

Landmark ruling on social grants may open tenders to scrutiny

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Companies tendering to deliver important government services risk being forced to open their books and operational information to the public, after a landmark decision of the Constitutional Court last week.



A retendering process must be held after the contract for handing out social grants was found to be flawed. Image: [Corruption Watch](#)

The judgment, handed down last week, declared invalid the R10bn contract for the payment of social grants between the South African Social Security Agency (Sassa) and Net1 subsidiary Cash Paymaster Services (CPS).

It ordered Sassa to re-run its tender process. CPS remains tied into the contract as the court suspended the declaration of invalidity pending the decision at the end of the new tender process.

The news saw a R729m plunge in the value of Net1's stock on the JSE. Net1's shares fell 28% before recovering to close 12.8% down at R85.50. But the immediate consequences of the judgment are not as significant as the long-term consequences.

One of these is that private companies may, if they have contracted to deliver on the government's constitutional obligations, be held to the same standards of transparency and accountability as the government.

Unanimous decision

Judge Johan Froneman - on behalf of a unanimous court decision - said the constitutional right to social assistance meant certain obligations and duties for the government.

And when the government contracted with CPS to deliver on those duties, CPS also became an "organ of state" - with all the consequent duties of openness, accountability and transparency.

"When (CPS) concluded the contract it too became accountable to the people of SA," said Froneman. This did not mean "its entire commercial operation suddenly becomes open to public scrutiny".

"But the commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operation and financial aspects," he said.

Froneman said where a company had performed a public function for a significant period, considerations of obstructing private autonomy did not feature prominently, if at all.

CPs continues to provide services

The message is clear: if you want to profit from implementing the government's constitutional duties, fine. But you cannot hide behind being a private company to avoid the public scrutiny that the government is subject to.

"Despite declaring the contract invalid, CPS would not be able to "walk away" from it because it had a constitutional responsibility to ensure that a workable payment system remained in



Judge Johan Froneman gave the ruling

place until a new one was operational," said Froneman. "The court therefore had the constitutional warrant to suspend the declaration of invalidity until the new payment process was up and running" he added.

after a unanimous decision by the Constitutional Court. Image: [Who's Who in Southern Africa](#)

"Moreover, CPS had no right to benefit from an unlawful contract. And any benefit that it may derive should not be beyond public scrutiny," the court found.

Part of the court's order is that, at the end of the initial five-year contract, CPS must file at court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.

But the judgment did not specify what would be done with any profit - a big question left hanging.

Monitoring



The ruling means that there will have to be greater transparency among companies doing business on behalf of government. Image: [Corruption Watch](#)

Another question arises from the court's somewhat cursory justification for compelling Sassa to report back to the court at each crucial stage of the new tender process - called a "structural interdict".

Structural interdicts are considered an intrusive remedy and the Constitutional Court has said in the past that courts should proceed from the basis that the government will implement orders in good faith - unless there is reason to think otherwise. A structural interdict implies the court has reason to think otherwise in the case of Sassa, but it is unclear why.

Judge Froneman said the right to social assistance is important and that there was potential prejudice to beneficiaries. Earlier on in the judgment he said the court was not in a position to tell whether, or how, a new system would affect payments to beneficiaries. So perhaps the structural interdict is intended to ensure that whatever happens, the court can ensure the interests of beneficiaries are looked after. But if that was its thinking, it should have been

more clearly articulated.

Moreover, the Social Assistance Act and the constitution arguably already require this of Sassa and the judgment does not explain why there is reason to think Sassa would not do its utmost to ensure there would be no interruption to payments.

Nor does it explain how a court-monitored tender process would avoid the cancellation of grants.

Last year, Sassa announced it could pay social grants in-house from 2017 after the expiry of its contract with CPS. Social Development Minister Bathabile Dlamini appointed an advisory committee to advise her on the best payment models.

Source: Business Day via I-Net Bridge

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