

CONFIDENTIAL ADVICE

to

THE MINISTERIAL TASK TEAM

on

SASSA'S DEVIATION REQUEST TO TREASURY

Wim Trengove SC
11 March 2017

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THE PURPOSE OF THIS ADVICE

1. The Ministerial Task Team resolved on 9 March 2017 as follows:
"Minister Radebe recommended that Senior Counsel be briefed to handle the matter. He further recommended the immediate briefing of Adv Wim Trengove SC to correct the error, to oversee the determinations and implementation of correct solutions and to establish the facts independently of every party currently involved in the matter. A multi-disciplinary team of departmental experts must drive the implementation of the new process."

2. I do not understand my instruction to mean that I am to take charge of the determination and implementation of the correct solution. I do not have the expertise or authority to do so. It remains the prerogative and duty of SASSA represented by its CEO acting under the direction of the Minister. My role is to provide independent advice to the MTT and SASSA on the legality of its preferred solution.

3. SASSA's contract with Cash Paymaster Services for the payment of social grants expires on 31 March 2017. It proposes to enter into a new contract with CPS by private negotiation and without a competitive bidding process. Such a deviation from the normal requirement of a competitive bidding process requires Treasury approval. SASSA is preparing a request for such approval. Its counsel gave me a copy of their draft request on Friday evening 10 March 2017. He assured me that the final request will not be materially different.

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4. The purpose of this note is to comment on the legal implications of SASSA's Deviation Request. It must be assessed in the light of two constitutional duties bearing on SASSA. The first is its duty to pay social grants. I shall call it its "*payments duty*". The second is to follow a competitive bidding process when it procures the services of contractors. I shall call it its "*procurement duty*".

SASSA'S PAYMENT DUTY

5. SASSA has a constitutional duty to pay social grants to beneficiaries on behalf of the state. The Constitutional Court described this duty in *Allpay (2)*¹ as follows:

"47 *In terms of s 27(1)(c) of the Constitution everyone has the fundamental right to 'have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Section 27(2) states that '(t)he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.² The state has done so. The Social Assistance Act³ (Assistance Act) makes provision for social assistance.⁴ Chapter 3 deals with the administration of social assistance, including payments to beneficiaries.⁵*

¹ *Allpay Consolidated Investment Holdings v Chief Executive Officer, SASSA 2014 (4) SA 179 (CC)*

² As well as the other rights enumerated in s 27(1)

³ 13 of 2004

⁴ Section 3

⁵ Sections 14 ñ 23

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48 SASSA must, under the Agency Act, administer social assistance in terms of ch 3 of the Assistance Act.⁶ The objects of SASSA are to act, eventually, as the sole agent for the administration of social assistance, but also to act as an agent for the prospective administration and payment of social security.⁷ SASSA may, with the concurrence of the responsible minister, enter into an agreement with any person to ensure effective payments to beneficiaries.⁸ 27 The agreement must include provisions to ensure the effective and economical use of funds for payment to beneficiaries; the promotion and protection of the human dignity of beneficiaries; the protection of confidential information held by the agency; honest, impartial, fair and equitable service delivery; mechanisms to regulate community participation and consultation; and financial penalties for non-compliance.⁹

6. SASSA accordingly performs constitutional duties of the state by its payment of social grants. They are the duties of the state,
- to achieve the progressive realisation of everyone's right to social security in terms of s 27(1)(c); and
 - to fulfil the right of every child to the basic amenities of life in terms of s 28(1)(c).

⁶ Section 4(1)(a) of the Agency Act

⁷ Section 3(a) and (b)

⁸ Section 4(2)(a)

⁹ Section 4(3)

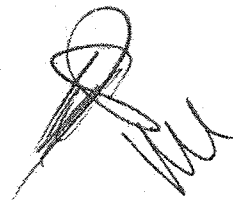


SASSA'S PROCUREMENT DUTY

7. Section 217(1) of the Constitution provides that, when an organ of state contracts for goods or services, it must do so "*in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*".
8. This requirement is echoed in s 51(1)(a)(iii) of the Public Finance Management Act and in Treasury Regulations 16A3.1 and 3.2.
9. Treasury Regulation 16A6.4 provides for an exception to the general requirement of a competitive process if, in any specific case, "*it is impractical to invite competitive bids*".
10. National Treasury issued SCM Instruction Note 3 on 19 April 2016. Its purpose is "*to provide guidance on measures to prevent and combat abuse in the Supply Chain Management System*". Paragraph 8 regulates deviations from the normal requirement of a competitive bidding process. Paragraph 8.1 says that deviation is permissible only "*in cases of emergency and sole supplier status*". Paragraph 8.5 adds that deviation will only be allowed "*in exceptional cases subject to the prior written approval of the relevant treasury*".

SASSA'S PERFORMANCE IN THIS CASE


11. SASSA is ordinarily obliged to comply with both its payment duty and its procurement duty. It must pay social grants and, if it employs contractors to do so on its behalf, it must procure their services by a competitive bidding process.

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12. SASSA can no longer comply with both duties for the payment of social grants from 1 April 2017 after expiry of its contract with CPS. It can contract with CPS to continue paying the social grants but it cannot do so by a competitive bidding process. CPS is moreover the only contractor capable of performing this function for some time because no other contractor has the infrastructure and resources in place to take over the payment functions overnight.
13. It is clear that SASSA is now in an emergency and has no other option than to contract with CPS. But it does not, in my view, qualify for exemption from the general requirement of a competitive bidding process because its predicament is self-inflicted. This much is apparent from SASSA's Follow-Up Report to the Constitutional Court dated 2 March 2017. The Minister and the Acting CEO put it as follows:
- 13.1. *"The Minister and SASSA have since been advised that the plan (of November 2015 to go it alone from 1 April 2017) was overly optimistic, unrealistic and underpinned by insufficient research".¹⁰*
- 13.2. *"The Minister and SASSA accept responsibility for delays in identifying and redressing deficiencies in the plan since the time of reporting to the court on 5 November 2015 to date."¹¹*

¹⁰ Para 19

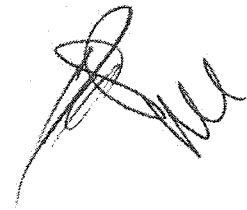
¹¹ Para 20

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- 13.3. *"The Minister and SASSA accept that they ought to have been so aware earlier (than October 2016, that SASSA will not be able to go it alone from 1 April 2017)".¹²*
- 13.4. *"The Minister and SASSA accept that formal negotiations ought to have commenced at an earlier stage."¹³*
14. It means that it remains unlawful for SASSA to contract with CPS without a competitive bidding process. But its higher duty and first priority is to ensure that all social grants are paid on time. It can only do so by contracting with CPS to continue paying the social grants for some time. I am accordingly of the view that SASSA is obliged to contract with CPS to continue paying the social grants for some time despite the fact that the method by which it will do so will be unlawful for want of compliance with the normal requirement of a competitive bidding process.
15. The fact that SASSA's method of contracting with CPS will be unlawful, imposes a duty on it to minimise its unlawful conduct. It must do so by contracting with CPS to continue paying social grants for only so long as it reasonably requires to employ a lawful process for the appointment of a new contractor, that is, by a competitive bidding process.
16. SASSA seems to have accepted this duty in its Follow-Up Report to the Constitutional Court where the Minister and the Acting CEO put it as follows:

¹² Para 21

¹³ Para 37



"SASSA's conduct to date has been based on its intention to assume the function of paying and administering social grants itself, an intention that has been expressed publicly since at least 2012.

SASSA now accepts that to pursue this intention in the short or medium term will cause undue delay in putting the payment of social grants on a lawful footing. Instead, it will run a competitive bidding process to have a new contractor or contractor in place."¹⁴

17. SASSA's Deviation Request also proceeds from the same starting point:

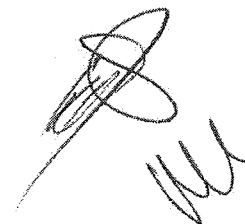
"SASSA's and the Minister's current thinking is the RFP that will result from the RFI process should lead, as soon as reasonably practicable, to the appointment, via a competitive bidding process, of a contractor or contractors to perform the grant administration and payment functions that are currently the subject of the CPS contract until such time as SASSA is ready to implement its ultimate vision of providing all of those functions itself."¹⁵

18. SASSA's agreement in principle with CPS on 3 March 2017 however seems to depart from this approach. According to the Deviation Request, the agreement in principle provides for a new contract for a period of two years, not only to appoint a new contractor by a competitive bidding process, but also to allow SASSA to acquire the skills, resources and infrastructure to take over some of the functions currently performed by CPS.¹⁶ But SASSA is in my view not entitled to enter into a new contract

¹⁴ Paras 46 and 47

¹⁵ Draft Deviation Request para 2.21

¹⁶ Draft Deviation Request para 2.25.6

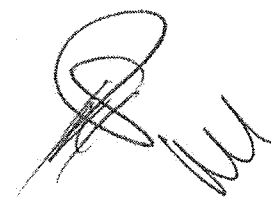


with CPS for longer than the time reasonably necessary to appoint a new contractor by a competitive bidding process.

19. SASSA is no doubt entitled, in normal circumstances, to pursue a goal of self-sufficiency by equipping itself with the skills, resources and infrastructure necessary to take over all or some of the functions of paying social grants. But these are not normal times. SASSA has squandered its freedom to pursue its preferred outcomes. It is now under a duty to minimise its breach of its procurement duty when it enters into a new contract with CPS without following a competitive bidding process. It may not enter into such a contract for any longer than is reasonably necessary to regularise its position by appointing a new contractor by a competitive bidding process.
20. The plan to enter into a two year interim contract with CPS in any event seems a very recent idea apparently borne of the discussions between SASSA and CPS from 1 to 3 March 2017. As recently as 8 February 2017, SASSA proposed an interim arrangement with CPS of only 12 or a maximum of 18 months.¹⁷ Even more recently, on 28 February 2017, the CEO of SASSA applied to the Constitutional Court for leave to enter into an interim contract with CPS for only one year.¹⁸
21. SASSA has accordingly not made a persuasive case for its suggestion that its interim contract with CPS should be for a period of two years.

¹⁷ Letter dated 1 February 2017 from the Minister of Social Development to the Minister of Finance para 9; letter dated 7 February 2017 from the CEO of SASSA to the DG of Treasury para 2.4; letter dated 8 February 2017 from the Minister of Social Development to the Minister of Finance para 2.5

¹⁸ Notice of Motion p 3 para 3; Founding Affidavit p 6 para 12

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CONCLUSIONS

22. I conclude as follows:

- 22.1. SASSA is obliged to enter into an interim contract with CPS because it is the only way in which it can discharge its duty to ensure that all social grants are duly paid.
- 22.2. The method by which SASSA contracts with CPS will be unlawful for want of compliance with the requirement of a competitive bidding process. It must minimise the extent of its breach of this requirement by entering into an interim contract with CPS for no longer than is reasonably necessary to appoint a new contractor by a competitive bidding process. SASSA does not seem to require two years for that purpose.
- 22.3. It would be appropriate for Treasury to allow SASSA to deviate from the normal requirement of a competitive bidding process provided that it contracts with CPS for no longer than the time it reasonably requires to appoint a new contractor by a competitive bidding process.

Wim Trengove SC

Chambers
Sandton
11 March 2017

