



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 48/17

In the application of:

**RAiN CHARTERED ACCOUNTANTS INCORPORATED**

Applicant

and

**SOUTH AFRICAN SOCIAL SECURITY AGENCY**

Respondent

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

and

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

**SOUTH AFRICAN POST OFFICE SOC  
LIMITED** Second Amicus Curiae

**Neutral citation:** *RAiN Chartered Accountants Incorporated v South African Social Security Agency* [2021] ZACC 27

**Coram:** Zondo ACJ, Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ, Tshiqi J

**Judgments:** Madlanga J (unanimous)

**Decided on:** 10 September 2021

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## ORDER

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On application to the Constitutional Court:

1. It is declared that the South African Social Security Agency (SASSA) is responsible for paying reasonable fees for work which will be done to comply with paragraphs 1 and 3 of this Court's order of 1 April 2021 (April 2021 order).

2. For purposes of performance of the work referred to in paragraph 1, SASSA must consider whether it is open to it to appoint RAI<sub>N</sub> Chartered Accountants Incorporated (RAI<sub>N</sub>) in accordance with the deviation process provided for in Treasury Regulation 16A.6.4 and, if it is, it must appoint RAI<sub>N</sub>.
3. To facilitate SASSA's decision under paragraph 2, SASSA and RAI<sub>N</sub> must meet forthwith after this order and commence negotiations in good faith in respect of the fees referred to in paragraph 1.
4. In the event of there being no agreement on the fees within four calendar days of this order, the fees will be determined by the Chief Executive Officer of the South African Institute of Chartered Accountants or a chartered accountant nominated by him and any fees payable for this purpose shall be borne by SASSA.
5. The Chief Executive Officer of SASSA must take all necessary steps within her powers and functions to ensure that the deviation process referred to in paragraph 2 of this order and appointment of RAI<sub>N</sub>, if it is to be appointed, is finalised within 10 calendar days of agreement by RAI<sub>N</sub> and SASSA on RAI<sub>N</sub>'s fees or of their determination under paragraph 4.
6. SASSA's attorneys of record must bring paragraph 5 to the notice of SASSA's Chief Executive Officer.
7. If SASSA does not appoint RAI<sub>N</sub>, it must consider whether it is open to it to appoint another suitably qualified service provider in accordance with the deviation process provided for in Treasury Regulation 16A.6.4 and, if it is, it must appoint that other service provider within 14 calendar days of the date of this order.
8. Within 10 calendar days from the date of appointment, RAI<sub>N</sub> or any other appointed service provider must submit to Cash Paymaster Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Incorporated the list of all outstanding documents relevant to the audit verification undertaken by RAI<sub>N</sub> under the order of 17 March 2017.

9. Cash Paymaster Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Incorporated must furnish RAIN or any other appointed service provider with the listed documents in their possession, within 15 calendar days from the date of receipt of the list of outstanding documents referred to in paragraph 8.
10. Within 30 calendar days of receipt of the outstanding documents referred to in paragraph 8, RAIN or any other appointed service provider must submit to the National Treasury, the updated verification report including:
  - (a) all issues raised by the National Treasury in its letter of 28 November 2019; and
  - (b) all issues arising from the documents referred to in paragraph 8.
11. Within 20 calendar days of receipt of the updated verification report, the National Treasury must allow Cash Paymaster Services (Pty) Limited and SASSA to make representations on the updated verification report, if they so wish.
12. Within 40 calendar days of receipt of the updated verification report, the National Treasury must consider and approve the updated verification report and file its approval together with the updated verification report with the Registrar of this Court.
13. If the National Treasury is unable to approve the updated verification report, it must file an affidavit setting out:
  - (a) its reasons for not approving the updated verification report; and
  - (b) its own determination of the profit made by Cash Paymaster Services (Pty) Limited from the unlawful contract that was declared invalid; or
  - (c) alternatively, what it requires to properly determine the profit made by Cash Paymaster Services (Pty) Limited, in the event that it is unable to make the determination referred to in paragraph 13(b).
14. SASSA must pay the costs of this application.
15. Costs that were reserved in terms of the April 2021 order remain reserved.

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## JUDGMENT

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MADLANGA J (Zondo ACJ, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

[1] This is another instalment in the unending sequels to the *Allpay*<sup>1</sup> litigation. I will not burden this judgment with that background.

[2] We are disposing of this matter without an oral hearing.

[3] In its last judgment handed down on 1 April 2021 part of this Court's order (April 2021 order) requires RAIN Chartered Accountants Inc (RAIN), the applicant, to make a final determination on the profits received by Cash Paymaster Services (Pty) Ltd<sup>2</sup> (CPS).<sup>3</sup> What is at issue relates to this part of the order. An earlier order granted by

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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) SA 604 (CC); 2014 (1) BCLR 1 (CC).

<sup>2</sup> This entity is now in liquidation.

<sup>3</sup> The order in *Freedom Under Law NPC v Minister of Social Development (Corruption Watch (NPC) RF and South African Post Office SOC Ltd Amicus Curiae)* [2021] ZACC 5; 2021 (6) BCLR 575 reads:

1. Within 10 days from the date of this order, Rain Chartered Accountants Inc must submit to Cash Paymaster Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Inc the list of all outstanding documents relevant to the audit verification undertaken by Rain Chartered Accountants Inc under the order of 17 March 2017.
2. Cash Paymaster Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Inc must furnish Rain Chartered Accountants Inc with the listed documents in their possession, within 15 days from the date of receipt of the list of outstanding documents referred to in paragraph 1.
3. Within 30 days of receipt of the outstanding documents referred to in paragraph 1, Rain Chartered Accountants Inc must submit to the National Treasury, the updated verification report including:
  - 3.1. all issues raised by the National Treasury in its letter of 28 November 2019;  
and
  - 3.2. all issues arising from the documents referred to in paragraph 1.

this Court on 17 March 2017 required the South African Social Security Agency (SASSA), an organ of state responsible for payment of social grants, to determine the profits.<sup>4</sup> SASSA chose to engage a firm of accountants to do this on its behalf. After a competitive bidding process, it appointed RAIN to do the work.

[4] RAIN did do substantial work towards determining the profits, but was hamstrung in its performance by the failure, if not refusal, by CPS and two other entities, KPMG Services (Pty) Ltd (KPMG) and Mazars Inc (Mazars), to furnish it with certain documents or information it required to make a proper determination. It is this that gave rise to the litigation instituted by Freedom Under Law (FUL), a public interest and non-profit organisation created to promote democracy and advance understanding of and respect for the rule of law, and the principle of legality in Southern Africa. Of course, RAIN can only make the final determination of CPS's profits if it has been provided with the outstanding information. The April 2021 order also required CPS, KPMG and Mazars to furnish RAIN with the documents after all three firms have been furnished with a list of what is required by RAIN.

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4. Within 20 days of receipt of the updated verification report, the National Treasury must allow Cash Paymaster Services (Pty) Limited and the South African Social Security Agency to make representations on the updated verification report, if they so wish.
  5. Within 40 days of receipt of the updated verification report, the National Treasury must consider and approve the updated verification report and file its approval together with the updated verified report with the Registrar of this Court.
  6. If the National Treasury is unable to approve the updated verification report, the National Treasury must file an affidavit setting out:
    - 6.1. reasons for not approving the updated verification report; and
    - 6.2. the National Treasury's own determination of the profit made by Cash Paymaster Services (Pty) Limited from the unlawful contract that was declared invalid; or
    - 6.3. alternatively, should the National Treasury be unable to make the determination referred to in subparagraph 6.2, it must set out in its affidavit what it requires to properly determine the profit made by Cash Paymaster Services (Pty) Limited.
  7. Costs are reserved.

<sup>4</sup> See the order in *Black Sash Trust v Minister of Social Development (Freedom Under Law intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC).

[5] An issue has now arisen: who must pay RAIN's fees for the work it must do in terms of the April 2021 order? SASSA which engaged RAIN says it is not liable to pay the fees. RAIN is also asking for a declarator that SASSA is liable for any disbursements, including legal fees, reasonably incurred to enable it to comply with the order. So, the legal fees are distinct from costs incurred in the present proceedings. SASSA will have none of this as well. It is these two questions that fall to be decided. First, a brief background.

[6] The agreement between RAIN and SASSA was for a four-month period ending 30 September 2019. The contract price was calculated based on an estimate of hours required to complete the assignment. The agreement provided that even if RAIN were to require, and work for, more hours than what was estimated, it would not be entitled to additional payment for the extra hours. In the event, RAIN worked for far more hours than its estimate. Although the documents required by RAIN to carry out its task were with other parties (mainly CPS), the agreement made it SASSA's obligation to afford RAIN "timeous access to information reasonably required to perform the service". CPS did not only delay in furnishing RAIN with information but also provided it with incorrect information. For example, "[t]he heart of the problem" – as RAIN puts it – was that CPS furnished it with a general ledger and trial balance which did not agree. This necessitated requests to CPS for additional information and documents. And RAIN solicited SASSA's assistance as it was its obligation to obtain the information for RAIN. This was met with more delays.

[7] After quite a struggle and significant delay, the information was eventually received. RAIN avers that the toing and froing about the outstanding information and the very fact of having to work with inaccurate information caused it to put in a lot more hours than what had been budgeted for, "first initially and then subsequently when the correct and complete information was finally provided". I must emphasise that SASSA acknowledged the impact of the delays in a complaint it lodged with Net1, CPS's holding company. In the complaint SASSA said the failure by CPS to provide the

required information timeously resulted in RAIN having to perform unnecessary work with the result that “[t]he budget [was] getting exhausted with not much progress”.

[8] RAIN did not – and still does not – claim additional payment for the extra hours of work occasioned by the circumstances I have just explained.

[9] All these facts are either common cause or not disputed.

[10] RAIN avers that no one could have foreseen that a general ledger and trial balance would not reconcile. Therefore, no one would have factored this irreconcilability in determining a contract price. As we now know, that which was unforeseeable did transpire.

[11] The information to which the delays related was not the information which is the subject of the April 2021 order. It was only upon doing a verification process after receipt of all the information referred to in the preceding paragraphs that RAIN identified “critical issues” that required investigation. These issues included whether there was cost-shifting and profit-shifting which would have resulted in the over-stating of expenditure and under-stating of income. Much as RAIN did all it could to get to the bottom of this, it transpired that more information was required to get the true picture. It is this information that CPS, KPMG and Mazars must furnish to RAIN in terms of the April 2021 order. Before I deal with what happened after the grant of this order, let me mention something of some import.

[12] After all the delays – and the additional work occasioned by them – and the inaccurate information, RAIN submitted its report. It sent its final invoice to SASSA. In response SASSA said it would make the final payment upon acceptance of the report. And its acceptance of the report would be indicated by filing it with this Court. Subsequently, SASSA paid the final invoice and filed the report with the Court. SASSA even paid the retention money. Of course, RAIN’s report did state that the full picture



could only be presented if the information withheld by CPS, KPMG and Mazars was made available.

[13] Pursuant to the April 2021 order, RAIN sent an email to SASSA enquiring if SASSA accepted liability for its fees for doing the work required by the order. A Ms Mahlobogoana, SASSA's General Manager: Legal Services, responded to the email saying, "SASSA has a responsibility to pay for your services as far as the Court has ordered. SASSA is the one that appointed RAIN after a due process." Another response, this time by a Mr Mowa, SASSA's Senior Manager: Internal Control, was also receptive to the idea that SASSA was responsible for RAIN's fees for work to be done in terms of the April 2021 order. It said, "Once RAIN has the information, then the issue of fees can be discussed to enable a determination of the amount of work to be done, which will inform the hours required and the fees." So, even in terms of this second response, the issue was the quantum, not whether SASSA was liable at all.

[14] Towards the end of April 2021 SASSA reneged on these positive responses. The same Mr Mowa who had written the second response said, "Kindly note that SASSA does not have a responsibility to resolve the issue of fees as the Court has not placed any liability on SASSA to pay the fees." It is this stance that has brought RAIN before us.

[15] In its efforts to parry RAIN's offensive, SASSA contends that the work that must be performed in terms of the April 2021 order falls within the scope of work covered by the agreement between the parties. Therefore, RAIN cannot seek payment for it. This entails no more than a determination – through a contractual interpretative exercise – of the scope of work provided for in the agreement. According to SASSA that is so unexceptional a matter that it does not fall within this Court's jurisdiction.

[16] In addition, SASSA argues that in response to the tender invitation, RAIN freely tendered on the price that SASSA accepted. To agree to RAIN's demand would effectively be changing the contract price after the event. According to SASSA, if

granted, RAI<sup>N</sup>'s demand would constitute a violation of the provisions of section 217 of the Constitution. This section stipulates that organs of state must procure goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. So, to allow payment in addition to the contract price which influenced the award of the contract would not only be unfair to the bidders whose bids did not succeed based on the quoted prices but would also flout the section 217 factors. In short, SASSA wants RAI<sup>N</sup> to perform the task required by the April 2021 order without any payment.

[17] SASSA also submits that – to the extent that CPS's non-cooperation could not be foreseen – a variation in terms of which the contract price may be increased can be done only in terms of National Treasury SCM Instruction Note 3 of 2016/17 (Treasury Instruction Note 3).<sup>5</sup> SASSA submits that in terms of this instrument, a fair price variation can only be up to 15%.

[18] Regarding the claim for payment of legal fees, SASSA pleads that the agreement made no provision for such payment.

[19] SASSA prays for the dismissal of the application or, alternatively, for an order directing it and RAI<sup>N</sup> to negotiate in good faith to determine whether the work required by the April 2021 order falls within the scope detailed in the agreement. And if it does, that SASSA pay RAI<sup>N</sup> in accordance with the mentioned Treasury Instruction.

[20] RAI<sup>N</sup> responds that it is not seeking a variation of the agreement. A variation is a legal impossibility as the agreement terminated in September 2019. And nothing in the April 2021 order suggests that the Court had a variation in its collective mind. Nor,

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<sup>5</sup> National Treasury Instructions, of which Treasury Instruction Note 3 is one, are issued in terms of section 76 of the Public Finance Management Act 1 of 1999 (PFMA). This particular Instruction provides:

“The Accounting Officer/Accounting Authority must ensure that contracts are not varied by more than 20% or R20 million (including VAT) for construction related goods, works and or services and 15% or R15 million (including VAT) for all other goods and or services of the original contract value.”

continues RAI<sup>6</sup>N's argument, does SASSA suggest that the April 2021 order has somehow revived the agreement. According to RAI<sup>6</sup>N, the effect of the order is that a new agreement must be concluded to facilitate performance in terms of the order.

[21] It finds its entitlement to the claimed relief on unconscionable state conduct which breaches the constitutional principles of reliance, accountability and rationality.<sup>6</sup> The facts that undergird this claim are:

- (a) RAI<sup>6</sup>N performed in terms of the agreement as best it could under the constraints it faced as a result of SASSA's failure to provide information timeously in accordance with its contractual obligation.
- (b) Relatedly, the incomplete, incorrect and late information furnished by CPS resulted in RAI<sup>6</sup>N expending considerably more time than had been anticipated.
- (c) As it was SASSA's contractual obligation to provide all information timeously, the consequences of the delay cannot be laid at RAI<sup>6</sup>N's door.
- (d) If it was SASSA's view that RAI<sup>6</sup>N had failed to perform in accordance with the agreement, it was entitled to cancel the agreement, which it never did. Nor did it ever complain about the adequacy of RAI<sup>6</sup>N's work.

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<sup>6</sup> In *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) at para 65 this Court held that the retroactive reduction of subsidies to schools by the Department for Education was unlawful, legally and constitutionally unconscionable when measured against the public law principles of reliance, accountability and rationality. The Court held:

“Government officials must, in dealing with those who act in reliance on their undertakings, act rationally. A budget cut announced in relation to payments promised but not yet made would be regrettable. But it may be rational. Behaviour and expectations can be tailored to it. But it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed. Revoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it.”

See also *Pretorius v Transport Pension Fund* [2018] ZACC 10; 2019 (2) SA 37 (CC); 2018 (7) BCLR 838 at para 26.

- (e) What SASSA did instead was to accept RAIN's report, file it with the Court and make the final invoiced payment, including payment of the retention money.

[22] RAIN relies on the same facts to plead that SASSA is estopped from denying that it performed under the agreement. SASSA's acceptance of the report in the exact manner indicated by SASSA itself<sup>7</sup> and the making of a final payment put it beyond question that SASSA did not harbour any issues about RAIN's performance. If successful, pleading in this manner will mean the ordinary reward for rendering professional services, namely professional fees, will follow as a matter of course. That is, if RAIN gets to do the work.<sup>8</sup> The reward will no longer be hamstrung by SASSA's claim that the work still to be done falls within the scope of the contract that has come to an end. In sum, RAIN invokes estoppel to parry that claim.

[23] Proof of unconscionable state conduct which breaches the constitutional principles of reliance, accountability and rationality will have the same effect as success on estoppel. Therefore, it is enough for RAIN to establish only one of these.

[24] In the *Allpay* matter and its sequels, this Court has retained the power to see to compliance with its orders. On that basis alone, we are entitled to entertain this matter.

[25] I do not find it necessary to deal with SASSA's contention that the work required in terms of the April 2021 order falls within the scope of the agreement. That is not necessary because SASSA represented to RAIN that it was accepting RAIN's performance. And it even paid the full contract price, including the retention money, without demur. Since as far back as November 2019 when SASSA accepted the report and made the final payment, RAIN has been under the impression that all its obligations under the agreement were dead and buried. Even as late as after the April 2021 order

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<sup>7</sup> SASSA had said its acceptance of RAIN's report would be signified by SASSA's filing of the report at Court, which SASSA did.

<sup>8</sup> The reason for using "if" will become apparent later.

was granted, two of SASSA's officials unequivocally accepted that SASSA bears the duty to pay RAIN's fees for the work to be performed in terms of the order. In the context of estoppel, I raise this to buttress the point that it was SASSA's understanding that RAIN did not owe any work under the contract whose period had since expired.

[26] I am satisfied that the requirements of estoppel are met.<sup>9</sup> SASSA's acceptance of RAIN's report and final payment to RAIN make plain that at the time of payment SASSA was happy with RAIN's performance and did not believe that any work was owed under the contract. If SASSA's insistence that the scope of work under the contract entails the work required in terms of the April 2021 order were to be allowed, RAIN would suffer prejudice. Thus, SASSA is estopped from denying that RAIN performed fully under the contract. SASSA's belated attempt to question RAIN's performance is reprehensible in the extreme. It is an attempt at snatching at a bargain, but no bargain exists. Someone within SASSA must have had a sudden flash of "brilliance" and decided that SASSA must renege on its unequivocal acceptance of RAIN's performance. That, of course, is totally misconceived and will not be countenanced.

[27] This conclusion makes it unnecessary to grapple with RAIN's assertion that SASSA's conduct is unconscionable and breaches the constitutional principles of reliance, accountability and rationality.

[28] On RAIN's own admission, this Court's order has effectively created the need for a new contract. This is not something that was apparent when the April 2021 order was granted. What we were aware of was that there was work outstanding. We could not readily have realised that any issue would arise with regard to SASSA's liability to

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<sup>9</sup> In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* [2004] ZASCA 59; 2004 (6) SA 491 (SCA) at para 7 the Supreme Court of Appeal said this about the requirements for estoppel:

"Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so."

See also *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 44-6.

pay the fees. After all, the outstanding work went to the heart of establishing CPS's profits, something that relates to the original assignment. RAIN has now explained to our satisfaction why – despite the centrality of the outstanding work to the original end goal – there is a need for additional payment for that work. In that sense, I accept that this effectively necessitates a new contract. For that reason, I do not consider it proper, without ado, to order SASSA to pay RAIN's fees for the work to be performed in terms of the April 2021 order; not in the face of section 217 of the Constitution.

[29] The provisions of section 217 notwithstanding, I think we are where we are because of some unexplained reluctance on the part of SASSA to facilitate RAIN's performance in terms of this Court's order. I say so because SASSA is aware that – as indicated by RAIN – in terms of Treasury Regulation 16A.6.4<sup>10</sup> an organ of state may deviate from the requirement of a competitive bidding process. This regulation provides:

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”

A disclaimer: my reference to this regulation does not serve as a pronouncement on its constitutionality. That is not an issue before us. The point is: it exists.

[30] To use the hackneyed but useful legal phrase, what is impractical must surely depend on the circumstances of each case. In some instances, impracticality may manifest in absolute impossibility to engage in a competitive bidding process. Below that there may be a range of what constitutes impracticality. At the centre though must be the question whether a competitive bidding process is well and sensibly suited for the circumstances. A dictionary meaning of “impractical” is “not adapted for use or

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<sup>10</sup> Treasury Regulations, GN R225 GG 27388, 15 March 2005. Like National Treasury Instructions, Treasury Regulations are issued in terms of section 76 of the PFMA.

action; not sensible”.<sup>11</sup> Ultimately what is impractical is a matter of a judgement call to be made by the organ of state concerned. But what the organ of state may decide is not unbounded; it must be informed by the operative word – “impractical”. And that is an objectively accessible notion.

[31] That said, paragraph 8 of Treasury Instruction Note 3 sheds light on what is considered to be “impractical”. Paragraph 8 deals with deviations. “Impractical” must be read in the light of this paragraph, which accords in some respects with what I have just said. In paragraph 8.1 the note states that an accounting officer must only deviate from a competitive bidding process “in cases of emergency and sole supplier status”. The first of these concepts is defined as occurring “when there is a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids”. The second occurs “when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution”. Paragraph 8.5 provides that “any other deviation will be allowed in exceptional cases subject to the prior written approval from the relevant Treasury”. Paragraph 8.5 serves to indicate that deviations may be done in situations that are wider than just those typified in paragraph 8.1. And this harks back to the point that at its widest impracticality, which – in terms of Treasury Regulation 16A.6.4 – is the jurisdictional fact for deviation, is an objectively accessible notion.

[32] Although it is not for this Court to decide whether there must be a deviation in this matter, I would be failing in this Court’s duty if I were not to make comments that are of relevance to the subject. This Court’s duty stems from the fact that it is in its interest that the issue of CPS’s profits be finally determined with expedition.

[33] It is worth noting that SASSA accepts that the work to be done in terms of the April 2021 order “must be done without any further delays”. It does not require rocket

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<sup>11</sup> Waite *Paperback Oxford English Dictionary* 7 ed (Oxford University Press, Oxford 2012) at 363.

science to realise that – on its own – a competitive bidding process will take a much longer time than a deviation. To illustrate, take a scenario where a bridge has been swept away by floods. The urgent engagement of a contractor to put up a makeshift bridge so that school children may continue to attend a school on the other side of the river is a worthy candidate for a deviation. And the deviation process is something that can be finalised within a few days. What is before us may not compare with the urgent need to erect a makeshift bridge. But – on SASSA’s own admission – the outstanding work needs to be done expeditiously.

[34] A firm of accountants coming in cold will probably take more time than RAIN to finalise the work that must still be done. The firm will first have to familiarise itself with the available information and then chart a path that needs to be followed. That, of course, will be a duplication of work that has already been done by RAIN. And one cannot discount the possibility that – as a self-respecting firm – its view of the available information may be different to that of RAIN. That may well entail engaging in substantially more work. After all, it is not unheard of that firms of accountants have taken views that are at odds on the exact same task. But one thing is sure, all things being equal, it is more likely that RAIN will finalise the outstanding work with more expedition than a firm coming in cold.

[35] These factors, i.e. what I deal with in the two preceding paragraphs, appear – and I use “appear” advisedly – to indicate that going out on a competitive bidding process is impractical in the circumstances facing us. That is not my call to make. That is SASSA’s decision, which it must take acting properly. And it must do so well aware of the fact that – as “impracticality” is an objectively determinable concept – its decision is subject to review and, in that sense, it enjoys no monopoly in this regard. I will add this much. The CPS saga has been hanging over our people’s heads for far too long. It needs to end sooner rather than later.

[36] Since it pre-eminently lies with the organ of state concerned – not this Court – to do a deviation, an appropriate order is one that requires SASSA to consider whether



it is open to it to appoint RAIN in accordance with the provision for deviation contained in Treasury Regulation 16A.6.4. To avert a situation where – post the grant of the order in the present application – there may be finger-pointing as to where further delays, if any, occurred in carrying out the deviation process, I think it fit that the order must place the responsibility of expediting the process on SASSA's Chief Executive Officer. Even though the Chief Executive Officer is not party to the proceedings, I cannot conceive of any reason why she would object to performing this task. In the unlikely event of an objection, she is at liberty to approach this Court for appropriate relief.

[37] Regarding the claim that SASSA is liable for disbursements, including legal fees, reasonably incurred to enable RAIN to comply with the April 2021 order, I am not convinced that RAIN is entitled to an order to recover these. These should perhaps be some of the overheads it must meet out of its accounting fees. Also, it is not altogether clear what the exact nature of these disbursements is.

[38] As a consequence of the instant litigation, the April 2021 order must be modified.

[39] RAIN enjoys substantial success and is thus entitled to costs.

[40] The following order is made:

1. It is declared that the South African Social Security Agency (SASSA) is responsible for paying reasonable fees for work which will be done to comply with paragraphs 1 and 3 of this Court's order of 1 April 2021 (April 2021 order).
2. For purposes of performance of the work referred to in paragraph 1, SASSA must consider whether it is open to it to appoint RAIN Chartered Accountants Incorporated (RAIN) in accordance with the deviation process provided for in Treasury Regulation 16A.6.4 and, if it is, it must appoint RAIN.

3. To facilitate SASSA's decision under paragraph 2, SASSA and RAIN must meet forthwith after this order and commence negotiations in good faith in respect of the fees referred to in paragraph 1.
4. In the event of there being no agreement on the fees within four calendar days of this order, the fees will be determined by the Chief Executive Officer of the South African Institute of Chartered Accountants or a chartered accountant nominated by him and any fees payable for this purpose shall be borne by SASSA.
5. The Chief Executive Officer of SASSA must take all necessary steps within her powers and functions to ensure that the deviation process referred to in paragraph 2 of this order and appointment of RAIN, if it is to be appointed, is finalised within 10 calendar days of agreement by RAIN and SASSA on RAIN's fees or of their determination under paragraph 4.
6. SASSA's attorneys of record must bring paragraph 5 to the notice of SASSA's Chief Executive Officer.
7. If SASSA does not appoint RAIN, it must consider whether it is open to it to appoint another suitably qualified service provider in accordance with the deviation process provided for in Treasury Regulation 16A.6.4 and, if it is, it must appoint that other service provider within 14 calendar days of the date of this order.
8. Within 10 calendar days from the date of appointment, RAIN or any other appointed service provider must submit to Cash Paymaster Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Incorporated the list of all outstanding documents relevant to the audit verification undertaken by RAIN under the order of 17 March 2017.
9. Cash Paymaster Services (Pty) Limited, KPMG Services (Pty) Limited and Mazars Incorporated must furnish RAIN or any other appointed service provider with the listed documents in their possession, within 15 calendar days from the date of receipt of the list of outstanding documents referred to in paragraph 8.

10. Within 30 calendar days of receipt of the outstanding documents referred to in paragraph 8, RAIN or any other appointed service provider must submit to the National Treasury, the updated verification report including:
  - (c) all issues raised by the National Treasury in its letter of 28 November 2019; and
  - (d) all issues arising from the documents referred to in paragraph 8.
11. Within 20 calendar days of receipt of the updated verification report, the National Treasury must allow Cash Paymaster Services (Pty) Limited and SASSA to make representations on the updated verification report, if they so wish.
12. Within 40 calendar days of receipt of the updated verification report, the National Treasury must consider and approve the updated verification report and file its approval together with the updated verification report with the Registrar of this Court.
13. If the National Treasury is unable to approve the updated verification report, it must file an affidavit setting out:
  - (d) its reasons for not approving the updated verification report; and
  - (e) its own determination of the profit made by Cash Paymaster Services (Pty) Limited from the unlawful contract that was declared invalid; or
  - (f) alternatively, what it requires to properly determine the profit made by Cash Paymaster Services (Pty) Limited, in the event that it is unable to make the determination referred to in paragraph 13(b).
14. SASSA must pay the costs of this application.
15. Costs that were reserved in terms of the April 2021 order remain reserved.

For the Applicant:

G Budlender SC instructed by Harris  
Nupen Molebatsi Incorporated

For the Respondent:

M Mphaga SC and ME Manala  
instructed by Renqe FY Incorporated