This principle was confirmed in the case of **Zondi v MEC, Traditional and Local Government Affairs and Others** where the Constitutional Court held<sup>26</sup>:

**“The power to make an order that is just and equitable is not limited to the time when the Court declares a statutory provision inconsistent with the Constitution and suspends the order of invalidity. During the period of suspension this Court retains the power to reconsider the continued suspension of the declaration of invalidity and the period of suspension as well as the conditions of suspension in the exercise of its power to make an order that is just and equitable. When the facts on which the period of suspension was based have changed or where the full implications of the order were not previously apparent, there seems to be no reason both in logic and principle why this Court should not, before the expiry of the period of suspension, have the power to extend the period, if to do so would be just and equitable.”** [Own Emphasis]

85. Further, the Constitutional Court stated (in **Zondi v MEC, Traditional and Local Government Affairs and Others**) that<sup>27</sup>:

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<sup>26</sup> 2006 (3) SA 1 (CC) para 40

<sup>27</sup> At para 47

**“What is just and equitable depends on the facts of each case. It must be emphasised that in view of the principle of finality, the power to extend the period of suspension should, as a general matter be 'very sparingly exercised'. Factors that may be relevant in a particular case include the sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos. What is involved is the balancing of all relevant factors bearing in mind that the ultimate goal is to make an order that is 'just and equitable'.”**

[Own Emphasis]

86. Accordingly, if this route is opted for SASSA would need to place sufficient facts and justification before the Constitutional Court as to why the extension is sought.

### **Section 238(b) of the Constitution**

87. Another option available to SASSA given the circumstances is approaching another organ of state or department to perform the ancillary services.
88. As stated above, section 238 of the Constitution permits SASSA to delegate any of its functions, including the rendering of ancillary services,

to another organ of state.<sup>28</sup> As quoted above, the SCA (in **CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd**) held that:

**“Although the rendering or procuring of banking services for beneficiaries is not a function of SASSA, its function is payment of grants, not only manually but also electronically, into their banking accounts. This is exactly the function that SASSA has delegated to SAPO. This function could not be delegated in isolation and the fact that SASSA was able to procure additional and ancillary advantages for beneficiaries from SAPO, which strictly speaking falls outside of SASSA's functions, does not mean that the agency or delegation is not covered by s 238(b).”**

89. In my view, the same principles would apply. SASSA would have to ensure that it treats this delegation as a deviation and comply with the requirements such as recording the reasons for deviation.
90. In the circumstances, delegation in terms of section 238 of the Constitution seems to be the second most appropriate option for SASSA.<sup>29</sup> The deviation in this context is different from approaching an external service provider but is intra-state. The concerns of financial impropriety are lessened. Secondly, given the time frames and the

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<sup>28</sup> CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd at para 23

<sup>29</sup> If SASSA is unable to do the ancillary services on its own.

ultimate object, the responsibility is retained within the State.

### **Should SASSA report to the Constitutional Court**

91. As can be seen from the order of the Constitutional Court, the Court ordered that both CPS and SASSA report to it after March 2017 regarding the financial statements of CPS.
92. Further, the Progress Report of 5 November 2015 did not conclusively report to the Constitutional Court of the process to be undertaken by SASSA. In my view, it is advisable for SASSA to finally report to the Constitutional Court of its final decision on any of the methods discussed above. This would be to ensure that the Constitutional Court has confidence in the process taken by SASSA –that it is in accordance with its order.
93. Similarly, it is also advisable that SASSA reports to all the other parties involved in the AllPay litigation.

**CONCLUSION**

94. I remain available I am available to clarify any issues arising from this opinion. Since I have not been able to hold any consultations with client on the issues for my consideration, I regard this opinion as preliminary.

**M SIKHAKHANE SC**

SANDTON CHAMBERS

10 NOVEMBER 2016