

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between ~

Case NO.: 2017/48

BLACK SASH TRUST

APPLICANT

And

MINISTER OF SOCIAL DEVELOPMENT

FIRST RESPONDENT

CEO OF SA SOCIAL SECURITY AGENCY

SECOND RESPONDENT

SOUTH AFRICAN SOCIAL SECURITY AGENCY

THIRD RESPONDENT

MINISTER OF FINANCE

FOURTH RESPONDENT

NATIONAL TREASURY

FIFTH RESPONDENT

CASH PAYMASTER SERVICES (PTY) LTD

SIXTH RESPONDENT

INFORMATION REGULATOR

SEVENTH RESPONDENT

SEVENTH RESPONDENT'S WRITTEN SUBMISSIONS

1 INTRODUCTION

The main application

- 1.1 In the main application, the applicant, Black Sash seeks orders relevant to the payment of social grants. In addition to such relief, Black Sash seeks orders the effect of which is to purport to protect the personal information of social grants beneficiaries (“**the beneficiaries**”).
- 1.2 The seventh respondent (“**the Regulator**”) plays no role in the payment of social grants to the beneficiaries but is concerned with the protection of the personal information of the beneficiaries. It is for this reason that the Regulator does not oppose any of the relief which Black Sash seeks relevant to the steps relating to the conclusion and implementation of the contract in terms of which social grants are going to be paid to beneficiaries.
- 1.3 The Regulator was established in terms of section 39 of the Protection of Personal Information Act 4 of 2013 (“**POPIA**”) and its functions relate to the protection of personal information.
- 1.4 As far as the main application is concerned, the Regulator only has an interest in the relief which Black Sash seeks relevant to the protection of personal information, i.e. the relief sought in paragraphs 5(b) and 11(b) of the notice of motion in the main application.

- 1.5 In paragraphs 5(b) and 11(b) of its notice of motion, Black Sash seeks an order in terms of which any contract which may be concluded between SASSA and CPS must “*provide that personal information of beneficiaries is the property of SASSA.*” This is the relief which the Regulator does not support.

The application for leave to intervene

- 1.6 Freedom Under Law has applied for leave to intervene as an applicant in the main application. As an applicant, Freedom Under Law supports the relief sought by Black Sash in the main application and seeks other relief set out in its notice of motion. Such other relief sought by Freedom Under Law is not relevant to the Regulator’s functions.

- 1.7 The Regulator does not oppose any of the relief which Freedom Under Law seeks as an applicant. Accordingly, none of that relief is dealt with in these written submissions.

The application for condonation

- 1.8 The Regulator seeks condonation for the late filing of its answering affidavit.

- 1.9 The Regulator’s application for condonation was served upon the other parties on Friday, 10 March 2017 and none of the parties has filed any papers to oppose it. As at the time of finalizing these written submissions, no papers

had been received for purposes of opposing the Regulator's application for condonation.

2 THE APPLICATION FOR CONDONATION

- 2.1 The Regulator's answering affidavit in the main application ought to have been filed in this Court on 7 March 2017. An electronic copy was delivered to the Registrar of this Court on 7 March 2017. The Regulator believed that it was correct to file its answering affidavit by e-mailing it to the Registrar.
- 2.2 The Registrar did not accept the aforesaid electronic filing. A hard copy was filed on 8 March 2017 and the Registrar then advised that an application for condonation for the late filing of the Regulator's answering affidavit was required.
- 2.3 The Regulator's answering affidavit was filed one day late for the reasons which are set out in the Regulator's founding affidavit in the application for condonation.
- 2.4 In *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) this Court restated that the standard for considering an application for condonation is the interests of justice – the question being whether it would be in the interests of justice to grant or refuse condonation.
- 2.5 In considering whether it would be in the interests of justice to grant condonation, this Court said that regard must be had to the extent and cause

of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; and importance the issue to be raised in the matter and the applicant's prospects of success.¹

- 2.6 The Regulator has satisfied all the requirements for condonation as established by this Court in a long line of cases. Each of the relevant requirements is dealt with individually below.

Explanation for the delay

- 2.7 The Regulator has provided a full, genuine and reasonable explanation for the failure to file its answering affidavit timeously. The explanation is set out in paragraphs 3.14 to 3.20 of its founding affidavit.

- 2.8 The delay in filing the Regulator's answering affidavit was occasioned by the following:

- 2.8.1 Members of the Regulator only took office on 01 December 2016. The Regulator did not exist before this time. Its current members, who took office on 1 December 2016 are its inaugural members.

¹ At paragraph 20 on page 477. See also *Head of Department v Settlers Agricultural High School and Others* 2003 (11) BCLR 1212 (CC) and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC).

- 2.8.2 The Regulator has not yet established any administrative and operational capacity and does not yet have offices of its own. Certain provisions of POPIAS will only come into force and effect when the Regulator has reached operational and administrative readiness. At the moment, the Regulator operates with 2 (two) seconded officials of the Department of Justice and Constitutional Development.
- 2.8.3 The Regulator does not yet have a procurement system contemplated in terms of section 217 of the Constitution and it is for this reason not yet in a position to procure legal services in the manner contemplated in that section. Consequently, it could not timeously appoint attorneys to represent it in this matter for purposes of drafting, settling and filing its answering affidavit in this Court timeously.
- 2.8.4 As a result of the aforementioned difficulties, the Regulator, on its own, entered into correspondence with the Court under the impression that certain aspects of this application could be resolved by way of correspondence (with the Chief Justice).
- 2.8.5 When the Regulator was advised on 6 March 2017 that “*the Court does not deal with matters by correspondence with parties or prospective parties, nor can it advise on the course of conduct to be adopted by litigants*”, its members (without the assistance of an attorney and counsel) prepared the answering affidavit which was e-mailed to the other parties and the Registrar on 7 March 2017.

- 2.8.6 The State Attorney, Pretoria informed the members that it could not act on behalf of the Regulator due to a conflict of interest. On 6 March 2017, the State Attorney, however, agreed to appoint a private firm of attorneys to represent the Regulator. This, however, was only done on 9 March 2017 when the Regulator's attorneys of record were eventually appointed.
- 2.8.7 When the Regulator's attorneys of record were appointed, the Regulator was already out of time but attempts were made to file the application for condonation as soon as possible. The application for condonation was served on the other parties on Friday, 10 March 2017 and was filed in Court on Monday, 13 March 2017.
- 2.9 It is clear from what is stated above that the failure to file the Regulator's answering affidavit timeously was not due to the Regulator's reckless disregard of the directive issued by the Chief Justice setting out the dates on which answering papers had to be filed.
- 2.10 The delay was not occasioned by any negligence on the part of the Regulator. There is therefore, no basis to suggest that the Regulator's failure to file its answering affidavit timeously was due to its willful conduct.
- 2.11 The delay is not excessive. In the premises, it is submitted that the Regulator has provided a genuine and reasonable explanation for its failure to file its

answering affidavit on 7 March 2017 and that condonation should for this reason be granted.

Prejudice

- 2.12 The late filing of the Regulator's answering affidavit in Court did not cause any prejudice to the other parties to this application due to the fact that a copy thereof was by agreement e-mailed to them on 7 March 2017 – the date on which it was supposed to have been served upon them.
- 2.13 The late filing of the Regulator's answering affidavit has, however, inconvenienced the Court and the Regulator regrets this. This inconvenience, however, is not of such a nature that it warrants the dismissal of the application for condonation in that:
- 2.13.1 the delay is not excessive;
 - 2.13.2 the Regulator has given a full, genuine and reasonable explanation for the delay; and
 - 2.13.3 the application for condonation is not opposed by the other parties and the condonation will not result in the Regulator gaining any advantage to which it otherwise would not have been entitled.

Prospects of success

- 2.14 The Regulator's answering affidavit does not deal with the bulk of the relief which Black Sash and Freedom Under Law seek in the main application. It is only concerned with the relief relevant to the protection of personal information of the beneficiaries.
- 2.15 When regard is had to the contents of the founding papers, it becomes clear that no case has been made as to on what legal basis ownership of personal information of the beneficiaries should be vested upon SASSA. The Regulator further contends that the personal information belongs to the beneficiaries and they cannot be divested of ownership thereof.
- 2.16 The relief that Black Sash seeks can easily be achieved by the extension of the *Allpay 2* order to apply to the any contract concluded by the third respondent without vesting ownership of the personal information of the beneficiaries upon SASSA. In this regard, the relevant relief is sought in paragraph 5(a) and 11 (a) of the notice of motion and that is the relief which the Regulator contends should be granted.

Interests of justice

- 2.17 In *Van Wyk v Unitas* this Court restated the issues which must be taken into consideration in determining whether it would be in the interests of justice to grant condonation. The relevant issues are those addressed above.
- 2.18 The relief which the Regulator contends should be granted, i.e. the relief in paragraph 5(a) and 11 (a) of the notice of motion achieve the purpose which is sought to be achieved, i.e. the protection of personal information of the beneficiaries.
- 2.19 The Regulator has addressed all the issues on the basis of which the Court is now in a position to assess whether it would be in the interests of justice to grant condonation. In the circumstances, the Regulator has made out a proper case for condonation and it is entitled to that relief.

3 PROTECTION OF PERSONAL INFORMATION RELIEF

- 3.1 The Regulator only opposes the relief which Black Sash seeks in paragraphs 5(b) and 11(b) of its notice of motion in terms of which it wants the contract in issue to provide that personal information of beneficiaries is the property of SASSA.
- 3.2 When regard is had to the definitions of “*data subject*” and “*personal information*” in section 1 of POPIA, it necessarily follows that ownership of personal information cannot be vested upon a person to whom it does not relate.

- 3.3 Section 1 of POPIA defines “*data subject*” to mean “*the person to whom personal information relates.*” On the other hand, “*personal information*” is defined to mean information relating to a living natural person. The relief in dispute is to the effect that provision must be made in the contract in issue that the personal information “*relating to beneficiaries*” will become the property of SASSA.
- 3.4 The personal information of the beneficiaries belongs to the beneficiaries themselves. There is no basis in law to divest them of that ownership and vest ownership upon SASSA.
- 3.5 All that which Black Sash seeks to do or achieve is to ensure that the personal information of beneficiaries is protected and that it is not disseminated other than in terms of the law. This can be achieved by the relief which Black Sash seeks in paragraph 5(a) and 11(a) of the notice of motion.
- 3.6 If personal information is made to become the property of SASSA, it would mean that SASSA could then deal therewith as it deems fit without any reference to the beneficiaries. The law does not make provision for this and cannot be made to be so by way of a Court order.
- 3.7 In addition, the persons whose personal information is sought to be made the property of SASSA are not before the Court. An order such as the one in issue ought not to be considered, let alone being granted without the persons whose

personal information is sought to be made the property of SASSA being before the Court and without them being heard.

3.8 Black Sash has not cited any authority for the relief which it seeks in paragraphs 5(b) and 11(b) of its notice of motion. In paragraph 44 of its heads of argument, it accepts that this relief is not legally competent and that the relief “*should be deleted.*”

3.9 In the premises, the relief sought in paragraphs 5(b) and 11(b) of Black Sash’s notice of motion ought not to be granted.

Costs

3.10 The Regulator does not oppose the substantive relief sought by Black Sash for bringing this application and seeking the relief which is set out in its notice of motion.

3.11 As far as the relief in paragraphs 5(b) and 11(b) is concerned, the Regulator accepts that Black Sash intended to protect the beneficiaries and should not be penalised by an order for costs due to its abandonment of that relief.

Dated at Sandton on this 13th day of March 2017.

Kennedy Tsatsawane

Mabatho Kgariya