

SOUTH AFRICA / JUDGMENT

Zalisa and Others v South African Social Security Agency and Others (82073/2018) [2019] ZAGPPHC 4 (29 January 2019)

[2019] ZAGPPHC 4**COURT**

North Gauteng High Court, Pretoria

BEFORE

H.J Fabricius

CASE / FILE NUMBER

82073/2018

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case****Number: 82073/2018****In the matter****between:**

NOHDUMISO
ZALISA
1ST APPLICANT
THABO
JOSEPH
SKHOSANA
2ND APPLICANT
MATEBOHO
WINNIE
PENN
3RD APPLICANT
BONAKELE
PETRUS MAXONGO
4TH APPLICANT
GLADNESS
ZODWA
CELE
5TH APPLICANT
DWANA
NDIMENDE
6TH APPLICANT

MKHUJULWA
ERRICK
ZUMA
7TH APPLICANT
NTOMBISODWA
HAPINESS MNGANGA
8TH APPLICANT
KEABETSWE
TILLY
RATSATSI
9TH APPLICANT
PERTUNIA
MOKGADI
HAMESE
10TH APPLICANT
PETER
ESSAU NTETEDI
MABATLE
11TH APPLICANT
MAMISOLO
MARTHA
NKABI
12TH APPLICANT
GLADYS
SYLVIA
BUTHELEZI
13TH APPLICANT
MBALENHLE
ROSE
JIYANE
14TH APPLICANT
MONEYLINE
FINANCIAL SERVICES (PTY) LTD
15TH APPLICANT
AND
SOUTH
AFRICAN SOCIAL SECURITY AGENCY
1ST RESPONDENT
ACTING
CHIEF EXECUTIVE OFFICER OF THE
SOUTH
AFRICAN SOCIAL SECURITY AGENCY
2ND RESPONDENT
MINISTER
OF SOCIAL DEVELOPMENT
3RD RESPONDENT
SOUTH
AFRICAN POST OFFICE SOC LIMITED
4TH RESPONDENT
GRINDROD
BANK LIMITED

5TH
RESPONDENT

JUDGMENT

Fabricius J,

[1] On 28 November 2018, I heard an urgent application in which the Applicants sought an order in the following terms:

1. “Directing that this application is to be heard on an expedited basis in terms of the provisions of rule 6 (12) (a) of the Uniform Rules of Court;
2. Declaring that in providing biometric consents in respect of their EasyPay Everywhere (“EPE”) accounts held with the fifth respondent, to the first respondent (via its agent Cash Paymaster Services (Pty) Limited (“CPS”)), social grant beneficiaries have satisfied the requirements of regulation 21 (1) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance (“the Social Assistance Regulations”);
3. Interdicting the first respondent from stopping to pay any social grant into an EPE account in respect of which biometric consent was provided by the relevant beneficiary to CPS prior to 1 January 2018;
4. Directing the first respondent to process all Annexure C forms duly completed and submitted by social grant beneficiaries in respect of their EPE accounts held with the fifth respondent, within two weeks of the date of submission;
5. Directing the first respondent to pay social grants into bank accounts identified by beneficiaries in their duly completed and submitted Annexure C forms;
6. Directing that the costs of this application are to be paid by the first and second respondents, alternatively jointly and severally by the first and second respondents, and any other respondents opposing it.”

[2] After hearing arguments for the whole day, I issued an interim order, which was substantially in line with what was put to me by the Respondents, either during argument, or with references to undertakings which had been given by the Respondents in writing, before these proceedings commenced, and at a stage when the parties hereto corresponded on the relevant topics. Mr M. Mphaga SC on behalf of the First Respondent, at one stage late during the argument, conceded that this order could

follow, taking into account the day’s proceedings, but after an adjournment informed me that his instructions “had been withdrawn”, and that he would oppose the granting of this, or any other order. In this particular context, I deem it appropriate to refer the parties to the following: in *Hlobo v Multi-Lateral Motor Vehicle Accident Fund* 2001 (2) SA 59 SCA, Plewman JA said the

following at 65 par. [10]: “In this country (as in England) the conduct of a party’s case at the trial of an action is in the entire control of the party’s Counsel. Counsel has authority to compromise the action or any matter in it unless he has received instructions to the contrary”. In my opinion, Mr Mphaga SC was quite entitled, and in fact obliged, to put to me that the envisaged interim draft order, which had been debated by all parties in the Court during the proceedings, could appropriately be made having regard to the mentioned considerations. I do not believe that it was proper for the persons present in Court on behalf of the First Respondent to have “withdrawn his instructions”, at that stage. Be that as it may, that topic can rest there with this gentle reminder.

[3] The order that I made at the end of the proceedings, is the following:

“COURT ORDER

Having heard counsel and having read the papers, it is ordered that:

The first respondent is directed to process all Annexure C forms for the tenth to fourteenth applicants in respect of their EPE accounts by 1 December 2018;

The first respondent is directed to process all Annexure C forms duly completed and submitted by social grant beneficiaries in respect of their EPE accounts within two weeks of the date of submission, as and when such forms are submitted to SASSA by duly qualifying social grant recipients;

The first respondent is directed to pay the social grants into the bank accounts identified by beneficiaries in their duly completed and submitted Annexure C forms;

Pending the handing down of the judgment before 31 January 2019 in this matter the first respondent shall pay the social grants of EPE account holders who provided biometric consent for payment of their grants into their EPE accounts, unless otherwise authorized in terms of a duly completed and submitted Annexure C form; and

Costs reserved.”

[4] The main judgment referred to in par. 4 of that order, now follows.

Applicants’ argument:

[5] Applicants argument was conveniently summarized in written Heads of Argument which, for practical reasons I rely on when formulating what was put before me on behalf of the Applicants.

Urgency:

- [6] It was submitted that to appreciate why this application was urgent, it was necessary to consider the three categories of individual Applicants, and then also the position of the Fifteenth Applicant, a juristic person. The irremediable harm immediately faced by each category of individual Applicant, was given greater force, because they were far alone in their predicament. It was said that the number of people facing the harm which the individual Applicants faced, was some two million beneficiaries.
- [7] The first category of Applicants includes those who made the choice, or election, to have their social grants paid into private bank accounts before the change to the Regulations in issue took place on 6 May 2016.

The second category of Applicant includes those who elected to have their social grants paid into private bank accounts in the period after 6 May 2016, and up to 1 January 2018. During this period, the South African Social Security Agency (“SASSA”), the First Respondent, had authorized Cash Paymaster Services (Pty) Ltd (“CPS”) to accept, on SASSA’s behalf, the instruction that their social grants be paid into their chosen private bank accounts.

The third category includes those who, after 1 January 2018, elected to have their grants paid into private bank accounts, and conveyed their election to SASSA by means of forms which SASSA had determined to be used for this purpose. These are the so-called “Annexure C” forms. Those instructions had not been given effect to within a reasonable time of presenting such forms. That is an important reason why I granted prayers 1, 2 and 3 of the said interim order.

- [8] The Fifteenth Applicant, Moneyline, is a company which manages bank cards and has a commercial interest in ensuring that those who have made elections to have their social grants paid into their private bank accounts, by which it manages the bank cards, have their choices on it, and do in fact have their social grant paid into those accounts.
- [9] The urgency for the first and second categories of social grant beneficiaries, lies primarily in the fact that if the Respondents were not prevented from giving effect to their stated intentions to “ought to migrate”, the grant payments into South African Post Office (“SAPO”) bank accounts, then:
1. The first and second categories of beneficiaries would not be paid their social grants into their chosen private bank accounts in respect of which the Fifteenth Applicant operates the bank cards. As a result, they will – by operation of the terms of the agreements covering these accounts – forfeit and lose their free funeral cover worth R2 500 each, which loss is not remediable in due course;
 2. The first and second categories of beneficiaries would, if the social grants were not paid into their chosen private bank accounts in respect of which the Fifteenth Applicant operates the bank cards, have to go to a SASSA office to find out what happened to their grant payment for the month, and then go to a SAPO branch to draw the grant. This is particularly evident from the affidavit of the Eighth Applicant where she explains in her Supplementary Affidavit the steps that she was advised to take if she wanted to restore payment into her chosen bank

account after she has been auto-migrated by SASSA. The inconvenience, confusion, distress, time wasted and transport costs – particularly in rural areas – if transport be available when required, would cause the elderly, the disabled and those entrusted with the care of young children (i.e. social grant recipients), harm which is not remediable in due course;

3. Even if such harm suffered were notionally remediable in the hands of a person who could afford to pay lawyers to bring action claims in due course, the individual Applicants’ “right” to do this, is merely illusory;
4. The loss of some two million grants from the accounts for which Fifteenth Applicant manages the bank cards for a fee, will be a devastating blow to the Fifteenth Applicant’s business, the damage to its goodwill will be irremediable, and it would be unable to obtain substantive redress in the ordinary course, not least because recovery of damages in these circumstances against public authorities would be costly, difficult to prove and difficult to sustain a cause of action on;
5. The Respondents have indicated in no uncertain terms that they intend to make payment of the social grants in issue into the SAPO bank accounts, not into the private bank accounts which the first and second categories of grant beneficiaries have chosen, and have in fact been using to receive the social grants paid for the past number of years. The crux therefore was that the Applicants simply wanted the status quo to be maintained;
6. The Respondents repeated assurance that “the Applicants will be paid”, was simply not true in respect of the Fifteenth Applicant, and not practically true in respect of all three categories of individual Applicants. It is true that there would be standing to the credit of the individual Applicants’ money in accounts that they did not choose, and do not normally use and were not aware of. It was submitted in this context that the Applicants were not required to go on a treasure hunt through the forests of State machinery, and State-owned enterprises, to find where the payment has been hidden. They are entitled to have their prior choices respected, and the way in which they receive their social grants uninterrupted;
7. The submission furthermore was that if there were going to be changes made by the State, the social grant recipients were entitled to be given notice of the impending change, and a fair opportunity to elect to continue with their existing accounts as managed by the Fifteenth Applicant. Instead they were being “auto-migrated”, but there was nothing “automatic” about this migration. It was the product of a deliberate decision-making process on the part of the Respondents;
8. The Respondents have imposed, in violation of the Rule of Law, as it was put, that as of 31 January 2019, all valid and authorized prior elections as to the destination of social grants would be erased, and a new order would be imposed. The exception provided by the “Annexure C” method of recognizing the social grant recipients’ elections was, in the light of the experience of the third category of Applicants, as illusory as any right to recover damages in due course;

9. The Respondents' protestations that commercial urgency did not merit urgent adjudication, was erroneous in law, and in any event really only applied to the Fifteenth Applicant. For the other Applicants and their dependants, and others in the same position, the situation was far closer to body and soul, life and death, inasmuch as social grants were not "commercial";
10. The commercial interests of the Fifteenth Applicant corresponded with the life-interests and dignity-interests of the other Applicants. The fact that the Fifteenth Applicant brought this application to Court, has opened a door to justice that the other Applicants would probably never have been able to open themselves;
11. In the context of the Court's power to grant and interim interdict on an urgent basis, it was held in *Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Council* 1997 (4) SA 213 (W), per Goldstein J, that in appropriate cases "mere" commercial interests could indeed justify the grant of an urgent

order. I agree with that finding.

12. It was also submitted that the failure of Respondents to timeously process the third category of Applicants' applications (Annexure C forms) and to have the social grants paid into the private bank accounts was unreasonable, and there was no justification for such delay;
13. The delay prejudices those Applicants – not least because they are unable to get the free funeral cover as soon as is reasonably possible – but they are deprived of the other benefits of a private bank account as well. In the case of the Fifteenth Applicant's bank card managed accounts, these include the convenience of thousands of pay-points around the country including many other service areas where SAPO branches are far distant, have limited trading hours, and where long queues can predictably be expected; (if affordable transport is available in any event)
14. The object of the entire social grant policy has included, as a number of Constitutional Court judgments have demonstrated, to "bank their previously unbanked". This was part of the overall poverty alleviation policy. The actions of the Respondents ran counter to this policy and they were "un-banking the banked", and auto-migrating them into second rate SAPO accounts, riding rough-shot over their express wishes to have private bank accounts.

[10] It was furthermore submitted by Mr Morrison SC that in opposing the relief sought in this application, the Respondents probably overlooked the following relevant facts:

1. As EasyPay Everywhere ("EPE") accountholders, each of the 14 individual Applicants would have received R2 500 free funeral cover upon being issued with an EPE card. This benefit will not be payable if the card was not active for a period of longer than three months at the time of their beneficiary's death;
2. Moneyline offers +/- 300 mobile branches that visit approximately 6500 pay points, where beneficiaries can transact and withdraw money. These are situated in some of the most rural parts of South Africa, and importantly, they are not SASSA pay points;

3. SASSA has resolved to discontinuing servicing over 9000 pay points, leaving beneficiaries to their own devices to travel to the nearest SAPO office or fixed banking infrastructure at their own cost;
4. Certain of the Applicants, along with other beneficiaries, have completed Annexure C forms that SASSA either refuses to accept, or has failed and/or refuses to process;
5. The next cycle for the payment of social grants commences on 1 December 2018.

All of the abovementioned were major considerations when I granted my interim order on 28 November 2018.

- [11] Insofar as the cessation of payments into EPE accounts from the end of January 2019 is concerned, the first immediate consequence would be that the Applicants (and other EPE cardholders), will lose their funeral cover. For example, the Second Applicant expressly stated that he was a pensioner and that absent the funeral cover, his four dependants would not be able to afford to bury him.
- [12] There was also a real possibility that SASSA's requirements for beneficiaries with private bank accounts, to submit Annexure C forms by 31 January 2019, may not come to the attention of all such beneficiaries, inasmuch as many of them lived in the most remote rural areas of the country, and were often old, frail and disabled. Whilst SASSA did provide house visits, outreach, sms's and telephone calls, as means of communication, it had provided no concrete plans to ensure that the affected social grant beneficiaries would in fact be contacted, and that their lives would not be disrupted. In fact, SASSA requested assistance from Moneyline to contact these beneficiaries and have them return the completed Annexure C forms.
- [13] A further important consideration was that the deadline of 31 January 2019, had been self-imposed by SASSA. It was contended that it had provided no basis to explain this apparent urgent need for this process to be completed in such a short time.
- [14] Taking into account the abovementioned considerations, as well as the decision of Goldstone J in *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G – H, wherein he held that the urgency of commercial interests could justify the invocation of Uniform Rule of Court 6 (12), no less than any other interests, depending in each case on its own particular circumstances, I held that the case before me was indeed urgent, and accordingly I issued the interim order, which in turn was justified on the facts.

The issues:

[15] It was contended that essential to this application are the procedures in terms of which millions of beneficiaries from April 2012 until December 2017, made their election to receive payment of social grants in the bank accounts of their choice. According to SASSA and the Minister, these procedures did not comply with Regulation 21 (1) (a) as amended. In their view, such beneficiaries must still comply by 31 January 2019, failing which their social grants would be paid into SAPO accounts opened on their behalf.

[16] From 22 August 2008 to 5 May 2016, Regulation 21 (1), provided that social grants would be paid in two ways, either by way of –

1. “Electronic transfer into an account of the beneficiary or institution where the beneficiary resides, subject to written authorization by the beneficiary”; or
2. “Manual payments at a designated place”.

Since 6 May 2016, Regulation 21 (1) has provided that payment of social grants may be effected in the following ways:

“The agency shall pay a social grant –

- a) Into a bank account of the beneficiary or institution where the beneficiary resides, provided that:
 - i) The beneficiary of the social grant consents to payment in accordance with sub-Regulation 21 (1)
 - (a) in writing and has submitted such consent in person to the agency;
 - ii) Where a beneficiary is unable to submit the consent contemplated in sub-paragraph i) in person, alternative arrangements must be made with the agency; or,
- b) By the payment method determined by the agency”.

In contrast to the views of SASSA and the Minister, Mr Morrison SC submitted that beneficiaries were not required, for a second time, to provide authorization for the payment of social grants into their chosen bank accounts. This submission was made for two reasons: first the procedures in terms of which these beneficiaries made their election to receive payment of the social grants where expressly authorized and accepted by SASSA, following which payments were made over many months and/or years, and, unless,

and until SASSA reviews and sets aside its own decision, an issue which was not before me, SASSA could not require beneficiaries to provide consent for a second time. Second, in providing consent in the manner that they did, beneficiaries satisfied the requirements of Regulation 21 (1) as it read at the relevant time.

[17] Applicants also contended that this case also deals with SASSA's ability to process a duly completed and submitted Annexure C forms, and whether this ought to be done within a reasonable period. The Minister submitted that there are currently no back-logs in the processing of the forms, and no delays in the subsequent capturing of all relevant data on SASSA's system to enable payment, but she has provided no information regarding the time it takes for this to happen. One was not told whether this would take days, weeks or even months, and SASSA was silent on this issue.

[18] As already mentioned, SASSA requested assistance from Moneyline to contact the beneficiaries and to have them return completed Annexure C forms. SASSA, as is apparent therefore, does not have the capacity to contact all beneficiaries itself.

[19] At its core therefore, this case was about SASSA's intention – with the Minister's express approval – to take the law into their own hands. Yet, our law frowns upon those who do so.

See: Chief Lesapo v North West Agricultural Bank and Another [1999] ZACC 16; 2000 (1) SA 409 (CC) par. 1, and, Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 2014 (3) SA 23 (SCA) at par. 23, wherein it was held that “the resort to self-help, breeding as it does chaos and anarchy, is the very antithesis of the Rule of Law”.

[20] ESSENTIAL FACTS

20.1 From 1 April 2012 to 31 March 2018, CPS administered payments to all social grant beneficiaries, pursuant to a tender awarded by SASSA. While the award of the tender was declared invalid on 29 September 2013, the declaration of invalidity was suspended for the duration of the awarded contract.

20.2 The “administer[ing of] social assistance in terms of Chapter 3 of the Social Assistance Act, [13 of] 2004” is a function allocated to SASSA by section 4(1)(a) of the South African Social Security Agency Act 9 of 2004 (“the SASSA Act”). However, SASSA is entitled to “enter into an agreement with any person to ensure effective payments to beneficiaries”.

20.3 For most of the six years, a beneficiary could receive payment of a social grant in two ways: either by way of an electronic funds

transfer (“EFT”) directly into his or her chosen bank account; or in cash, at a designated pay point. As SASSA's

agent, CPS was responsible for capturing beneficiaries' choices, and paying in the chosen manner

20.4 On 6 May 2016, the Social Assistance Regulations were amended to change, amongst other things, the manner in which social grants were to be paid. While the option to be paid by EFT directly into one's chosen bank account remained, the cash payment option was replaced by “the payment method determined by [SASSA].”

20.5 It would take another two years for SASSA officially to determine this payment method – by EFT into a special bank account, with limited functionality, held at SAPO. Until then, and even for a few months thereafter, beneficiaries were able to continue receiving payment of their social grants in cash, at designated pay points.

20.6 By 31 December 2017, CPS had stopped capturing beneficiaries' authorizations to be paid into their chosen bank accounts. This

function was taken over by SASSA, in accordance with the former acting CEO's letter of 29 November 2017 in which she stated

that "[t]he previous authority given by SASSA to enable beneficiaries to approach CPS directly to request a transfer into a bank account of their choice is hereby withdrawn."

20.7 Once SASSA took over this function of capturing authorisations from beneficiaries to have their social grants paid into private bank accounts, SASSA insisted, in order for a beneficiary's election to be paid into a private bank account to be effective, on the submission, by the beneficiary, in person, of a duly completed Annexure C form. This insistence was premised on a particular interpretation of regulation 21, an interpretation which was erroneous in that it failed to take into account the principles of interpretation, in particular purposive interpretation, as per Mr. Morrison's submission.

20.8 In relevant part, section 5(2)(e) of the Social Assistance Act 13 of 2004 provides that "[t]he Minister may prescribe additional requirements ... in respect of ... forms, procedures and processes for ... payments". The Annexure C form has never been prescribed; it does not appear in any Government Gazette, and appears to be nothing more than a bureaucratic invention of convenience.

[21] I was referred to the decisions of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at par. 26, and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd T/A Eye and Laser Institute* 2014 (3) SA 481 (CC) at par. 26. With reference to the relevant dicta, it was submitted that it would follow that if SASSA was of the view that the procedures in terms of which certain beneficiaries made their election to receive payment of the social grants in the bank accounts of their choice was unlawful, then it would have to make an application to this Court to review its own decision in terms of which such elections were made. They could not resort to self-help in this context, and it also did not matter whether they were acting in good faith or whether there was a good cause for their conduct. It was submitted that this approach was also in line with the Constitutional Court's decision in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

Previous consent:

[22] Prior to their shift of Annexure C forms as required by SASSA, there were two ways in which beneficiaries could authorize CPS to pay social grants into their chosen bank accounts:

Either directly by contacting the CPS call centre to provide authorization for the grant to be paid into an existing bank account; or

Indirectly, by providing biometric consent to Moneyline when opening an EPE account, evidence of which would then be provided to, and captured by CPS.

[23] In either case, once CPS had received a beneficiary's authorization for his or her social grant to be paid into the bank account of his or her choice, it would then ensure that such payments were made by EFT. Regardless of the method of authorization, payment in this manner continued until the end of 2017. Starting in January 2018, payment directly into beneficiaries' chosen bank accounts was made by SASSA. Such payments continued to be made.

[24] Whether the authorizations provided comply with Regulation 21 (1) depends, in part, on which version of the Regulation is to be considered. On behalf of Applicants it was submitted in line with *Curtis v Johannesburg Municipality* 1906 TS 308, that the amendment of Regulation 21 (1) on 6 May 2016, did not render beneficiaries previous authorization in terms of the un-amended provision invalid. Reference was made to the dictum of Innes CJ at 311, where he said the following: "The general rule is that, in the absence of express provision to the contrary,

statutes should be considered as affecting future matters only; and more especially that should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation". To that I may add that the whole topic of retrospectivity of statutes was dealt with in great detail in *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Services and Another*

[2017] 4 ALLSA 175 GP (also 2017 (6) SA 435 GP). Also, this general rule has been approved and applied by the Constitutional Court in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) at par. 27.

Also, in *Werkman's Compensation Commissioner v Jooste* [1997] ZASCA 58; 1997 (4) SA 418 (SCA) at 424 F to H, Smalberger JA said the following: "There is at common law a prima facie rule of construction that a statute (or any amendment or legislatively authorized alteration thereto) should not be interpreted as having retrospective effect. ... The presumption against retrospectivity arising from this rule may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration. ..."

[25] It was therefore submitted that insofar as Regulation 21 (1) was concerned, there was nothing in the amended text to suggest that the presumption against retrospectivity should be rebutted. On the contrary, the text made it clear that retrospectivity was never intended. If it were, this would mean that hundreds of millions of cash payments would have been made unlawfully prior to 6 May 2016.

Accordingly, compliance with Regulation 21 (1) must be assessed according to the requirements of the provision as it read at the relevant time. Despite this, both SASSA and the Minister treat all consents given prior 2018 the same, regardless of when it was given, and regardless of the process in terms of which it was given. In their view, this is so, because what was not provided directly to SASSA in the form of a duly completed Annexure C.

Interpretation:

[26] I was referred to *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 SCA. In the latter case, it was held that the Court must in each relevant particular context consider all the circumstances surrounding the conclusion of a contract to determine what the parties' intention was in concluding it, and all relevant facts must be considered in that exercise, whether or not the words particular contract were ambiguous or lacked clarity.

It was therefore submitted that seemingly mindful of these decisions, the Minister's approach to amended Regulation 21 (1) considered the context provided in reports prepared by a panel of experts appointed by the Constitutional Court pursuant to directions issued on 6 June

2017. But, as the Replying Affidavit made clear, none of the findings and recommendations of the panel could have influenced such amendment of the Regulation which took place over a year prior to the panel being established.

The relevant context to the amendment of Regulation 21 (1) in May 2016 is set out in the recent decision dealing with the 6 May 2016 amendments to two provisions in the Social Assistance Regulations.

See: *The Minister of Social Development of the Republic of South Africa and Others v Net 1 Applied Technologies South Africa (Pty) Ltd and Others*; *The Black Sash Trust and Others v The CEO: The South African Social Security Agency and Others*

[2018] ZASCA 129, a decision of 27 September 2018.

After setting out the background to the decision to amend the Regulations, Navsa JA, considered how the Minister in Office at the time, sought to amend the Regulations and what she intended to achieve. What was clear from Navsa JA's description of the process was that the focus of the intervention was to deal with certain deductions from beneficiaries' bank accounts. It was therefore telling that the then Minister was of the view that she had achieved her goal and this resulted in her issuing a demand to Grindrod, the bank to "cease all EFT debit orders and stop orders" from beneficiaries' accounts. Put differently, the Minister's focus was not on the procedure in terms of which beneficiaries consented to having their social grants paid into their chosen bank accounts, but rather with regulating the manner in which those bank accounts were operated. Whilst this could not be determinative, it did provide part of the context to which both of the *Endumeni* and *Novartis* decisions *supra* refer, and which should be taken into account when interpreting Regulation 21 (1).

[27] It was also submitted that two further considerations needed to be considered. First, the possible impact of any interpretation of Regulation 21 (1) on the private contractual relationship between social grant beneficiaries on the one hand, as bank account holders, and the banks

with whom they hold such accounts on the other; and second, whether SASSA has any authority to interfere in this private contractual

relationship. It was held in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) at par. 57 that self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.

The submission therefore was that stripped bare, the attitude adopted by SASSA and the Minister, was that because beneficiaries did not consent to receive payments of social grants in their chosen bank accounts in terms of an amended Regulation 21 (1), they have not provided the requisite consent at all.

Insofar as SASSA's purported authority to interfere with private contractual relationships is concerned, I was referred to the Full Court of this Division in *Minister of Finance v Oakbay (Pty) Ltd* on the basis that such interference would have to be empowered either by statute or the Constitution. (2018 (2) SA 515 GP).

Accordingly, it was submitted that there is no legislative provision, including Regulation 21 (1), that authorizes SASSA to interfere with the private contractual relationship between a social grant beneficiary and his/her chosen bank. Should SASSA take its threatened action, it would run the risk of interfering with tens – if not hundreds – of thousands of such relationships.

Requirements of Regulation 21 (1):

[28] Until 5 May 2016, there was no requirement that authorization be provided to SASSA; all that was required was that it be provided in writing. Whilst Applicants accept that authorization by way of the CPS call centre was not done in writing, it was submitted that all authorizations provided biometrically during their EPE enrolment process were done in writing. This flowed from the provisions of s. 12 of the Electronic Communications and Transactions Act 25 of 2002, and if read together with the definitions in s. 1, made it clear that authorizations in respect of all EPE accounts opened until 5 May 2016, were provided in writing. Insofar as the amended Regulation 21 (1) was concerned, Applicants accepted that although the "in writing" requirement was met by all beneficiaries as part of the EPE enrolment process, their authorizations were provided to Moneyline and not "in person" to SASSA or CPS acting

as SASSA's agent. However, given that such authorizations were accepted as valid by SASSA, resulting in social grant payments to EPE accounts, it followed that such authorizations were provided in terms of an "alternative arrangement" with SASSA.

Applicants are entitled to final interdictory relief:

[29] As was apparent from paragraphs 3 and 4 of the Notice of Motion, a prohibitory interdict and a mandatory interdict respectively was sought. In order to be successful with a final interdict, Applicants were required to satisfy the following requirements:

The existence of a clear right;

An injury actually committed or reasonably apprehended; and

The absence of similar protection by any other ordinary remedy.

See: *Setlogelo v Setlogelo* 1914 AD 221 and 227, and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (C) at paras. 44 and 45.

Clear right:

[30] In order to establish a clear right, the Applicants have to prove on balance of probabilities – facts which in terms of the substantive law establish the right relied on.

Nienaber v Stuckey 1946 AD 104 at p. 1053 to 1054.

It was contended that it had been shown that each of the 14 individual Applicants had a right to elect how to receive payment of his or her social grant and has provided valid authorisation for that election to be honoured by SASSA. Insofar as Moneyline was concerned, it was shown that SASSA was not authorized to interfere with the contractual relationship between EPE account holders and Grindrod, on which Moneyline relies for managing the EPE card program. As far as the injury apprehended was concerned, the test is objective with the Applicants not being required to establish that any anticipated injury would follow.

See: *Free State Gold Areas Ltd v Merriespruit (OFS) Goldmining Company* 1961 (2) SA 505 (W) at 515 to 518.

It was submitted that it had been shown that should the payments not be made into the beneficiaries' accounts, they would lose their funeral cover and their lives would be severely inconvenienced and disrupted. In addition, Moneyline would suffer irreparable financial harm.

[30] In conclusion it was contended that no adequate, ordinary or reasonable legal remedy would grant similar protection. The PAJA remedy, as contended for by SASSA, was not an alternative remedy in that at best, it offered another mechanism for approaching this Court for urgent declaratory or interdictory relief. In any event, the provisions of

s. 8 of the Promotion of Administrative Justice Act 3 of 2000, made provision for the grant of a temporary interdict on the one hand, but on the other hand was also intended for past conduct, and not conduct that would result in the future.

[31] It was also submitted that if the central legal issue in this case was not resolved by 31 January 2019, the harms anticipated in respect of the First to Ninth Applicants and those they represented, was similarly likely to occur. Therefore nothing short of an urgent interdictory relief was capable of providing the protection the Applicants required.

[32] The above fairly lengthy narrative in my view fairly and accurately deals with the Applicants' case and in certain respects also with the reasons for the Respondents' opposition to the relief sought. I will nevertheless refer briefly to a number of particular grounds of opposition.

First and Second Respondents' argument:

[33] The Respondents opposed the application on a number of grounds, and firstly dealt with the question of urgency. There is at this stage no reason to debate this in any detail, inasmuch as I issued the interim order on the basis that the case for urgency had indeed been made out. This was so particularly in respect of the First to Fourteenth Applicants. It must be remembered that each debate about urgency has to be contextual. We were dealing here with the payment of social benefits to persons who are old, vulnerable, poor and who in the main are not properly mobile either. To them proper, timeous and reliable payment into an account of which they have knowledge, and which they can use with attended benefits is obviously of more importance than the majority of cases who come before an Urgent Court. In many instances their very survival is at stake. As far as the Fifteenth Applicant is

concerned, I have already referred to the argument on its behalf, and the relevant judgments in that context.

[34] It was also argued that the declaratory relief sought was impermissible in the light of the clear wording of Regulation 21 published on 6 May 2016. The argument was that I could not grant this declaratory relief, because the legal position has clearly been laid down by statute. Reference was made in this context to *Ex parte Noriskin* 1962 (1) SA 856 (D).

[35] I have dealt at some length with Applicants' argument pertaining to the interpretation of this Regulation, and whether or not it affects previous rights. I referred to the relevant authorities as well. Whilst much can be said in favour of Applicants' argument relating to the interpretation of the particular Regulation, it must also be remembered that a Court must determine the meaning of the provision needed to be interpreted by analysing the purpose of the statute and the context of the legislation. At the same time it must look at the subject matter and the values that underlie the statute. I agree with Mr Mphaga's argument that in essence the Court must give the words their ordinary meaning, but must give a contextual and purposive reading of the legislation. This is clear from the *Natal Joint Municipal Pension Fund* decision *supra* at par. 18. It must also be remembered that s. 3 of the *South African Security Agency Act No. 9 of 2004* ("the SASSA Act") makes provision for the effective management, administration and payment of social assistance and service, as mandated by s. 27 of the Constitution. In this context reference was also made to *Commissioner for the South African Revenue Service v Bosch* 2015 (2) SA 174 (SCA) at par. 9.

It was therefore contended that on a proper construction of Regulation 21 (1), read with the objective and purpose of the SASSA Act and s. 27 of the Bill of Rights, it was patently clear that the Minister may determine a method of payment of social assistance. Furthermore, the Applicants did not contend that the Minister did not possess such a discretion. In addition, it was clear that

the First Respondent had given its interpretation to the Regulations by correspondence already dated 29 November 2017 and 29 October 2018, which interpretation was consistent with the purpose of the statute and the context of the legislation.

[36] As far as First Respondent's interpretation was concerned, it is clear that it is the administrative body that deals with social grants as defined in the SASSA Act. The letters by SASSA that I have referred to stated that the interpretation to be attributed to Regulation 21 (1) was the following: "A beneficiary can exercise a choice to have the grant paid into a personal bank account, or to receive a grant through the new SASSA/SAPO card. However, it also implies, where a beneficiary does not actively exercise his/her choice, the SASSA/SAPO card becomes the default method payment, to ensure that every beneficiary is able to access his/her grant".

[37] In the context of what was held in *CSARS v Bosch* 2015 (2) SA 174 (SCA), where it was stated that there was authority to the effect that, in the marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation, it was clear that SASSA had been consistently interpreting Regulation 21 (1) since December 2017.

An interpretation that recognizes and adapts the contractual interpretation, was also confirmed in the Constitutional Court in *Marshall and Others v Commissioner South African Revenue Service* [2018] ZACC 11.

[38] It is my view, that in the present proceedings this is an approach that ought to be adopted. It gives due effect to the statutory role of the First Respondent and its powers and obligations.

[39] The applicability of the Administrative Justice Act (PAJA):

On 4 October 2018, NET 1 addressed a letter to the Minister in which the following was stated in par. 20: "Insofar as the Administrative Law is concerned, we have been advised that the decision to cease making payments of grants into our customers' EPE accounts and/or redirect the payments into SAPO accounts (and unilaterally opens such accounts for these purposes) constitutes administrative action for the purposes of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA")". It was submitted that Applicants' were indeed aware of the fact that a PAJA Review was the only remedy available for the relief that they sought. The argument was that prayers 4 and 5 of the Notice of Motion could therefore only be granted if the decision of failure to take a decision by SASSA has been found to be unlawful and reviewable. The ultimate question would be whether a beneficiary's right to be paid a grant has adversely been affected by the procedure, the administrator followed in requesting the Annexure C forms as per Regulation 21 (1) of the Regulations. In that context it was submitted that a case for administrative review has not been made out by the Applicants at all, let alone in these proceedings. The Applicants sought a declaratory order to the effect that First Respondent acted in breach of his statutory

obligation by not processing Annexure C forms. It was submitted that the alleged failure by SASSA constitutes an administrative action as contemplated in s. 1 of PAJA.

[40] It is clear from a number of decisions including *Minister of Health and Another N.O v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC), that a litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely either on s. 33 (1) of the Constitution or the common law or indeed the Rule of law. In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA), it was held that where PAJA applies, effect must be given to it and that it could not be contended as an alternative that the principle of legality could found a cause of action. The proper place for the principle of legality in our law is for it to act as a safety net or measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call, or an alternative path to review when PAJA applies.

[41] In the present instance, the Applicants have not followed the provisions of PAJA, and they cannot rely on the principle of legality in the present context therefore. Accordingly, as a matter of logic, I cannot grant a final interdict if no case for illegality has been made out in terms of the provisions of PAJA relating to this topic. In the same context, I ought not to exercise my discretion in granting the declaratory order sought in prayer 2 of the Notice of Motion.

[42] It was contended that the provisions of PAJA do not prevent a Court from issuing an urgent order. I agree that this is so in appropriate circumstances, and I kept that in mind when issuing my interim order on 28 November 2018. In the present proceedings relating to the issuing of final orders, different considerations apply and there is no reason why the Administrative Justice Act can be side-stepped.

[43] Third Respondent's argument:

The crux of Third Respondent's argument is really that Applicants state no more than that biometric consent is sufficient for compliance with Regulation 21 (1) (a). The aim of this Regulation, coupled with Annexure C, is more than a mere regulatory verification of a beneficiary's identity and contact details. It seeks to introduce a system over which SASSA can be assured of its internal integrity. This is only possible if all beneficiaries assist in confirming their election through the in-person submission of an Annexure C form. The completion and submission of this form can hardly be described as onerous as the completion of the affidavits which the Applicants have deposed to in this matter. The telephonic authorisation referred to in the Founding Affidavit, and again in the Replying Affidavit, do not constitute consent given in person. And it does not appear that the Fifteenth Applicant contends this form of authorization complies with Regulation 21 (1). It is clear from the Minister's Answering Affidavit that the system to be put in place is one that is authorized by statute, and no case for illegality had been made out in my view. It must also be remembered what the purpose of the Minister's approach is, namely to prevent various abuses that have occurred in the past. In the light of what I have said relating to the argument on behalf of the First Respondent, it is not necessary to further deal with any

arguments raised on behalf of the Third Respondent.

[44] It is in my view abundantly clear that I ought not to exercise my discretion in granting any declaratory relief for the reasons stated. As far as a final interdict is concerned, it is not appropriate in the present circumstances relating to the absence of a clear right that is contended for on the one hand, and the interpretation that is to be given contextually of Regulation 21 (1) on the other hand. Furthermore, as I have said, the provisions of PAJA have been unjustifiably sidestepped in these proceedings, and as a result of all of the above, I exercise my undoubted discretion against the Applicants as a whole. I simply cannot ignore that a statutory system, properly authorized, has been put in place for sound reasons as well as the undertaking given by Respondents, that grantees are being paid and will be paid their grant. If in any individual case, or cases, this does not occur, appropriate steps by the First Respondent will no doubt be taken. As far as the Fifteenth Applicant is concerned, it will seek to enforce its rights, such as they may be, by proceedings other than interdictory. It is, simply put, not appropriate for a Court, against the clear wishes of the statutory authority, and in the absence of illegality, to put its own preferred system in place of that imposed by it for rational reasons. I think that the dictum in par. [85] in *Electronic Media Network Ltd and Others v e.tv (Pty) Ltd and Others* 2017 (9) BCLR 1108 (CC), applies to this reasoning.

[45] The application is accordingly dismissed and the interim order of 28 November 2018 lapses from date hereof. As far costs are concerned, the Applicants did obtain interim relief, but the end result is in favour of the Respondents. Accordingly, I deem it appropriate and fair that no costs order is made.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 82073/2018

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Date of Hearing: 28 November 2018

Date of Judgment: 29 January 2019 at 10:00

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