



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 48/17

In the matter between:

**BLACK SASH TRUST** First Applicant

**FREEDOM UNDER LAW NPC** Second Applicant

and

**MINISTER OF SOCIAL DEVELOPMENT** First Respondent

**CHIEF EXECUTIVE OFFICER OF THE SOUTH  
AFRICAN 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) LIMITED** Sixth Respondent

**INFORMATION REGULATOR** Seventh Respondent

**RAIN CHARTERED ACCOUNTANTS  
INCORPORATED** Eighth Respondent

**KPMG SERVICES (PTY) LIMITED** Ninth Respondent

**MAZARS INCORPORATED** Tenth Respondent

**LESAKA TECHNOLOGIES (PTY) LIMITED** Eleventh Respondent

and

**CORRUPTION WATCH NPC (RF)** First Amicus Curiae

**Neutral citation:** *Black Sash Trust and Another v Minister of Social Development and Others* [2026] ZACC 12

**Coram:** Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J

**Judgment:** Majiedt J (unanimous)

**Heard on:** 27 May 2025

**Decided on:** 8 April 2026

**Summary:** Social grants — invalidity of contract — just and equitable profit determination— judicial review — liquidation — public interest

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**ORDER**

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On application for direct access to this Court, the following order is made:

1. The sixth respondent (Cash Paymaster Services (Pty) Limited) (CPS) is ordered to refund the adjusted certified profit of R81 286 177 to the third respondent (South African Social Security Agency) (SASSA), in respect of which amount SASSA is granted leave to prove a concurrent claim.
2. In respect of CPS' pending action against SASSA for an upward price adjustment of R316 447 361, it is declared that, if the said action succeeds in full or in part, CPS need not refund to SASSA, as additional profit, any increased price which the latter is ordered to and does pay to CPS.
3. Each party is to bear its own costs.

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## JUDGMENT

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MAJIEDT J (Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

### *Introduction and background*

[1] This is the latest episode in the long-running saga involving the unlawful award of a tender for the countrywide payment of social grants to beneficiaries. It all started more than a decade ago in *AllPay I*,<sup>1</sup> when the award of the tender by the present third respondent, the South African Social Security Agency (SASSA), to the present sixth respondent, Cash Paymaster Services (Pty) Limited (CPS), was declared to be constitutionally invalid. There have been numerous legal skirmishes since then.<sup>2</sup>

[2] In *AllPay II*,<sup>3</sup> the contract concluded pursuant to the award of the tender was declared invalid, but the declaration was suspended for a period that, in the events that occurred, was for the five-year term of the invalid contract expiring on 31 March 2017 (first suspension period). In terms of *Black Sash I*,<sup>4</sup> the period of suspension was extended by 12 months (second suspension period), followed by a further and final

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<sup>1</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) BCLR 1 (CC); 2014 (1) SA 604 (CC).

<sup>2</sup> *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 II*); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2015] ZACC 7; 2015 (6) BCLR 653 (CC) (*AllPay III*); *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash I*); *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash II*); *South African Social Security Agency v Minister of Social Development* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC) (SASSA); *Black Sash Trust v Minister of Social Development* [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) (*Black Sash III*); *Freedom Under Law v Minister of Social Development* [2021] ZACC 5; 2021 (6) BCLR 575 (CC) (*FUL*); *RAiN Chartered Accountants Incorporated v South African Social Security Agency* [2021] ZACC 27; 2021 (11) BCLR 1225 (CC) (*RAiN*); and *Cash Paymaster Services (Pty) Limited v Freedom Under Law NPC* [2022] ZACC 2; 2022 (6) BCLR 661 (CC) (*CPS*).

<sup>3</sup> *AllPay II* *id.*

<sup>4</sup> *Black Sash I* above n 2.

six-month suspension in terms of SASSA<sup>5</sup> (third suspension period). CPS was required to continue rendering the services during the suspension periods. This Court's orders contained provisions for CPS' profits during the suspension periods to be certified in audited statements. Whether CPS should be ordered to repay those profits to SASSA was not, and has not yet been, determined by this Court.

[3] The current proceedings concern an order sought by the second applicant, Freedom Under Law NPC (FUL), directing CPS to furnish certain information to the fifth respondent, National Treasury (Treasury). This information is aimed at enabling Treasury to determine whether and in what amount CPS has made a profit from the tender previously declared unlawful by this Court in *AllPay I*. It bears mention at this early stage that CPS is now in liquidation at the instance of SASSA as one of its creditors. This is an important consideration in deciding the ultimate overall issue in this case, that is, the question of CPS' profits, if any, from the unlawful contract, as opposed to the preliminary skirmish about the delivery of information.

[4] A brief history of the arduous litigation route up to this point is necessary. FUL's application was made for the delivery of information sought by Treasury in an explanatory affidavit filed by Treasury in this Court. That affidavit had been filed pursuant to this Court's judgment and order in *RAiN*.<sup>6</sup> Treasury contended that it required the information to enable it to determine CPS' profit, if any, as ordered by this Court.

[5] In its application, FUL sought a further order that, insofar as any of the information requested by Treasury was not in CPS' possession, but rather in the possession of the eleventh respondent, Lesaka Technologies (Pty) Limited, formerly NET1 Applied Technologies South Africa Limited (Lesaka), then CPS should be required to obtain the information from Lesaka. In the event that CPS was unable to obtain the information from Lesaka, CPS was to inform Treasury and Lesaka should

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<sup>5</sup> SASSA above n 2.

<sup>6</sup> *RAiN* above n 2.

then be ordered to provide the requested information directly to Treasury. FUL further sought an order that Treasury must determine the profit made by CPS from its unlawful contract with the third respondent, SASSA, within 60 days of receipt of all the information provided.<sup>7</sup>

[6] When the matter was set down for hearing in 2024, the Chief Justice issued directions to the parties, broaching with them the feasibility of appointing a referee under section 38 of the Superior Courts Act<sup>8</sup> in respect of the dispute concerning the

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<sup>7</sup> FUL sought the following relief:

- “1. The sixth respondent, Cash Paymaster Services (Pty) Ltd (‘CPS’), must provide the National Treasury with all the information (including documentation and answers to questions) sought by the National Treasury in paragraphs 15 to 36 of its affidavit filed under this case number on 10 September 2022 (‘the Explanatory Affidavit’), which is annexure JF1 to FUL’s founding affidavit, within 40 days from the date of this Order.
2. To the extent that any of the information in prayer 1 is not in CPS’s possession but is in the possession of Lesaka Technologies (Pty) Ltd (the eleventh respondent, formerly NET1 Applied Technologies South Africa Ltd, hereinafter ‘Lesaka (NET1)’), then
  - 2.1 CPS must obtain that information from Lesaka (NET1) and provide it to the National Treasury within 40 days from the date of this Order;
  - 2.2 alternatively, if CPS is unable to obtain that information from Lesaka (NET1), then:
    - 2.2.1 CPS must write to the National Treasury and Lesaka (NET1) within 20 days of the date of this Order, indicating the nature and extent of the information in prayer 1 that is in the possession of Lesaka (NET1) and that CPS has been unable to obtain from Lesaka (NET1), and
    - 2.2.2 Lesaka (NET1) must furnish the National Treasury with the information specified in CPS’s letter within 20 days of receipt of CPS’s letter.
3. The National Treasury may, should it deem necessary, write to CPS and/or Lesaka (NET1) requesting any further information that it requires in order to determine CPS’s profit by no later than 10 days after the receipt of the information provided to it pursuant to paragraphs 1 and 2.
4. Should the National Treasury request any further information from CPS and/or Lesaka (NET1) in terms of paragraph 3, CPS and/or Lesaka (NET1) must furnish the further information requested to the National Treasury within 20 days of receipt of such request.
5. National Treasury must determine the profit made by CPS from its unlawful contract with the third respondent, the South African Social Security Agency, within 60 days of receipt of all the information provided pursuant to paragraphs 1 to 4 of this Order.
6. Ordering such further and/or alternative relief that the Court determines is just and equitable, including but not limited to any appropriate directions for the future conduct of this matter.”

<sup>8</sup> 10 of 2013.

furnishing of information. That proposal was, in the main, prompted by the fierce factual dispute on the papers among the parties about the requested information, as to its relevance, its existence and the extent to which it had already been supplied. This proposal found favour and, as directed, the parties submitted draft terms of reference for the section 38 referee.

[7] In December 2024, this Court appointed a section 38 referee,<sup>9</sup> but recalled that order in March 2025 due to a disagreement regarding responsibility for the payment of the referee's operations and ancillary administrative issues, which threatened to delay the section 38 process. FUL's application was re-enrolled for hearing on 27 May 2025 and the parties were granted leave to file supplementary submissions.

*The liquidator's report*

[8] In advance of the hearing on 27 May 2025 (which was held virtually), the Chief Justice issued directions requiring CPS' liquidator to file a report on the current status of the company's winding-up, mandating that such a report include: the total value of CPS' assets and liabilities; an indication of whether the liquidator had investigated the prospects of recovering any amounts from related or third parties on the basis of voidable dispositions or other irregularities and the outcome of any such investigation; the status of the enquiry in terms of sections 417 and 418 of the old Companies Act<sup>10</sup> (liquidation enquiry); and whether the commissioner had furnished a final report. The parties were required to be ready to address "the practical utility of continuing these proceedings, in light of CPS' liquidation and the information provided by the liquidators".

[9] The liquidator complied with this direction. In summary, her report, which is dated 23 May 2025, reflected that CPS' "uncontroversial assets" total R50 981 820. Its "controversial assets" consist of: R52 million owed to the company by a subsidiary

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<sup>9</sup> Retired Judge Margaret Victor was appointed.

<sup>10</sup> 61 of 1973.

that is also in liquidation and for the recovery of which litigation seemed unavoidable; R358 196 928 being an amount claimed by CPS in a pending action against SASSA for an upward price adjustment for the services rendered by CPS in terms of this Court's orders; and a contested claim by CPS against SASSA for a contribution to the costs of the liquidation enquiry.

[10] As to liabilities, the liquidator's report reflected that claims proved at the first meeting of creditors total R778 511 264. The bulk of this comprises a claim by SASSA totalling R632 894 722 in terms of a judgment of the High Court, Gauteng Division, Pretoria (Tsoka J judgment)<sup>11</sup> and a further claim by SASSA of R74 786 892 as "payment of services not rendered". The report also stated that the South African Revenue Service (SARS) had submitted claims totalling R401 392 066 based on assessments issued after CPS went into liquidation. CPS has instituted review proceedings to set the assessments aside. If SARS' claims stand, they will, says the liquidator, be preferent in terms of section 102 of the Insolvency Act.<sup>12</sup>

[11] The enquiry concluded in June 2023 and the Commissioner has not filed a report.<sup>13</sup> After the conclusion of the enquiry, the Master of the High Court lifted the confidentiality in respect of the enquiry. On 18 October 2023, the entire record of the enquiry and all the accompanying documents were provided electronically to Treasury, SASSA, RAiN, Lesaka and all the witnesses who gave evidence at the enquiry.

[12] In conclusion, the liquidator pointed out in her report that, given SASSA's proved claims, creditors will receive payment of a pro rata dividend, but if SARS is successful in proving a claim against CPS, then concurrent creditors, including

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<sup>11</sup> *Corruption Watch (NPC) (RF) v Chief Executive Officer of the South African Social Services*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 21904/2015 (23 March 2018). The capital amount of the Tsoka J judgment was R316 447 361, on which interest was to run from June 2014 to date of payment.

<sup>12</sup> 24 of 1936.

<sup>13</sup> The lack of a report appears to be due to a failure by one or more of the parties to hand in final written submissions to the enquiry.

SASSA, may receive no dividend at all. This is a very important conclusion, to which I will return presently. In response to a question in the directions, the liquidator reported that she has investigated the prospects of recovering amounts from related and third parties on the basis of voidable dispositions and other irregularities, and that there are no such prospects. CPS' uncontroversial assets totalled R50 981 821. I leave aside for now the contentious assets, save to make mention of the pending action by CPS against SASSA in the sum of R358 196 928. That claim relates to this Court's orders authorising CPS to request Treasury to recommend a different price to be paid to CPS by SASSA to ensure the continued performance of the reciprocal obligations between the two entities. CPS avers that the recommendation for the revised price was given by the then Minister of Finance.

*Further directions*

[13] In light of the liquidator's report, the Chief Justice issued further urgent directions, requiring the parties to be ready to address the following additional matters at the hearing: the implications of the liquidator's report, particularly the conclusion that CPS did not have sufficient funds to pay even SASSA's proved claim; and whether, if this Court were to conclude that there was on the papers a certified profit in the amount of R252 660 000, based on audits conducted by the tenth respondent, Mazars Incorporated (Mazars) in respect of the first and second suspension periods and by the ninth respondent, KPMG Services (Pty) Limited (KPMG), in respect of the third suspension period, this Court could order CPS to pay that amount, even after the *concursum creditorum* (coming together of creditors) had been established.

[14] These and other matters were traversed at the hearing in May 2025. In July 2025, the Chief Justice issued further directions calling on the parties to make written submissions on certain issues. The call for written submissions was prefaced with the following:

- "1. At the virtual hearing on 27 May 2025 members of the Court raised the question as to whether, in view of the liquidation of the sixth respondent

(CPS) and related questions of expense and delay, it might be in the interests of justice to bring proceedings in this matter to final conclusion on the basis of the profit of R252 590 152 certified by KPMG and Mazars (hereafter referred to as the certified profit), adjusted to any extent necessary in respect of the matters raised below.

2. The Court has not reached a settled view as to the appropriate outcome. However, there are certain matters on which it seeks clarity and which may be relevant if the course referred to in paragraph 1 is adopted. These matters concern possible adjustments to the certified profit.”

[15] The parties who had participated in the virtual hearing were asked to respond to the following questions (I set them out in full because the detailed responses to these questions have a direct bearing on the outcome that I reach in this case):

- “a. Assuming the Court considers it appropriate to follow the course mentioned [to finalise the matter on the basis of the certified profit of R252 590 152], does any party:
  - i. raise the procedural objection that there is not currently before the Court an application in which such relief is claimed?
  - ii. contend that an order for a refund by CPS to the third respondent (SASSA) of the certified profit, adjusted as needs be as contemplated in these directions, should not be made?
- b. At the virtual hearing, counsel for the eleventh respondent (Lesaka) said that, if the Court was minded to follow the course [of bringing proceedings to a final conclusion on the basis of the certified profit of R252 590 152], a deduction would need to be made from the certified profit in respect of the amount of R316 447 361 which CPS was ordered to repay to SASSA in terms of the judgment of Tsoka J delivered on 23 March 2018. A member of the Court indicated that on his understanding this had been taken into account in the second Mazars certification, which certified a loss of R556 992 623 in respect of the six-month period ended 30 September 2018. On further study of the papers, the Court is now doubtful that this is so. As a result, the Court seeks responses to the following:
  - i. Was allowance made, in the certified profit, for CPS’ obligation to repay to SASSA the amount of R316 447 361?

- ii. If allowance was not so made, should such an adjustment be made to the certified profit?
- iii. If an adjustment should be made, is there any justification for deducting anything more than the capital amount of Tsoka J's judgment?
- c. Is it common cause that the certified profit should be adjusted by reversing the provision for retrenchment costs in the amount of R107 033 718, bearing in mind that on the evidence those costs were not incurred? If this is not common cause, what is the justification for declining to make the adjustment?
- d. Should the certified profit be adjusted by reversing the BEE expenditure of R437 093 759, bearing in mind the absence of evidence to substantiate the expenditure? The parties should motivate their answers.
- e. Paragraph 8.3 of the liquidator's report dated 23 May 2025 records that there is pending litigation in which CPS is claiming, as against SASSA, a price adjustment of R358 196 928:
  - i. Is this claimed price adjustment an adjustment to the price to which CPS was entitled for work done during one or more of the periods certified by KPMG and/or Mazars?
  - ii. If so, and if CPS is successful in the pending litigation, will this have the effect of increasing its certified profit by R358 196 928?
  - iii. If the answer to (ii) above is yes, is it possible to determine the adjusted certified profit prior to the final determination of the pending litigation?
  - iv. If CPS is successful in the pending litigation, is the effect of the *concursum creditorum* that set-off could not apply between SASSA's obligation to pay the increased price and CPS' obligation (if so ordered by this Court) to pay such sum to SASSA as part of the certified profit?
- f. Paragraph 9.12 of the liquidator's report dated 23 May 2025 records that SASSA has proved a claim of R74 786 892 'for payment of services not rendered':
  - i. Does SASSA's claim as aforesaid relate to one or more of the periods certified by KPMG and/or Mazars?
  - ii. If so, is the SASSA claim undisputed and if not what steps are being taken to resolve it?

- iii. On the assumption that SASSA has the said claim against CPS, will the effect be to reduce the certified profit, viz should an adjustment be made by reducing the certified profit by that amount?"

*Can this Court decide the ultimate issue?*

[16] It must immediately be apparent that these are complex, wide-ranging questions covering several different and difficult aspects. It is necessary, though, to start with the first jurisdictional hurdle question – does this Court have the power, in what is in essence a preliminary dispute akin to a disagreement about discovery, to decide the ultimate issue in the case, which is the question of CPS’ profit, if any? In their responses to this question, none of the parties raised an objection, and, it must be said, very properly so.

[17] A brief recap of the basis for the initial declaration of invalidity is required to give some perspective on where we are now in this saga. This Court’s declaration of invalidity in *AllPay I* was based on two grounds. The first ground was that SASSA failed to ensure that the empowerment credentials claimed by CPS were objectively confirmed.<sup>14</sup> The second was that Bidders Notice 2 did not specify with sufficient clarity what was required of bidders in relation to biometric verification, with the result that only one bidder was considered in the second stage of the process.<sup>15</sup> This rendered the process uncompetitive and made any comparative consideration of cost-effectiveness impossible.<sup>16</sup> In sum, then, the fatal shortcomings lay with SASSA, and not with CPS. Moreover, this Court in *AllPay II* strongly deprecated SASSA’s conduct, calling it “unhelpful and almost obstructionist”.<sup>17</sup>

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<sup>14</sup> *AllPay I* above n 1 at para 72.

<sup>15</sup> *Id* at paras 86 and 91.

<sup>16</sup> *Id* at para 86.

<sup>17</sup> *AllPay II* above n 2 at para 75:

“Yet, contrary to the obligations it carries under section 195, SASSA has adopted an unhelpful and almost obstructionist stance. It failed to furnish crucial information to AllPay regarding the implementation of the tender and to Corruption Watch in respect of steps it took to investigate irregularities in the bid and decision-making processes. Its conduct must be deprecated, particularly in view of the important role it plays as guardian of the right to social security and as controller of the beneficiaries’ access to social assistance.”

[18] I accept that, while in its previous orders for the determination of the profit made by CPS in the extended contract, this Court has foreshadowed the possibility that an order for the repayment of profit would be made, it has, however, not yet pertinently held that the profit, whatever it is, should be refunded. For the reasons that follow, I hold that an order for repayment is justified in this case.

[19] There are seemingly divergent views in our courts regarding the effect of this Court's judgment in *AllPay II*, particularly in the Supreme Court of Appeal. First, in *Venus Rays Trade*,<sup>18</sup> that Court explained its understanding of the principles laid down in *AllPay II* relating to the crafting of an appropriate remedy in cases that entail setting aside a contract, as the "corrective principle"<sup>19</sup> and, of relevance in this matter, the "no-profit-no-loss principle".<sup>20</sup> As the corrective principle does not feature here, this judgment is confined to the latter.

[20] Due to the importance of this aspect, it is necessary to cite the relevant passages in full:

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<sup>18</sup> *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2022] ZASCA 54; 2022 (5) SA 56 (SCA).

<sup>19</sup> *Id* at paras 39 and 40. The Court stated:

"The first is the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists. In *AllPay (No 2)* the Court described the rationale for the corrective principle as follows:

'Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed when they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality.'

The application of the corrective principle was explained thus:

'This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social security matters.'

<sup>20</sup> *Id* at para 41.

“The second guiding principle is the ‘no-profit-no-loss’ principle which the Court articulated as follows:

‘It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.’

The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses. On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.”<sup>21</sup> (Footnotes omitted.)

[21] Then, in *Phomella*,<sup>22</sup> the Supreme Court of Appeal held that *Venus Rays Trade* was clearly wrongly decided on this point (the “no-profit-no-loss” principle). In overruling that judgment, the Court held:

“A careful and contextual reading of *AllPay 2* thus shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. The approach in *AllPay 2* of allowing a party to retain payments, and thus to benefit, under an unlawful contract has been echoed in a number of matters. . . . One such example is found in *Buffalo City*, where the majority in the Constitutional Court held:

‘...I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not

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<sup>21</sup> Id at paras 41-2.

<sup>22</sup> *Special Investigating Unit v Phomella Property Investments (Pty) Ltd* [2023] ZASCA 45; 2023 (5) SA 601 (SCA).

permit a party to obtain further rights under the invalid agreement.”<sup>23</sup> (Footnotes omitted.)

[22] Later, the Court held:

“Therefore, it must be said that the ‘principle’ relied upon by the SIU as set out in *Mott MacDonald* is no principle at all. The same must be said of the following dictum in [*Venus Rays Trade*]:

‘The second guiding principle is the “no-profit-no-loss” principle which the Court articulated as follows:

“It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.”

Deriving as it does from the same dictum in *AllPay 2*, it is clearly wrong and should not be followed.”<sup>24</sup>

[23] Recently, in *Mafoko*,<sup>25</sup> the Supreme Court of Appeal held that an innocent contractor may well be entitled to profit. Ultimately, though, that Court did not have sufficient information to make an appropriate order, and remitted the case to the High Court to consider a just and equitable order. In the course of its reasoning, the Court endorsed the approach in *Phomella* in these terms:

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<sup>23</sup> Id at para 18, citing *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) (*Buffalo City*); 2019 (6) BCLR 661 (CC) at para 105.

<sup>24</sup> *Phomella* above n 22 at para 19.

<sup>25</sup> *Mafoko Security Patrols (Pty) Ltd v Mjayeli Security (Pty) Ltd* [2025] ZASCA 179 (*Mafoko*). This approach was recently confirmed by the Supreme Court of Appeal in *Caledon River Properties (Pty) Ltd t/a Magwa Construction v Special Investigating Unit* [2026] ZASCA 5 at para 18:

“In *Phomella* and, more recently, in [*Mafoko*] . . . it was emphasised that the dictum in *Allpay II* does not lay down a rigid rule that excludes the retention of profit. While an innocent tenderer has no accrued right to benefit from an unlawful contract, the Court enjoys a broad discretion to permit the retention of such benefits where justice and equity so demand. As held in *Mafoko*, the public good is not inherently opposed to private gain; indeed, legitimate public procurement relies on the normative benchmark of a competitive return for the service provider.”

“In *Phomella*, this Court explained that the principle of no loss, but no gain, does not correctly reflect the position adopted in *AllPay II*, nor is it consistent with the remedial latitude the Constitutional Court has applied in other cases in which it has made a just and equitable order . . . . *Phomella*’s interpretation of *AllPay II* is correct. *AllPay II* held that the award of a tender found to be unlawful and declared invalid does not give rise to a *right* to benefit from an unlawful contract. What this means is simply this: without a right, there is no duty resting upon a court exercising its just and equitable discretion to order that the benefit of the unlawful contract must be conferred. But the absence of such a right and its correlative duty does not mean that the court in the exercise of its discretion *may* not permit a party to enjoy the benefit of a contract, including the profits that may accrue.”<sup>26</sup> (Emphasis in original.)

[24] The Court continued:

“The mistake made by certain courts that have sought to understand *AllPay II* is to equate the absence of a right to benefit from an unlawful contract with the exclusion of such benefit from the exercise by the court of its just and equitable discretion. *AllPay II* does not say this. Indeed, it simply holds that any benefit derived ‘should not be beyond public scrutiny’. This means that any benefit derived from an unlawful contract falls to be scrutinised in order to determine how the court should exercise its just and equitable discretion. It does not mean that the benefit of an unlawful contract is excluded from remedial consideration, for then the benefit would indeed be beyond public scrutiny because it would fall outside the very exercise the court undertakes to weigh relevant considerations so as to arrive at a just and equitable order . . . . The exclusion of benefit, and more particularly profit, from remedial consideration could also have perverse and undesirable consequences. The conduct of a person awarded a tender that is found to be unlawful falls within a spectrum of culpability. Such a person may be complicit in the unlawful conduct or innocent of it, with degrees of turpitude or blamelessness between these polarities.”<sup>27</sup>

[25] There can be very little quarrel with these dicta in *Mafoko* insofar as they hold that an innocent contractor may, depending on the facts, possibly be entitled to profit accrued in the execution of an invalid public contract. In the present instance,

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<sup>26</sup> Id at para 13.

<sup>27</sup> Id at paras 14-5.

however, we are dealing with a different type of case. It is of the utmost importance that one distinguishes *AllPay II* from decisions in this Court like *Buffalo City*<sup>28</sup> and *Gijima*,<sup>29</sup> and cases like *Venus Rays Trade*, *Phomella* and *Mafoko* in the Supreme Court of Appeal. The present case has unique characteristics that distinguish it from the usual scenario of an innocent contractor seeking to claim profit in an invalid contract which the contractor had executed in good faith and without any culpability in the eventual invalidity.

[26] First, it bears repetition that none of the parties, not even CPS (via the liquidator), or Lesaka, has raised any objection to this Court making an order for repayment of the profit. On the contrary, as stated, the parties are agreed that this Court can do so even though it is not obliged to do so. Secondly, the wide powers afforded this Court under section 172(1)(b) permit it to do so. *AllPay II* made an order for the continuation of the invalid social pensions contract, not on the basis of the preservation of the parties' contractual rights (in particular those of CPS as an innocent contractor), but as a just and equitable remedy to ensure the continuation of the payment of social pensions to the indigent.

[27] This basis for the order in *AllPay II* was clarified beyond any doubt later in *AllPay III*:

“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; (2) has no right to benefit from an unlawful contract; and (3) was ordered to account for its benefits under the invalid contract. These aspects may, if necessary, be pursued in the future.”<sup>30</sup> (Footnotes omitted.)

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<sup>28</sup> *Buffalo City* above n 23.

<sup>29</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

<sup>30</sup> *AllPay III* above n 2 at para 15. See also *Black Sash I* above n 2 at para 40 and *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42; 2020 (1) BCLR 110 (CC); 2020 (1) SA 305 (CC) at paras 26-8.

[28] It bears emphasis, further, that this Court in *AllPay II* declared CPS to be an organ of state with all the concomitant constitutional duties and obligations.<sup>31</sup> This Court emphasised CPS’ constitutional tasks and obligations by virtue of the contract it had concluded with SASSA to handle the administration and payment of social pensions.<sup>32</sup> And it pointed out that “[w]hen Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs”.<sup>33</sup>

[29] In *Black Sash I*, this Court reiterated the rationale behind its order in relation to CPS’ profits. The Court stated:

“No party has any claim to profit from the threatened invasion of people’s rights. At the same time no one should usually be expected to be out of pocket for ensuring the continued exercise of those rights. That equilibrium was the premise of the Court’s previous remedial order. It is just and equitable to continue on that basis.”<sup>34</sup>

[30] It is beyond doubt, then, that this case stands on a completely different footing from cases involving the preservation of the contractual rights of private contractors who find themselves at the wrong end of an invalid public contract through no fault of their own, as had happened in *Buffalo City*, *Gijima* and the three Supreme Court of Appeal cases referred to. In those cases, as stated, the rationale of the orders granted

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<sup>31</sup> *AllPay II* above n 2 at para 52:

“That SASSA is an organ of state is clear. But, for the purposes of the impugned contract, so too is Cash Paymaster. In determining whether an entity is an organ of state, the presence or absence of governmental control over that entity is a factor, but in our constitutional era, is not determinative. In Cash Paymaster’s case the ‘control test’ is not helpful; although it may be independent from SASSA’s control, the function that it performs – the country-wide administration of the payment of social grants – is fundamentally public in nature.” (Footnotes omitted.)

<sup>32</sup> *Id* at paras 56-8.

<sup>33</sup> *Id* at para 59.

<sup>34</sup> *Black Sash I* above n 2 at para 50.

in favour of the innocent private contractors was to preserve vested contractual rights. It is necessary to recap briefly the facts and reasoning in *Gijima* and *Buffalo City*.

[31] In *Gijima*, the State Information Technology Agency SOC Limited (SITA) had appointed Gijima Holdings (Pty) Limited (Gijima), a private contractor, to provide information technology services to a state department through the conclusion of a settlement agreement. It was agreed that SITA would comply with all its internal procurement procedures in respect of the agreement. Throughout, Gijima was concerned with whether SITA had complied properly with its procurement processes. SITA assured Gijima that it had the authority to enter into the settlement agreement. When a payment dispute arose, SITA resisted the claim on the basis that the agreement, as well as the three extending addenda that followed it, were invalid as there was non-compliance with the provisions of section 217 of the Constitution when the parties concluded the agreement. SITA was adopting this stance for the first time, as it had always assured Gijima that all relevant procurement processes had been complied with.

[32] SITA approached the High Court to set aside the agreement and the three addenda. There was a delay of just under 22 months in SITA bringing review proceedings. The High Court non-suited SITA because it had brought the review far outside the 180-day period stipulated in section 7(1) of the Promotion of Administrative Justice Act<sup>35</sup> (PAJA), SITA had not sought an extension and the High Court could not find any grounds for such extension. The majority in the Supreme Court of Appeal dismissed the appeal with costs.

[33] On appeal, this Court held that, in awarding the impugned agreement, SITA had acted contrary to the dictates of the Constitution. The award of the contract was thus declared invalid. When exercising its remedial powers under section 172(1)(b) of the Constitution, the Court held:

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<sup>35</sup> 3 of 2000.

“[I]t must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with SITA repeatedly. SITA assured it that a proper procurement process had been followed.”<sup>36</sup>

[34] This Court held further:

“Overall, it seems . . . that justice and equity dictate that, despite the invalidity of the award of the agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity *must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled.*”<sup>37</sup>  
(Emphasis added.) (Footnote omitted.)

[35] *Buffalo City* concerned the construction of houses in Duncan Village, East London. Having successfully tendered for what became known as “the Reeston contract”, the respondent in the case, Asla Construction (Asla), set about implementing the contract and performed work under it. In response to provisional sentence proceedings by Asla for work done based upon payment certificates issued by the Municipality, the latter launched a self-review, alleging that the contract was unlawful for not complying with the constitutional and statutory prescripts applicable to the procurement of goods and services.

[36] The High Court found that the contract was patently unlawful, declared its award invalid and dismissed Asla’s contractual claims that formed the basis of the provisional sentence proceedings. Asla was successful in its approach to the Supreme

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<sup>36</sup> *Gijima* above n 29 at para 53.

<sup>37</sup> *Id* at para 54.

Court of Appeal. That Court held that a proper case for condonation in terms of section 9 of PAJA had not been made out. The Court, however, deliberately declined to make any definitive findings with regard to the underlying legality or illegality of the contract.

[37] On appeal, this Court made an order declaring the impugned contract invalid but not setting it aside “so as to preserve the rights that the respondent might have been entitled [to]”.<sup>38</sup> This Court noted that its order preserved rights which had already accrued but did not permit a party to obtain further rights under the invalid agreement. This preservation of rights was found to be just and equitable in the circumstances. The Court noted:

“When the Municipality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The Municipality was content for the respondent to complete the contract (building low-cost houses) to the benefit of the Municipality and residents of Reeston. It was common cause that the work has been practically completed.”<sup>39</sup>

[38] Consequently, this Court held that “justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract”.<sup>40</sup> The Court held that the delay by the Municipality in launching its review proceedings was unexplained and thus unreasonable. The effect of this Court’s ruling is that parties such as municipalities should not delay the institution of review proceedings where they find unlawfulness in the tender process. An innocent contractor should not be deprived of its contractual rights for work already performed, as that would benefit a party that failed to act swiftly to rectify unlawfulness while disadvantaging an innocent firm that performed services to the benefit of a party with unclean hands.

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<sup>38</sup> *Buffalo City* above n 23 at para 105.

<sup>39</sup> *Id* at para 104.

<sup>40</sup> *Id* at para 105.

[39] In summary then, what emerges from *Gijima* and *Buffalo City* is that this Court has disapproved of supine attitudes adopted by organs of state who bring delayed review proceedings as avenues to escape financial obligations under unlawful contracts. The purpose is to invalidate unlawful contracts but not to prejudice service providers who innocently performed under these contracts. A state organ must act with promptness when unlawfulness is discovered. It cannot fold its arms, enjoy the benefits of services rendered and give no value in return.

[40] *AllPay II*, it bears repetition, is different. The basis for the dictum there is that CPS will have to refund profit it may make in the future execution of the invalid contract because, being in effect an organ of state, it must continue its constitutional obligation of administering and paying social pensions. And, as stated, the rationale for its approach to any profit made by CPS in the execution of the contract was made plain in *AllPay II* and again in *Black Sash I*. This Court is, therefore, entitled to decide this issue of the repayment of profits and the amount to be paid. But equally, there is nothing in our law that, in suitable circumstances, precludes an innocent, private contractor from claiming profits where it has rendered services in terms of an invalid public contract. That, it must be emphasised, will always be a fact-specific inquiry and no general precedent is sought to be laid down in this judgment. The reason for that is plain – every case will have to be decided on its own facts, and the facts must be adequate to enable a court to decide on a just and equitable order. A wide range of factors may play a role in that determination, as is illustrated in *Mafoko*.<sup>41</sup>

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<sup>41</sup> *Mafoko* above n 25 at para 28:

“As I have indicated, to make an order that is just and equitable, in the circumstances of this case, requires the consideration of a number of matters. Was Mafoko entirely blameless for the unlawful award of the tender to it? Did its incumbency as a service provider burden it with constitutional duties to continue to provide the service? If so, what is the content of that duty and for how long should it have endured? What benefits and burdens accrued to the SABC and Mafoko in the performance of the services rendered by Mafoko? What profit did Mafoko enjoy? How closely did any such profit conform to a normal return for a firm in a competitive market for security services? Was such a return necessary and deserved, given the period over which Mafoko rendered its services? I do not suggest that all of these questions must be answered to make a just and equitable order, nor that these questions are exhaustive of the issues that may be relevant. *What these questions do demonstrate is that a just and equitable order is not a binary choice between Mafoko retaining all the profits it may have made or being required to disgorge its profits. Justice and equity are capacious*

[41] Ever since 17 April 2014 when *AllPay II* was handed down, the emphasis has been on determining the profits earned by CPS. This Court's orders have never been directed at ascertaining what a reasonable profit margin would be. As CPS has now been in liquidation for some years, it is too late in the day to turn back the clock with a view to determining a reasonable profit margin, assuming an allowance of a reasonable profit would be just and equitable. This Court now finds itself in the invidious position of either having to allow the full profit without the benefit of any facts at all regarding the reasonableness of that profit, or ordering a repayment of the profit. Since this Court in its *AllPay II* judgment appears to have had in mind a repayment of profit, even though no such order was made, and since none of the parties before us have contended that in principle an order for the repayment of profit should not be made, that is the preferable order in the circumstances. Importantly, we are not dealing here with an active company where depriving it of profit might signal its demise. We are concerned with an insolvent company whose main creditors are state entities (SASSA and, potentially, SARS).

[42] In view of CPS' pending action for an increase in its price for rendering the service over the extended period of the invalid contract, we are in a position to consider making some allowance for profit in the context of that pending action. Very little is known about the nature of that pending action in which CPS is claiming an upward price adjustment of R316 447 361. It apparently emanates from paragraph 6.2 of this Court's order of 17 March 2017 in *Black Sash I*. In terms of that provision, and in respect of the first 12-month extension of the contract, CPS was permitted to request Treasury in writing "to investigate and make a recommendation regarding the

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*concepts. Its boundaries may be uncertain, but it is designed to render a nuanced judgment as to what order will be just and equitable. Such an order was not rendered by the High Court, but, at the same time, an order that simply permits Mafoko to retain its profits would amount to an order made in advance of answering some central questions that need to be posed."* (Emphasis added.)

price in the contract”. This was repeated in paragraph 4.1 of this Court’s order of 23 March 2018 in *SASSA*<sup>42</sup> in respect of the further six-month extension.

[43] The court hearing CPS’ application for an increased price may take into account just and equitable considerations including those outlined in *Mafoko*.<sup>43</sup> While that decision ultimately rests with the court which will hear the application, there is nothing precluding us from ordering that, in respect of any such price adjustment, CPS may keep the additional price ordered by the court. CPS will thus not have to disgorge it as additional profit, and SASSA will have no concurrent claim for a clawback of that profit. I agree with the view expressed in *Mafoko* that there must be some element of flexibility relating to a just and equitable order in respect of profit accruing to an innocent contractor. Whether any profit is due to CPS in respect of the increased price, and, if so, how much, will have to be considered by the court hearing the pending action.

[44] As stated in *AllPay II*, this Court was unequivocal about the fact that “any benefit that [CPS] may derive [from the unlawful contract] should not be beyond public scrutiny”.<sup>44</sup> And this Court was clear that “in respect of its gains and losses under that contract, [CPS] ought to be publicly accountable”.<sup>45</sup> The history of the case is a resounding call, if possible, to bring finality to this long running saga. It must also be borne in mind that CPS has now been in liquidation since October 2020 and any order may ultimately turn out to be an exercise in futility, although that is not a factor which would, in and of itself, preclude this Court from deciding on the issue of profit.

[45] Deciding the ultimate issue would comply with rule of law precepts, given the fact that this matter has been before this Court, in various guises, *no fewer than eleven times* (including this one). In its judgments in those cases, this Court has repeatedly

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<sup>42</sup> *SASSA* above n 2. An order was made on 23 March 2018 and reasons for that order followed on 30 August 2018.

<sup>43</sup> *Mafoko* above n 25.

<sup>44</sup> *AllPay II* above n 2 at para 67.

<sup>45</sup> *Id.*

vindicated the rule of law and the Constitution. A decision regarding a possible declaratory order and a further order for payment of an amount of profit will be further vindication.

[46] This Court is clothed with wide remedial powers under section 172(1)(b) of the Constitution<sup>46</sup> and is empowered to grant an order that is just and equitable. It is not bound by the relief sought in any notice of motion or pleadings when doing so.<sup>47</sup> In *Mhlope*, this Court held:

“Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are ‘any order that is just and equitable’. This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).”<sup>48</sup>

[47] Moreover, in FUL’s 2020 application it had specifically sought a declaration that CPS is liable to repay to SASSA all the profit that CPS is found to have earned pursuant to the unlawful social grants contract. That relief was merely deferred for later determination, due to CPS’ opposition at the time. For all these reasons, this

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<sup>46</sup> That section reads:

- “(1) When deciding a constitutional matter within its power, a court—
- ...
- (b) may make any order that is just and equitable, including —
- (i) an order limiting the retrospective effect of the declaration of invalidity; and
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

<sup>47</sup> *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*) at para 132 and *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) at para 211.

<sup>48</sup> *Mhlope* id.

Court is empowered, and in fact duty-bound, to use scarce judicial resources to the full and decide the ultimate issue in the case if it can be properly done.

*Factual matrix*

[48] Now that we have overcome that preliminary prospective hurdle, the central issue is this: can this Court make an order for a refund by CPS to SASSA of the certified profit, adjusted as may be necessary, as contemplated in the directions? That question has several subsidiary questions, which I deal with separately. But, first, an overview of the factual backdrop is necessary for a proper understanding of the main and subsidiary issues.

[49] Having set aside the contract as invalid and having previously suspended the declaration of invalidity for five years and then for a further period of 12 months,<sup>49</sup> this Court, on 23 March 2018 in *SASSA*,<sup>50</sup> made an order further extending the suspension of the declaration of invalidity for a period of six months. As part of its order in *SASSA*, the Court ordered a process for the provision by CPS of an audited statement of expenses incurred, income received and the net profit earned under the contract during the third suspension period and for SASSA to immediately obtain an independent audited verification of the details obtained. This order plainly envisaged the possibility that CPS might be ordered to repay any profits from the invalid contract. CPS had to file the audited statement within 30 days of the expiry of the third suspension period (that is, by 31 October 2018) and SASSA had to file with this Court its audited verification, approved by Treasury, within 60 days of completion of the contract (that is, by 30 November 2018). CPS was again ordered to permit the auditors appointed by SASSA to have unfettered access to its financial information for this purpose.

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<sup>49</sup> In terms of *AllPay II* above n 2 and *Black Sash I* above n 2.

<sup>50</sup> *SASSA* above n 2.

[50] KPMG was instructed by CPS to prepare the audited statement of the expenses incurred, the income received and the net profit earned under the contract in respect of the first suspension period, that is, the five-year period from February 2012 to March 2017. Mazars was appointed to do the same in respect of the second and third suspension periods (the 12-month and 6-month extensions from 1 March 2017 to 30 September 2018). The KPMG report showed a net profit earned by CPS of R705 322 484 for the first suspension period. The Mazars report showed a net profit for CPS for the second suspension period of R104 260 291 and a net loss for the third suspension period of R556 992 623. Based on these figures, CPS states that its net profits earned were R252 590 152 ( $R705\,322\,484 + R104\,260\,291 - R556\,992\,623$ ). As was done in the Chief Justice's directions, this amount will be referred to as "the certified profit".

[51] The eighth respondent, RAiN Chartered Accountants Incorporated (RAiN), was appointed by SASSA through a tender process to conduct the independent audited verification of the details provided by CPS (i.e. in respect of the income, expenses and profit audited statements prepared by KPMG and Mazars). In October 2019, RAiN issued its first report dealing with the five-year contract period from 1 April 2012 to 31 March 2017. RAiN provided its updated verification report to Treasury on or about 28 July 2022. RAiN suggested that CPS's profit might have been R800 million more than that reported by CPS' auditors to this Court.

[52] On 18 June 2020, SASSA launched an application for the winding-up of CPS. On 16 October 2020, CPS was placed under final winding-up. The deponent to CPS' answering affidavit in the present proceedings is the liquidator, Ms Puleng Felicity Bodibe.

[53] On 1 April 2021, FUL obtained the order which is the genesis of the relief sought in this application.<sup>51</sup> In terms thereof, RAiN had to, within ten days, provide CPS, KPMG and Mazars with a list of all outstanding documents relevant to the

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<sup>51</sup> FUL above n 2.

audited verification undertaken by RAIN under the order of this Court of 17 March 2017. CPS, KPMG and Mazars had to furnish RAIN with the listed documents in their possession within 15 days from the date of receipt of the list. Within 30 days of receipt of the outstanding documents, RAIN had to submit the updated verification report to Treasury, including all issues raised by Treasury in its letter of 28 November 2019, and all issues arising from the documents referred to in the list of outstanding documents to be provided.

[54] Within 20 days of the receipt of the updated verification report, Treasury had to allow CPS and SASSA to make representations on the updated verification report, if they so wished, and within 40 days of receipt of the updated verification report, Treasury had to consider and approve it, and file its approval together with the updated verified report. If Treasury was unable to approve the updated verification report, it had to file an affidavit setting out the reasons for not approving it, and make its own determination of the profit made by CPS from the unlawful contract. Should it be unable to make such a determination, it had to set out in its affidavit what it required to properly determine the profit made by CPS.

[55] On 10 September 2021, RAIN obtained an order from this Court in terms of which it was declared that SASSA is responsible for paying its reasonable fees.<sup>52</sup> This order again set out the process to be followed for the provision by RAIN of the list of all outstanding documents relevant to the audit verification undertaken by RAIN, and the process that followed, as per the previous order.

[56] On 11 February 2022, this Court dismissed an application by CPS for the variation of this Court's order of 1 April 2021.<sup>53</sup> On 10 September 2021, Treasury filed its explanatory affidavit, which sets out Treasury's reasons for not approving RAIN's updated verification report, and what it required to enable it to properly determine the profit made by CPS. On 20 September 2022, FUL sent a letter to this

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<sup>52</sup> RAIN above n 2.

<sup>53</sup> CPS above n 2.

Court regarding the explanatory affidavit and requested that CPS be ordered or directed to provide the information sought by Treasury. In response, this Court advised FUL that it should bring a substantive application in respect of the provision of information to Treasury to enable it to determine CPS' profits under the unlawful contract. That is the application now before this Court.

*Treasury's explanatory report*

[57] In brief, Treasury's explanatory report enumerated its challenges regarding RAIN's updated verification report thus:

- (a) The final report did not confirm the final profit derived by CPS from the SASSA contract.
- (b) RAIN was unable to report on the factual findings made in terms of the International Standards on Related Services (ISRS 4400).
- (c) RAIN and the audit firms have disagreed on matters regarding RAIN's concerns and questions regarding the determination of the amounts and methods used by the audit firms to derive those amounts.
- (d) Although RAIN was able to gain information from the auditors regarding issues previously reported as under dispute, no agreement could be reached between RAIN and the audit firms.
- (e) RAIN was also unable to obtain additional information requested from CPS and Lesaka.<sup>54</sup> Consequently, the disputed matters (bulk re-registration costs, Broad-Based Black Economic Empowerment (B-BBEE) related costs, expenditures not listed in the contract, legal expenses and retrenchment costs and their values and/or inclusion as part of SASSA's expenses) still required full and further verification and quantification.
- (f) As a result of gaining access to the auditors' working papers, RAIN was able to identify and report on new matters which could have an impact on the proper profit determination. RAIN required more information

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<sup>54</sup> Lesaka was previously NET1.

regarding these new matters to determine whether they should be classified as contractually incurred expenses (to be included in the proper profit determination), or expenses which were incidental to the contract that ought to be excluded from the proper profit determination.

- (g) RAIN could not obtain information on certain matters (e.g. Lesaka's profit) for not being "superficially" covered by the court order.
- (h) RAIN discovered further information which cast doubt on the validity of the profit determined per CPS' statement of income and expense.

[58] According to Treasury, it still required the following information from CPS to conduct its exercise—

- (a) interest earned by CPS on surplus cash;
- (b) Grindrod interest earned by Lesaka and CPS;
- (c) bulk re-registration costs;
- (d) royalty fees paid by CPS to Lesaka;
- (e) profit earned by Lesaka from the SASSA contract; and
- (f) B-BBEE expenses incurred by CPS and Lesaka and retrenchment costs incurred by CPS, and why these costs were not included in CPS' general ledger and, by extension, its financial statements.

*The certified profit*

[59] Before dealing with the questions directed to the parties, I make a few general observations. It bears emphasis that there are fierce disputes between the parties regarding what documents are necessary to enable Treasury to approve RAIN's updated verification and to enable Treasury to determine whether CPS (or Lesaka, if that is relevant) made any profit from the invalid contract and, if so, how much. These disputes concern, amongst others:

- (a) whether further documents and information are in fact needed;
- (b) whether CPS and Lesaka have already provided such documents and information;

- (c) if not, whether they are able to provide such documents and information or whether they have provided everything they can reasonably be expected to produce; and
- (d) what those documents show regarding the certified profits, that is, whether they are higher or lower than the figures certified by KPMG and Mazars (R252 592 152).

[60] For the reasons that follow, I conclude that this Court should use the certified profit as a baseline for determination in this case. That amount may have to be adjusted upwards or downwards. This is where the range of questions raised with the parties by the Chief Justice in the directions feature.

[61] But why simply settle for the amount of certified profit? In response to the questions relating to this aspect, as is to be expected, the parties advanced divergent submissions regarding this certified profit approach. In summary, SASSA supports the grant of the order that CPS should refund the certified profit, as consequentially adjusted on the strength of the common cause facts. Treasury's position was that, since it was not a party to the litigation and is not privy to the information pertinent thereto, it cannot respond meaningfully thereon. CPS has no objection to that course of action; however, this is subject to SASSA submitting a claim for proof in terms of section 44 of the Insolvency Act. Lesaka says that it would be inappropriate for it to take a view regarding the appropriateness of an order for a refund by CPS, as CPS is the only party impacted by such an order.

[62] While RAIN is not opposed to this Court adopting the proposed course of action, it contends that the certified profit should be supplemented with the profits that were made by the owner of CPS, Lesaka, as a result of the invalid contract. According to RAIN these profits arose from royalty payments and other intra-group transactions that RAIN had previously identified. That is a vexed question to which I return presently.

[63] FUL submits that the Court ought to order repayment of the amount accepted by CPS (through its liquidator) as the correct profit amount after adjustment, namely R81 812 595. FUL emphasises that this Court must order the repayment of the entire amount of profit so that CPS does not reap any benefit from the tainted profit.

[64] A conspectus of these responses suggests that there is no serious objection to this Court using the certified profit as a point of departure. That seems to me to be a sensible approach. Self-evidently, regard must be had to the parties' submissions in response to the directions to determine whether the certified profit requires adjustment.

[65] These are the considerations for using the certified profit as a baseline. As stated, given CPS' insolvent status, it may well be an exercise in futility to have the state entities before us attempt to persuade us that it has an even bigger claim than the certified profit against this insolvent company, which was placed in final liquidation precisely for an inability to pay its debts. It would be insensible to require those parties to make out a case for relief relating to payment exceeding the certified profit. I say this against the backdrop of the liquidator's distressing report which mentions the High Court's order that CPS must pay back to SASSA the amount of R316 million plus interest (the Tsoka J judgment). Courts, and particularly this Court as an apex court, should be slow to allow the use of scarce judicial resources for disputes which may ultimately culminate in meaningless and ineffectual orders.

*High Court order of 23 March 2018*

[66] I must give a brief account of the High Court order which was made by Tsoka J on 23 March 2018. The Court declared a variation agreement between SASSA and CPS that flowed from the original contract unlawful. As a consequence, the Court ordered CPS to repay SASSA the proceeds of the unlawful contract in the sum of approximately R316 million plus interest. The High Court judgment was given during the third suspension period certified by Mazars, but the Tsoka J judgment was suspended by an appeal to the Supreme Court of Appeal and a further attempt to

appeal to this Court. The Supreme Court of Appeal only dismissed the appeal on 30 September 2019, and this Court refused leave to appeal during 2020, shortly before SASSA applied for CPS' liquidation in October 2020.

[67] When interest is added, that judgment debt doubles and legal costs must still be added. The relevance of this High Court order is that if the certified profit does not take this amount into account, SASSA's claim may be far higher than the certified profit (because the certified profit will have to be reduced by the amount in the Tsoka J judgment). In addition, according to the liquidator, SASSA may have a further claim which may bring its total claim to approximately R708 million. But there is more. According to the liquidator's report, SARS may also have an extensive claim against this insolvent company. In that regard, as stated, there is litigation pending between SARS and the CPS liquidator. If SARS were to succeed with what is plainly a substantial claim, there is little prospect of concurrent creditors getting anything at all.

[68] The parties differed on whether the certified profit includes the amount in the Tsoka J order. SASSA accepts that a deduction of the amount was not made. Treasury was not a party to the litigation and says it cannot respond meaningfully on the matter. CPS' liquidator responded that, to the best of her knowledge, allowance was not made for the repayment to SASSA of the abovementioned amount and that the papers of KPMG and Mazars do not reflect it having been included.

[69] FUL accepts that no allowance was made, as confirmed by CPS and RAIN in response to the Court's queries. Lesaka notes that SASSA has lodged a claim in CPS' insolvent estate pursuant to the Tsoka J order in the sum of R632 894 722 (in respect of the capital sum plus interest). Lesaka alludes to the interest earned by CPS on the amount originally paid by SASSA, and later ordered by Tsoka J to be repaid to SASSA with interest. Lesaka states that it is not clear whether that interest was credited as income by KPMG. According to Lesaka, if the Court finds that CPS is obliged to repay the certified profit, then the SASSA claim must be reduced by the

interest component. On the other hand, if the interest was not credited to CPS by KPMG, then only the capital amount of the Tsoka J order falls to be deducted. RAIN accepts that these adjustments were not made, and would need to be made.

[70] In summary then, the parties were all agreed that an adjustment should be made. They differ, however, in respect of the extent of the adjustment (save of course for Treasury which is non-committal due to its not being involved in the litigation). SASSA submits that the adjustment should be limited to the capital amount of the judgment together with interest limited to the period until 16 October 2020, the date of the liquidation of CPS.

[71] The liquidator's position is that apart from the capital, interest should be added, calculated at 15.5% until 30 September 2018, the date on which the extended duration of the suspension of invalidity in respect of the SASSA contract expired (in other words, interest beyond that date should not be treated as an expense falling within the three suspension periods to be certified). As stated, Lesaka's position is that it has no knowledge whether the interest was credited as income by KPMG. If it was credited, it follows that any interest accounted for by KPMG to the credit of CPS ought similarly to be reversed. According to Lesaka, the amounts in question should be capable of simple computation if the principle is recognised.

[72] RAIN does not make any submissions on this. FUL would defer to SASSA's view on this issue, given that it would be the recipient of any order of repayment made by this Court and as it is the judgment creditor in respect of the Tsoka J judgment.

[73] Next, the parties are agreed that the certified profit should be adjusted by reversing the provision for retrenchment costs in the amount of R107 033 718, bearing in mind that on the evidence those costs were not incurred. All of them, including Treasury, accept that the certified profit should be revised and increased by addition of this amount as this expense cannot be supported or justified. The liquidator submits that the certified profit should be increased with the amount of R107 033 718, for the

period of April 2012 to September 2018 by reversing a deducted retrenchment cost provision that CPS claimed but which never materialised, as no actual redundancies occurred due to the contract invalidation and liquidation.

*Parties' answers to the rest of the questions*

*Possible reversal of the B-BBEE expenditure*

[74] In respect of the possible reversal of the B-BBEE expenditure of R437 093 795, due to the absence of evidence to substantiate the expenditure, there are divergent submissions. SASSA answers that the reversal is manifest; it points out that the sale and repurchase of shares by Lesaka is an overt business transaction that had nothing to do with CPS, and may perhaps be justified by the business activities which resulted in a receipt of significant royalties. In any event, submits SASSA, following the declaration that the contract is unlawful, there existed no legal basis for the incurring of the expense, as the suspension of invalidity was merely for purposes of non-disruption of services to SASSA beneficiaries. SASSA points out that it is RAIN's contention that Lesaka cannot be reimbursed for its "expenses" after its elaborate effort to distance itself from the profit shifting which occurred between it and CPS, as alleged by RAIN.

[75] Treasury, in its previous filings, had requested more information to assess the B-BBEE expenditure of R437 093 795. This information was not received. Accordingly, Treasury states that it is not in a position to respond and will abide the Court's ruling in this regard.

[76] FUL submits that the certified profit should be adjusted by reversing the B-BBEE expenditure, by at least the amount submitted by CPS' liquidator (R325 443 794) and, to avoid dispute, CPS' position (through its liquidator) should be accepted, with leave given to SASSA to pursue any further order for recovery of additional profit, if so advised.

[77] Lesaka submits that the B-BBEE expenses have three components which total R437 093 795:

- (a) B-BBEE transaction equity instrument charge under International Financial Reporting Standards (IFRS) 2 of R118 735 900;
- (b) B-BBEE service fees of R255 200 000; and
- (c) B-BBEE retainer fee of R63 157 895.

[78] Lesaka provides a breakdown of how the first line item should be treated pursuant to IFRS 2. It explains that the fact that the shares were repurchased does not detract from the need to account for the expense which was actually incurred. Lesaka indicates that, if anything, the cost accounted for, when issued to the B-BBEE party, was understated. Lesaka contends that, given the undisputed accounting requirement (which is designed to achieve a fair and faithful presentation), there is nothing to adjust. With regard to the service fee and retainer fee, Lesaka submits that it is common cause that the amounts in question were in fact incurred by CPS. According to Lesaka, CPS' "bottom line" was reduced by the amount of these payments. In these circumstances, Lesaka submits, there can be no genuine dispute that the expenses were incurred and were therefore properly recorded.

[79] RAIN submits that the full B-BBEE expenditure should be reversed. The service fee and the retainer fee should be reversed, because the liquidator concluded that on the available evidence, this contract was never implemented, and she was not provided with any supporting documents nor was anything submitted to the liquidation enquiry. In the circumstances, the liquidator concludes that this expense appears to be without supporting evidence. As to the first B-BBEE element, the "BEE transaction equity instrument charge", RAIN concurs with the submission of the liquidator (see below) that the expense is rightly carried by Lesaka and not CPS, and should be added to the certified profit.

[80] On behalf of CPS, the liquidator responds that the certified profit should be adjusted, but in the amount of R325 443 704,<sup>55</sup> instead of R437 093 759. This is on the following basis. First, in respect of the B-BBEE services, the total amount as per the calculations of KPMG and Mazars amounted to R255 200 000. It is pointed out that RAIN disputed a sum of R143 550 000 in respect of that amount on the grounds that there was no evidence to support the payments, and that certain payments appeared to benefit the entire NET1 group (and not CPS only). The liquidator states that she has not been able to procure evidence to support the payments or an appropriate allocation in respect of CPS only. Therefore, the liquidator submits that the amount of R143 550 000 should be added to the certified profit.

[81] Second, in respect of the retainer fees, according to the liquidator RAIN disputed the validity of the expense on the grounds that the retainer did not stipulate the services to be rendered in terms of the SASSA contract and again appeared to benefit the NET1 group (and not CPS only). The liquidator submits that the retainer fees of R63 157 804 should be added to the certified profit, unless Lesaka is able to provide clarity as to the appropriate allocation in respect of CPS.

[82] Lastly, in respect of the equity transaction fee, the liquidator states that RAIN found that the amount was not an actual expense and therefore should be added to the certified profit. The liquidator submits that, to the extent that the fee can be regarded as an expense, it would appear that the expense is rightly carried by Lesaka and not CPS. The amount of R118 735 900 should be added to the certified profit, unless NET1 is able to provide evidence to the contrary.

*The pending litigation in respect of CPS' claim against SASSA*

[83] The next question relates to paragraph 8.3 of the liquidator's report, the pending litigation in which CPS is claiming a price adjustment of R358 196 928 against SASSA. The parties were asked whether the claimed price adjustment was an

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<sup>55</sup> In the submission on behalf of the liquidator, this amount is given as R325 443 794, but as the sum of its three components: R143 550 000 + R63 157 804 + R118 735 900 = R325 443 704.

adjustment to the price to which CPS was entitled for work done during one or more of the periods certified by KPMG or Mazars. Treasury, Lesaka and RAIN do not make any submissions on this point. FUL accepts the liquidator's statement that this is an adjustment to the price to which CPS claims to be entitled for work done during one or more of the periods certified by KPMG or Mazars. I discuss next the question whether, if CPS is successful in the pending litigation, this would have the effect of increasing its certified profit by R358 196 928.

[84] Again, Treasury, Lesaka and RAIN make no submissions on this point. SASSA and the liquidator agree that the outcome of the pending proceedings will have a bearing on the profit earned under the contract. FUL accepts the liquidator's submission that if CPS is successful in the pending litigation, it will have the effect of increasing the certified profit in that sum.

[85] According to SASSA, given this increase in certified profit, a way of dealing with it is that this Court could make provision for the outcome of the pending proceedings, by certifying the profit through an addition to the amount arrived at in its judgment of any amount which would become payable pursuant to the finalisation of the pending proceedings. FUL accepts the liquidator's position that it is not possible to determine the adjusted certified profit prior to the final determination of the pending litigation.

[86] Regarding CPS' (through the liquidator) possible success in the pending litigation and the effect of the *concursum creditorum* on the set-off between SASSA's obligation to pay the increased price and CPS' obligation (if so ordered by this Court) to pay such a sum to SASSA as part of the certified profit, these are the submissions. SASSA submits that the effect of the *concursum creditorum* is that the set-off cannot be applied. However, on a practical side, SASSA suggests as follows. As the estate presently has assets of R50 981 821 and possibly has two preferent creditors (employees in the amount of R46 772 and SARS in the amount of R401 392 066), in the event that CPS were to succeed in the pending litigation against SASSA, provision

could be made for such an award to be paid to the preferent creditors. This would only require the consent of the liquidator, which is not anticipated to be withheld. This would not occasion prejudice to the concurrent creditors, but would instead advance the prospect of a greater distribution to them.

[87] Treasury, Lesaka and RAIN also make no submissions regarding this aspect. The liquidator submits that upon the *concursum creditorum* having become vested, SASSA's claims against CPS crystallised. Thus, no set-off can be applied against any amounts for which SASSA may be held liable to pay to CPS. The liquidator submits that CPS and SASSA should attempt to settle this action to attain finality, and that the certified profit should not be adjusted with this item. FUL accepts this line of reasoning by, and suggestion of, the liquidator.

*SASSA's claim for payment of services not rendered*

[88] Next, in relation to the recordal in paragraph 9.12 of the liquidator's report that SASSA has proved a claim of R74 786 892 "for payment of services not rendered", the question is whether this claim relates to one or more of the periods certified by KPMG or Mazars. Only the liquidator and FUL have responded to this question. Based on the liquidator's affirmative answer, FUL accepts that the claim relates to one or more of the periods certified by KPMG or Mazars.

[89] Regarding this claim of SASSA, the liquidator's response (which FUL accepts), is that there was an overpayment by SASSA to CPS when a comparison is made of the invoices listed and the amounts paid. The claim was investigated by the liquidator in terms of section 45 of the Insolvency Act and found to be in order. The liquidator states that the certified profit should be adjusted and reduced by an amount of R74 786 892 on the basis that SASSA proved a claim for which CPS is liable, and that amount is accordingly deductible from profits. Treasury and FUL understand the claim of R74 786 892 to arise from the liquidator's report and they accept the liquidator's submission.

*Analysis*

[90] Where does all of this leave us? There are plainly widely divergent views and fierce contestation about how much profit CPS eventually made from this unlawful contract. The only common cause aspect is that CPS did in fact make a profit and that it is safe to use the certified profit as a baseline. Even CPS and Lesaka accept that fact. Resolving the rest of the heavily disputed facts will require a full trial with substantial oral and documentary evidence. And then the adjudicator of fact will have to wade through all the figures, calculations and draw financial conclusions from them.

[91] The first point to get out of the way is the submission that Lesaka can be held liable for the CPS profits channelled to it if the evidence points that way. The first problem is that Lesaka was never party to any of this Court's previous orders. The determination of the profits of third parties is nowhere to be found in any of the orders. Lesaka's case is that the verification orders do not permit RAIN to determine the profits of third parties such as Lesaka and CPS' other shareholders.

[92] On the other hand, RAIN and SASSA argue that the order does allow them to determine profits, because the order concerns any benefit derived from the unlawful contract, including benefits obtained by CPS' shareholders. They contend that the determination of profit made by third parties like Lesaka may also be necessary to determine whether there was an impermissible shifting of profits or expenses by CPS. They also submit that, while certain expenses may have been incurred by CPS and Lesaka in the execution of the unlawful contract, a determination would still have to be made as to whether such expenses were strictly necessary for the purposes of executing the unlawful contract. According to them, it would be in the public interest for this to be known.

[93] According to this Court in *S.O.S Support Public Broadcasting Coalition*,<sup>56</sup> the starting point for interpreting an order is that “[c]ourt orders are intended to provide effective relief and must be capable of achieving their intended purpose”.<sup>57</sup> In circumstances where an order is clear and unambiguous, then a court cannot contradict or change that order. It is also not permitted to state what its subjective intention was regarding the order.<sup>58</sup>

[94] In this instance, the Court’s orders permitted SASSA to verify CPS’ audited profit statements and thus determine the expenses incurred and income and net profit received by CPS over the three suspension periods. There is nothing in that order expressly prohibiting SASSA from determining the validity of the expenses incurred by CPS and whether recorded expenses were an attempt to illegitimately shift profit. In *AllPay II*, this Court placed great reliance on the values of transparency and accountability in holding that CPS had no right to benefit from an unlawful contract, and that the commercial aspect of its business related to the social grants contract “is subject to public scrutiny, both in its operational and financial aspects”.<sup>59</sup>

[95] In determining its income and expenses, CPS was supposed to show its “break-even” point.<sup>60</sup> This Court in *AllPay II* did, however, state that its order did not open all of CPS’ business activities up to public scrutiny,<sup>61</sup> and the order does not relate to its other commercial activities. But the question whether expenses in relation to the fulfilment of the SASSA contract were inflated is highly relevant in determining CPS’ break-even point, and ultimately the net profit CPS truly made. Examining the legitimacy of these expenses may, in the case of Lesaka, require the examination of

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<sup>56</sup> *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Ltd* [2018] ZACC 37; 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC).

<sup>57</sup> *Id* at para 52.

<sup>58</sup> *Id* at para 53.

<sup>59</sup> *AllPay II* above n 2 at para 59.

<sup>60</sup> *Id* at para 67.

<sup>61</sup> *Id* at para 59.

the profit made by Lesaka in relation to its contractual dealings with CPS in the execution of CPS' obligation in terms of the unlawful contract.

[96] The determination of "expenses" in terms of this Court's order may very well then include a determination of whether expenses were inflated by CPS and Lesaka in order to defeat the purpose of this Court's order – which was to ensure accountability and transparency, as well as to prevent CPS from benefitting from an unlawful contract. Lesaka's contention that what matters is that an expense has been incurred, and not the legitimacy or reasonableness of the expense, can possibly be seen to defeat the purpose of accountability in the order – it becomes a tick-box exercise.

[97] Any enquiry will have to put into effect what this Court ordered in *RAiN*.<sup>62</sup> That order allows *RAiN* to look into whether there was "cost-shifting and profit-shifting which would have resulted in the over-stating of expenditure and understating of income" by stating that the information on this needed to be provided to it by CPS, KPMG and Mazars.<sup>63</sup> The practicality of determining Lesaka's profits is a different matter, but it is arguable that it does not fall outside the ambit of this Court's order. *FUL* suggested in its written submissions, without any concrete evidence it must be said, that there is a suspicion of some historical profit-shifting between CPS and Lesaka. *FUL* contended that "this was a natural corollary of the admitted fact that Lesaka's and CPS' businesses were interwoven and that no separate accounting was done between Lesaka and CPS in respect of the SASSA contract". They cited the evidence of Ms van Straaten (Lesaka's and CPS' company secretary and CPS' group financial controller) set out in CPS' supplementary answering affidavit.

[98] It is not necessary to decide this difficult question. As far as the rest of the main and ancillary issues are concerned, I have gone to great lengths to demonstrate how involved a full assessment will be of any profits that CPS may have made. And that lengthy, complex enquiry will have to be undertaken in respect of possible profits

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<sup>62</sup> *RAiN* above n 2.

<sup>63</sup> *Id* at para 11.

accruing to *a company in liquidation*. Self-evidently, the game is not worth the candle. The only possible viable option was to engage in a section 38 process, but this Court stepped back from that process when faced with a number of logistical and administrative objections and nit-picking by some of the parties. And even a section 38 process would have involved a lengthy, complex and costly investigation into the financial affairs of an insolvent company.

[99] There is to my mind only one practical, sensible solution. We need to draw a line in this never-ending saga. The first consideration is one of principle, and was much emphasised by Lesaka in argument. This Court's orders required an "audit" of profit statements prepared by CPS. The section 38 process was envisaged by some parties as a full forensic enquiry with a view to establishing CPS' profit and potentially recovering illicit value-transfers. That is not, however, an "audit", which is the expression of an opinion by an auditing expert on a set of financial statements prepared by the client. So, a section 38 process would really have converted what was envisaged by this Court's previous orders into something far more intrusive and exhaustive. At the hearing, counsel for Lesaka said that if we revived the section 38 process, it should be confined to a process of arriving at an audit opinion.

[100] On a practical level, even without any further profit above the certified profit, SASSA's concurrent claim against CPS is large and, on the evidence currently available, one cannot say that there has in all probability been profit-shifting. KPMG and Mazars are reputable firms, and they appear to have complied with this Court's orders in respect of the audit certification of profit.

[101] Furthermore, there has been an extensive insolvency enquiry, with extensive oral and documentary evidence. It seems that this has not caused CPS' liquidator to believe that she has claims against Lesaka to recover value illicitly transferred from CPS to Lesaka through accounting or other manipulations. There is no reason to doubt the liquidator's independence and willingness to pursue such claims if they existed. If there is additional profit, it is likely to lie in irregular value-transfers from

CPS to Lesaka, so to some extent the prospect of further profit is the flipside of the prospect of CPS' liquidator having claims against Lesaka.

[102] The full insolvency transcript and documents were made available to Treasury and RAIN,<sup>64</sup> and there is a troubling lack of engagement by these parties with this information. Importantly, the content of the KPMG and Mazars laptops were admittedly not examined by Treasury, although an offer to make them available was made to them. There is no evidence from any of the litigants that the evidence uncovered at the insolvency enquiry points to the likelihood of further profit being uncovered. The issues in the first RAIN report were apparently extensively canvassed at the insolvency enquiry with witnesses from KPMG and Mazars. RAIN and Treasury seem largely to have proceeded in disregard of the extensive fact-finding that took place at the insolvency enquiry.

[103] Although SASSA is CPS' major creditor and was represented by attorneys at the insolvency enquiry, there is no indication that SASSA has engaged intensively with the evidence that was uncovered or that SASSA believes there are further witnesses whom the liquidator could have called or from whom relevant new information will be forthcoming.

[104] Treasury appears not to have independently applied its mind and mostly echoed RAIN's averments and submissions. There is some merit in the criticism directed at RAIN by CPS and Lesaka that, instead of doing an "audit" of the profit, RAIN did an "agreed-upon procedures engagement". The distinction seems to be of some auditing significance.

[105] Determining whether RAIN has executed the task ordered by this Court will depend on whether this Court used "audit" in its standard accounting sense – this Court spoke of an "audit statement" and "independent audit verification". There are

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<sup>64</sup> These were sent to RAIN's attorneys by WeTransfer on 18 and 26 October 2023, and receipt was acknowledged.

extensive standards for an “audit”, and these will guide the auditor as to whether an item is material and to the evidence required to support it. Ultimately, an audit is an opinion by the auditor on the material accuracy of financial statements prepared by the client. An “audit” process is very far from a forensic enquiry with a view to determining whether a party has claims against others or has suffered damages.

[106] There is also no evidence from any of the parties that there are likely to be witnesses, not yet examined at the liquidation enquiry, who could shed further light on the matters troubling RAIN and Treasury, or that these witnesses are available and would be able to testify from memory. There is also no evidence of the likelihood of further documents existing in some or other trove. There is no reason to expect witnesses who have long since ceased to have a connection with CPS and Lesaka to have documents in their possession, and without these documents it is difficult to see how they could offer anything other than generalities.

[107] It is true that if it is found that there is a greater profit than the certified profit, SASSA’s pro rata share of the concurrent pot will be larger. However, it seems that the largest other creditor is likely to be SARS. Although there is obviously a difference between these two organs of state, it is not altogether without significance that one would really just have two organs of state fighting over the same pot of money.

[108] Naturally, it is so that, if CPS were actually able to recover more money, for example by way of claims against Lesaka (which appears to be a thriving entity with many business interests), the amount available to CPS’ concurrent creditors would be larger. But the question as to what CPS can recover from Lesaka is a matter for the liquidator and the liquidation enquiry, which has now been completed. The processes contemplated by this Court’s orders do not entail the bringing of claims by CPS against third parties. And there is, in any event, no evidence that successful claims against Lesaka are probable. Even if such claims were possible, there is no indication that the liquidator believes she has such claims or intends to pursue them. It is

significant that counsel for Treasury stated at the hearing that his client definitely regarded as relevant the practical utility of spending money on a further enquiry.

### *Conclusion*

[109] It is time to bring an end to this relentless, seemingly interminable litigation. This is the *twelfth* time that a case involving the illegal SASSA tender has been in this Court. That must be some sort of record – since 2014, it amounts to an average of one case per year. It all ends here. This Court has a colossal workload.<sup>65</sup> The efficient use of judicial resources is axiomatic.<sup>66</sup> It would serve no purpose at all to get bogged down in a laborious exercise of fact-finding, weighing up probabilities, assessing complex, heavily disputed financial evidence and calculating income, allowable deductions and the ultimate sum total to determine the amount of profit that CPS may have made. It may all turn out to be a worthless exercise since CPS is in liquidation.

[110] The logical solution to resolve this intractable conundrum relating to CPS' profit, if any, is to settle for the baseline certified profit amount, adjusted as may be necessary. All the parties, even CPS and Lesaka, accept that the certified profit is a fair number for a baseline profit. Resolving the disputes regarding by how much the baseline must be adjusted up or down would require a full trial. To use this Court's time and resources optimally a line must be drawn under all this litigation using the baseline certified profit with a robust approach to its adjustment. That is the order I propose to make.

[111] The baseline certified profit must be adjusted upwards in the amounts that follow. First, there is the amount of R107 033 718 in respect of retrenchment costs incurred. This appears to be uncontentious. Second, there must be an increase of R325 443 704 in respect of B-BBEE costs. This is the total of the amounts that the liquidator acknowledges should be added back:

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<sup>65</sup> *Minister of Tourism v Afriforum NPC* [2023] ZACC 7; 2023 (6) BCLR 752 (CC) at para 27.

<sup>66</sup> *Id.*

- (a) R143 550 000 in respect of B-BBEE services;
- (b) R63 157 804 in respect of B-BBEE retainer fees; and
- (c) R118 735 900 in respect of the equity transaction fee.

[112] There is some dispute about the B-BBEE transaction's effect and about these figures. RAIN and SASSA consider that the full amount of B-BBEE expenditure (R437 093 795) should be deducted, while Lesaka says that none of it should be deducted. However, since the refund order would be against CPS, it seems that we would be justified in accepting at least the liquidator's concessions. FUL accepts that the B-BBEE cost should be adjusted by at least this figure.

[113] A downward adjustment of the certified profit is also required. The first reduction is the sum of R528 994 505 owed to SASSA in respect of the Tsoka J judgment. There seems to be no dispute that the amount of the judgment was not taken into account by KPMG and Mazars. This amount of R528 994 505 is the capital of R316 447 361 with interest of R212 547 144 from June 2014 to September 2018 added.<sup>67</sup> Tsoka J ordered interest to run from June 2014, and 30 September 2018 is the terminal date of the profit periods.

[114] The interest in respect of the judgment debt has been calculated as simple interest, since it is well-established in our law that it is the prescribed rate of interest in terms of a court order. The interest runs at the prescribed rate applicable at the commencement of interest (here 15.5% as at June 2014), with no subsequent changes in the prescribed rate being taken into account.<sup>68</sup>

[115] The second reduction in the certified profit must be the sum of R74 786 892 in respect of SASSA's claim for work not performed. This relates to the three

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<sup>67</sup> The interest computation is on a monthly basis, as the order in the Tsoka J judgment refers to June 2014 in relation to the interest: "CPS is ordered to refund the said amount of R316 447 361.41 to SASSA, with interest from *June 2014* to date of payment". (Emphasis added.)

<sup>68</sup> Prescribed Rate of Interest Act 55 of 1975.

accounting periods and serves to reduce CPS' profit, an aspect which also appears to be uncontentious.

[116] It is important to explain why these deductions are necessary. As stated, SASSA has proved claims in these amounts. In respect of the Tsoka J judgment, its proved claim is actually greater, R632 894 722, because it includes interest beyond September 2018, which is the terminal date of the profit periods. This means that SASSA already has a concurrent claim for the return of this profit. To leave intact the amounts in the profit certified by KPMG and Mazars would effectively allow SASSA a double recovery.

[117] The net result of these increases and reductions is that the adjusted baseline certified profit is the amount R81 286 177. This is less than the unadjusted baseline of R252 590 152 but it is crucially important to bear in mind that SASSA is already getting a substantial refund of profit through its proved claims of R632 894 722 (in respect of the Tsoka J judgment) and R74 786 892 (in respect of work not done). It is undoubtedly so that the capital components of these amounts were included in the profit certified by KPMG and Mazars. Just taking into account the capital in the Tsoka J order of R316 447 361, SASSA will effectively be clawing back the following profits: R316 447 361 plus R74 786 892 plus the adjusted baseline of R81 286 177.

[118] What remains then is CPS' pending action against SASSA for an upward price adjustment of R358 196 928. There are three possible scenarios: CPS' action might succeed in full; it may fail altogether; or there might be an award for less than the full claimed amount. Such a claim will undoubtedly increase CPS' profit, and by virtue of the *concursum creditorum*, SASSA will have to pay it in full to CPS. SASSA should, however, not be granted a concurrent claim to claw back that profit.

*Costs*

[119] Regarding costs, there have been accusations and counter-accusations of lack of cooperation and failure of duty by various parties. On a conspectus of all the evidence it is clear that most, if not all, the protagonists have not covered themselves in glory at all. The tone of the averments in a number of affidavits has also been overly strident. Twelve years and twelve court cases later, attitudes have plainly hardened. And the parties appear litigation-weary. In exercising this Court's discretion on costs, the fairest and most balanced order would be one that each party bears their own costs.

[120] I make the following order:

1. The sixth respondent (Cash Paymaster Services (Pty) Limited) (CPS) is ordered to refund the adjusted certified profit of R81 286 177 to the third respondent (South African Social Security Agency) (SASSA), in respect of which amount SASSA is granted leave to prove a concurrent claim.
2. In respect of CPS' pending action against SASSA for an upward price adjustment of R316 447 361, it is declared that, if the said action succeeds in full or in part, CPS need not refund to SASSA, as additional profit, any increased price which the latter is ordered to and does pay to CPS.
3. Each party is to bear its own costs.

For the Second Applicant: A Coutsoudis and M Lengane  
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For the Second and Third Respondents: M Mphaga SC and M E Manala  
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For the Sixth Respondent: J E Smit SC instructed by VFV  
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For the Eighth Respondent: G Budlender SC instructed by Harris  
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For the Eleventh Respondent: J Blou SC and L Acker instructed by  
Stein Scop Attorneys Incorporated