

CASE REVIEW: Averting Looming Tragedy: A Review of The Black Sash Trust v Minister of Social Development and Others (2017)

Bright Nkrumah

Introduction

On 17 March 2017, the Constitutional Court handed down a ground-breaking judgment which, among other things, prevented an imminent crisis that threatened to disrupt monthly social grant payments to millions of poor and vulnerable South Africans. The outcome of the case at issue, *The Black Sash Trust v Minister of Social Development and Others* (CCT48/17) [2017] ZACC 8, has been hailed as a 'precedent-setting' landmark by human rights activists and the academic community as far as access to food (through payment of grants in a timely fashion) is concerned.

A brief background

In 2012, the South African Social Security Agency (SASSA) entered into a contract with Cash Paymaster Services (Pty) (CPS) to disburse social grants on its behalf. The Constitutional Court, on 29 September 2013, declared that the award of this contract was null and void (*AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay 1*)).

The Court, however, suspended the order of invalidity on condition that SASSA take over the duty of paying grants after the expiration of the contract on 31 March 2017 or award a five-year contract to a new service provider after a competitive tender process as set out under section 217 of the Constitution (*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*)).

The Court retained an oversight role over grant payments and ordered SASSA to submit a report to it on the tender process and its outcome. Against this backdrop, SASSA, on 5 November 2015, submitted a report to the Court, indicating that it intended to assume full responsibility for payment of grants (without awarding any new contract to CPS) when the suspension of invalidity lapsed on 1 April 2017. In the light of various reports from civil society organisations and opposition parties in Parliament, it became apparent though that SASSA was not well positioned to resume disbursement of the grants from 1 April 2017 and would continue to rely on the services of CPS without any competitive process.

The case

Given that SASSA failed to adhere to the order set out in *AllPay 2*, the Black Sash

Trust (the applicant) petitioned the Court to reinstate its supervisory role over the disbursement of social grants. The applicant sought the following orders:

- (i) that in order to ensure payment of social grants from 1 April 2017, SASSA submit a report on affidavit setting out how it intends to handle an interim contract with CPS;
- (ii) a declaration that CPS has an obligation to act in a reasonable manner when negotiating the payment contract with SASSA;
- (iii) that the contract must set out adequate protection to safeguard the autonomy, dignity and personal privacy of grant recipients;
- (iv) that SASSA and the Minister of Social Development (Minister) report continually to the Court on the measures adopted or to be adopted to forestall disruption of grant payment from 1 April 2017; and
- (v) a declaration that SASSA is legally obliged to ensure that the process of grant payment does not violate the autonomy, dignity and personal privacy of grant beneficiaries.

This application, submitted in the interest of the public (and grant beneficiaries in particular), generally sought to ensure that SASSA adhere to its legal obligation of paying grants to beneficiaries in a timely fashion.

An application for leave to intervene as a second applicant was lodged by an NGO called Freedom Under Law (FUL). The application by FUL aimed to seek relief from the Court to critically assess the proposed interim contractual arrangement between SASSA, the Minister and CPS. This application was heard simultaneously with that of the main application by the Black Sash. The applications lodged by these two organisations were not wholly opposed by CPS or the Minister.

On the one hand, whereas SASSA and/or the Minister opposed some aspects of the relief sought by FUL, they did not oppose the relief sought by the Black Sash. On the other hand, CPS acknowledged that it is constitutionally obligated to act reasonably, especially in the process of contracting with SASSA. It further supported the call for the reinstatement of the Court's oversight role and indicated its willingness to commit to the reporting mechanism recommended by the Black Sash. Two other entities, the South African Post Office (SAPO) and Corruption Watch, filed applications to be admitted as friends of the Court.

The judgment

The final decision was written by Froneman J and was concurred with by Zondo J, Pretorius AJ, Mojapelo AJ, Mhlantla J, Khampepe J, Jafta J, Cameron J,

Bright Nkrumah is a Postdoctoral Research Fellow of the NRF/British Academy Chair in Political Theory at the Department of Political Studies, University of the Witwatersrand.

Nkabinde ADCJ, and Mogoeng CJ. In it, the Court admitted both SAPO and Corruption Watch as friends of the Court, granted FUL's application for leave to intervene, and granted the Black Sash's application for direct access.

In delivering its judgment, the Court held that CPS and SASSA are obliged under section 27(1)(c) of the Constitution to ensure continuous disbursement of grants to recipients from 1 April 2017 until such time as an entity other than CPS is contracted for this purpose. It held, furthermore, that any failure on the part of CPS or SASSA to continue this process would be an infringement of recipients' right to social assistance.

Parting shot

To ensure payment of grants to recipients, the Court suspended its initial declaration of the contract as invalid for a period of 12 months, starting from 1 April 2017. Subject to further conditions, the Court ordered CPS and SASSA to continue disbursement of grant money to beneficiaries for a 12-month duration (commencing from 1 April 2017), based on similar terms as those set out in the current agreement between the two entities.

The reason for maintaining the terms and conditions of the contract (which was due to expire on 31 March 2017) was not only to ensure the protection of beneficiaries' personal data but to enhance transparency and accountability in the payment process. The Court order therefore makes provision for the involvement of the Auditor-General in reviewing the operationalisation of the interim contract.

The Court further directed SASSA and the Minister to submit, on a quarterly basis, reports in a form of affidavits indicating how they intend to ensure disbursement of the grants after the 12-month period expires; what measures they have adopted in that respect; what additional measures they intend to take; and when they will implement such measures. These timeframes, according to the Court, will ensure that the payment of social grants is not disrupted after the expiration of the 12-month period. The Court issued a non-binding order calling on the Minister to provide reasons why she should not, in her personal capacity, be ordered to pay the cost of the application.

Madlanga J, in a separate concurring judgment, acknowledged that the Court has an overarching remedial mandate to order SASSA and CPS to fulfil their constitutional duty of ensuring that beneficiaries receive their grants. He said that he found the judgment confusing nonetheless, especially the parts about the extension of an old invalid contract (due to expire on 31 March 2017) and the extension of the declaration of invalidity. Madlanga concluded, however, that in view of the Court's remedial powers, and in the interest of the grant beneficiaries in particular, he was satisfied that the resultant contract was undertaken on the same terms and conditions as those of the expiring one.

Aftermath of the case

Although the South African state administers a number of redistribution and poverty alleviation interventions (such as free water allocation and government housing provision), social grants are by far the largest of them. The outcome of the landmark decision in the case under review has thus played an enormous role in reducing poverty by enhancing timely redistribution of income to poor households in the form of grant payments.

The amounts paid, the significant number of grant recipients, and the extent of poverty and unemployment make social grants a fundamentally important intervention in South Africa. For the 2017/18 financial year, the total amount paid out in grants is likely to exceed R150 billion. Without the decision of the Court, the effect of non-payment of social grants to vulnerable and poor households would have been severe, affecting about 17 million South Africans in this period, more than 11 million of whom are younger than 18 (Mawson 2017; Dentlinger 2017). One additional seminal impact of the Court's decision worth citing is the transfer of grant payments from CPS affiliate, Grindrod Bank to commercial banks which to a greater extent might reduce cases of 'unlawful, illegal, immoral deductions happening off [Sassa beneficiaries'] bank accounts' (Hyman 2017). The marketing of products (insurance policy, loans, loan repayments, airtime and electricity) of the service provider's sister companies to the beneficiaries did not only compromise the personal data of beneficiaries, but also fostered exploitation.

Social grants – including the child support grant, the foster care grants, disability grants, old-age pensions and other forms of social assistance – support not only their direct beneficiaries but entire households. The number of social grant dependants therefore exceeds the number of beneficiaries by a substantial margin. Had the Constitutional Court not intervened, these households would have been left destitute and likely to face even worse food insecurity than usual, given that frequently they live from hand to mouth.

This is all the more the reason why the Department of Social Development and its Minister, Bathabile Dlamini, could be seen as having acted without due care by leaving the payment issue in limbo for a five-year period – crucially so after having been ordered in 2012 by no less than the Constitutional Court to adopt alternative measures. It is disconcerting that, prior to the case, both the Department and the Minister failed to admit that there was a pending crisis of national proportion and demonstrate any urgency in resolving the matter.

Conclusion

With approximately 30 per cent of South

Africans directly or indirectly dependent on social assistance, grant distribution is a necessary instrument for addressing food insecurity. Thus, any interruption in it would have impacted heavily on millions of beneficiaries and their families.

Without the Court's timely intervention, the economies of rural communities – villages and small towns – would have been hit hard, given that numerous dwellers depend heavily on social assistance to access food, basic goods and services in local markets. An additional knock-on impact would have been felt by shop owners, who would have been unable to pay their staff since their income streams would have been strongly affected.

References

AllPay Consolidated Investment Holdings (Pty)

African Social Security Agency [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

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).

Dentlinger L. (22 February 2017) '#Budget2017: social grants to be increased' Eyewitness News.

Hyman A. (06 March 2017) 'Explosive Black Sash Trust claims involving favoured Sassa grants firm's owner' BusinessDay.

Mawson N. (22 February 2017) '#Budget2017: Inflationary increase for welfare grants' Independent Online.

The Black Sash Trust v Minister of Social Development and Others (CCT48/17) [2017] ZACC 8.

INTERVIEW

Honourable Commissioner Jamesina Essie L. King, Chairperson of the Working Group on Economic, Social and Cultural Rights, at the African Commission on Human and Peoples' Rights

Can you tell us briefly about your work before your election to the African Commission?

I was a Commissioner in the Human Rights Commission of Sierra Leone, a Commission established by law to protect and promote human rights in the country. The establishment of this Commission was recommended by the Lomé Peace Accord after the conflict as well as the Truth and Reconciliation Commission. I was the first Chairperson of that Commission.

Since your election, what would you regard as the Commission's major achievements and challenges?

The legislative measures that states take to give effect to the rights of the [African] Charter [on Human and Peoples' Rights], which they are required to do and report to the Commission every two years. You can actually see gradual and sustained steps by governments to give effect to the Charter. The participation by states, national human rights institutions and non-governmental organisations in the work of the Commission is also phenomenal.

Another achievement is the high volume of publications produced by the Commission in different thematic areas interpreting the Charter and aiding states in its implementation. The challenges are insufficient human and financial resources for effective and efficient operation of the Commission, and the non-implementation of the Commission's decisions and recommendations.

Reports indicate that poverty rates in Africa remain very high and inequality between the rich and the poor has widened. What is your take on this?

I believe that there has been progress in many respects in addressing poverty and inequality in Africa. There are many countries where high maternal and infant mortality rates have gone down. There is higher enrolment in schools, and there is more enjoyment of economic and social rights. In spite of this improvement, there are still challenges, particularly in rural areas. Political instability and the negative impacts of conflicts and climate change continue to halt progress and impede development in Africa.

As the Chairperson of the Working Group on Economic, Social and Cultural Rights, what you would consider as major challenges to the enjoyment of socioeconomic rights in Africa?

The notion that the economic, social and cultural rights are dependent on the whims and caprices of government and dependent on the availability of resources. This notion is misplaced and implies that economic and social rights are not on the same level as civil and political rights. Until states parties to the Charter, as well as those implementing economic, social and cultural rights within states, [recognise] that they have an obligation as parties to the Charter to give effect to these rights, individuals will not be able to fully realise these rights.