IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 825/2017

In the matter between:

THE MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST APPLICANT**
THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	**SECOND APPLICANT**
THE SOUTH AFRICAN SOCIAL SECURITY AGENCY	**THIRD APPLICANT**

and

NET1 APPLIED TECHNOLOGIES SOUTH AFRICA (PTY) LTD	**FIRST RESPONDENT**
MONEYLINE FINANICAL SERVICES (PTY) LTD	**SECOND RESPONDENT**
MANJE MOBILE ELECTRONIC PAYMENT SERVICES (PTY) LTD	**THIRD RESPONDENT**

IN RE:

CASE NO: 43557/16

NET1 APPLIED TECHNOLOGIES SOUTH AFRICA (PTY) LTD	**FIRST APPLICANT**
MONEYLINE FINANCIAL SERVICES (PTY) LTD	**SECOND APPLICANT**
MANJE MOBILE ELECTRONIC PAYMENT SERVICES (PTY) LTD	**THIRD APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

GRINDROD BANK LIMITED **SIXTH RESPONDENT**

AND

CASE NO: 46024/16

FINBOND MUTUAL BANK **APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

GRINDROD BANK LIMITED **SIXTH RESPONDENT**

AND

CASE NO: 46278/16

THE SMART LIFE INSURANCE COMPANY LIMITED **APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

THE FINANCIAL SERVICES BOARD **SIXTH RESPOINDENT**

THE REGISTRAR OF LONG-TERM INSURANCE **SEVENTH RESPONDENT**

AND

CASE NO: 47447/16

INFORMATION TECHNOLOGY CONSULTANTS (PTY) LTD **APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

GRINDROD BANK LIMITED **SIXTH RESPONDENT**

MERCANTILE BANK LIMITED **SEVENTH RESPONDENT**

NET1 APPLIED TECHNOLOGIES SOUTH AFRICA LIMITED **EIGHTH RESPONDENT**

MONEYLINE FINANCIAL SERVICES (PTY) LTD **NINTH RESPONDENT**

MANJE MOBILE ELECTRONIC PAYMENT SERVICES (PTY) LTD **TENTH RESPONDENT**

THE SMART LIFE INSURANCE COMPANY LIMITED **ELEVENTH RESPONDENT**

CASE NO: 752/2017

In the matter between:

THE BLACK SASH TRUST **FIRST APPLICANT**

SIPHO LENNOX BANI **SECOND APPLICANT**

MARIA HENDRICKS **THIRD APPLICANT**

PATRICIA SAPTOE **FOURTH APPLICANT**

EVERNESS VEPI NKOSI **FIFTH APPLICANT**

SANNIE SEIPATI NTHITE **SIXTH APPLICANT**

ALETTA BEZUIDENHOUT **SEVENTH APPLICANT**

In the matters of:

CASE NO: 43557/16

NET1 APPLIED TECHNOLOGIES SOUTH AFRICA (PTY) LTD **FIRST APPLICANT**

MONEYLINE FINANCIAL SERVICES (PTY) LTD **SECOND APPLICANT**

MANJE MOBILE ELECTRONIC PAYMENT SERVICES (PTY) LTD **THIRD APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

GRINDROD BANK LIMITED **SIXTH RESPONDENT**

AND

CASE NO: 46024/16

FINBOND MUTUAL BANK **APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

GRINDROD BANK LIMITED **SIXTH RESPONDENT**

AND

CASE NO: 46278/16

THE SMART LIFE INSURANCE COMPANY LIMITED **APPLICANT**

and

THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **SECOND RESPONDENT**

MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE SOUTH AFRICAN RESERVE BANK **FOURTH RESPONDENT**

THE PAYMENT ASSOCIATION OF SOUTH AFRICA **FIFTH RESPONDENT**

THE FINANCIAL SERVICES BOARD **SIXTH RESPONDENT**

THE REGISTRAR OF LONG-TERM INSURANCE **SEVENTH RESPONDENT**

AND

CASE NO: 47447/16

INFORMATION TECHNOLOGY CONSULTANTS (PTY) LTD **APPLICANT**

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THE CHIEF EXECUTIVE OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **FIRST RESPONDENT**

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MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

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NET1 APPLIED TECHNOLOGIES SOUTH AFRICA LIMITED **EIGHTH RESPONDENT**

MONEYLINE FINANCIAL SERVICES (PTY) LTD **NINTH RESPONDENT**

MANJE MOBILE ELECTRONIC PAYMENT SERVICES (PTY) LTD **TENTH RESPONDENT**

THE SMART LIFE INSURANCE COMPANY LIMITED **ELEVENTH RESPONDENT**

Neutral Citation: *The Minister of Social Development of the Republic of South Africa & others v Net1 Applied Technologies South Africa (Pty) Ltd & others; The Black Sash Trust & others v The CEO: The South African Social Security Agency & others* (825/2017 & 752/2017) [2018] ZASCA 129 (27 September 2018).

Coram: Navsa, Cachalia, Tshiqi, Wallis and Schippers JJA

Heard: 16 August 2018

Delivered: 27 September 2018

Summary: Applications for leave to appeal – consideration of regulations in terms of the Social Assistance Act 13 of 2004 – whether regulations prohibit electronic debit deductions from bank accounts of social grant beneficiaries – whether, in light of new payment regime, decision will have any practical effect – in any event no reasonable prospects of success.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Van der Westhuizen AJ sitting as court of first instance).

Case No 825/2017:

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

Case No 752/2017:

1 The appeal is upheld to the following limited extent.

2 Part (c) of the order of the high court is set aside and replaced by the following:

'The application for intervention by the Black Sash Trust and others is granted.'

JUDGMENT

Navsa JA (Cachalia, Tshiqi, Wallis and Schippers JJA concurring):

Introduction

[1] These are two related applications for leave to appeal, referred by this court for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to address the court on the merits. We heard argument on the applications for leave to appeal and the merits.

[2] The principal question the court below, the Gauteng Division of the High Court, Pretoria, was called upon to adjudicate, at the instance of a number of applicants in several separate applications, which were consolidated,[1] was whether amendments to regulations promulgated under the Social Assistance Act 13 of 2004 (the Act) prohibited all electronic debits, including debit orders, stop orders or electronic fund transfers (EFTs) from the accounts of social grant beneficiaries, held with Grindrod Bank (Grindrod). The grants were paid from funds supplied by our National Treasury on behalf of the Department of Social Development. The relief sought by the applicants was in the form of a declaratory order that the regulations did not, as contended for by the Minister of Social Development (the Minister) and the South African Social Security Agency (SASSA), restrict beneficiaries (so as to prohibit the aforesaid deductions being made) in the operation of their bank accounts. In the court below, SASSA, its chief executive officer and the Minister opposed the applications. In this court they are the applicants for leave to appeal and the applicants in the high court oppose that application.

[3] It was uncontested that the amendments were motivated by the concerns of the Minister, SASSA and civil society, about alleged predatory marketing practices by vendors, intent on selling their services within the social grant payment system to social grant beneficiaries and then receiving payment by way of debit orders or by way of EFTs. The Minister was also troubled by allegations of unauthorised deductions from the bank accounts of beneficiaries, which were difficult to challenge and undo. A study commissioned by government, as far back as 2004, revealed that many elderly persons who received social grants were illiterate, struggled with technology and could easily be taken advantage of. The question, however, that the court below was called upon to address, was whether the regulations had the effect contended for by the Minister and SASSA.

[4] In the court below and before us the parties were in general agreement that beneficiaries of social grants should be protected against unscrupulous vendors and

[1] The first application under case no 43557/16 was brought by Net1 Applied Technologies South Africa (Pty) Ltd, Moneyline Financial Services (Pty) Ltd and Manje Mobile Electronic Payment Services (Pty) Ltd. The second, under case no 46024/16 was brought by Finbond Mutual Bank; the third under case no 46278/16 by the Smart Life Insurance Company Ltd and the last one, under case no 47447/16, by Information Technology Consultants (Pty) Ltd.

corrupt activities by employees of service providers and government officials. They disagreed about whether the regulations in question, either literally or by way of extended interpretation, prohibited electronic debits from the bank accounts of beneficiaries held at Grindrod. It was contended on behalf of the applicants that there were other avenues through which protection for beneficiaries could be explored, more particularly, by way of consumer protection legislation, including the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005 (the NCA).

[5] The court held in favour of the applicants and against the Minister and SASSA, and made the following order:

'(a) It is declared that regulations 21 and 26A 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, as amended under Government Notice R511 in Government Gazette 39978 of 6 May 2016, read with section 20 of the Social Assistance Act 13 of 2004, do not operate to restrict beneficiaries in the operation of their bank accounts;

(b) The first, second and third respondents are to pay the costs, including the cost of two counsel where applicable, jointly and severally, the one paying the other to be absolved.'

The first application for leave to appeal by SASSA, its CEO and the Minister, is directed against those orders.

[6] I now turn to deal with the second application for leave to appeal. In response to the applications for the declaratory order, the Black Sash Trust (the Black Sash), a non-profit non-governmental organisation (NGO), which works in co-operation with approximately 300 community advice offices that serve the indigent and vulnerable, and six individuals who are beneficiaries of social grants, all applied for leave to intervene in the litigation culminating in the orders set out above.

[7] The Black Sash sought leave to intervene on its own behalf and in the public interest and applied to be admitted as amicus curiae. Its six co-applicants sought leave to intervene on the basis that they, as social grant beneficiaries, had a direct and substantial interest in the litigation. In addition to having sought leave to intervene, the Black Sash and its co-applicants, in a conditional counter-application,

sought substantive relief. In the event of the court holding that the regulations did not prohibit deductions, or that they were invalid, they sought the following orders.

'a. It is declared that the State is under a constitutional and legal obligation to protect the beneficiaries of social grants from exploitation in a manner that prevents grant beneficiaries receiving full benefit from them;

b. The Minister of Social Development is directed to make regulations under the Social Assistance Act that adequately protect social grants from exploitation in a manner that prevents grant beneficiaries receiving full benefit from them.'

The court below refused the applications for leave to intervene and for the Black Sash to be admitted as amicus curiae, but made no order as to costs in relation thereto. The second application for leave to appeal was directed against those orders.

[8] In their heads of argument filed in this court, the Black Sash and its co-applicants submitted that in the event of this court upholding the court a quo's orders in the main application, they were entitled to an order in the terms set out in the preceding paragraph. However, at the outset of argument before us, we were informed by counsel on their behalf that they would not persist in seeking declaratory and/or mandatory relief. I shall, in due course, set out their submission concerning the manner in which the court could come to the assistance of social grant beneficiaries. Only the refusal of the application for leave to intervene was an issue before us. There was no opposition either rot the application for leave to appeal in relation to the refusal of leave to intervene or the intervention itself.

[9] A primary question in the applications before us, which I will address in due course, is whether, due to fundamental changes in the social grant payment system, implemented in the first quarter of 2018, the applications for leave to appeal were rendered moot. At this stage, it is necessary to set out the detailed background to and the context within which the applications we are called upon to adjudicate arose.

The background

[10] Before turning to legislation under which social grants are paid, one should first recognise, as pointed out by the Constitutional Court, that '[f]or many people in this country the payment of social grants by the State provides the only hope of ever

living in the material conditions that the Constitution's values of dignity, freedom and equality promise'.[2] The Constitutional Court acknowledged that beneficiaries of social grants 'are vulnerable people, living at the margins of affluence in our society'.[3]

[11] The Act provides for the rendering of social assistance to persons who qualify.[4] The preamble acknowledges the declaration in the Constitution that 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance, and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

[12] Section 3 of the Act provides for the payment of social grants and sets qualification requirements. Section 4 provides for payment, out of moneys appropriated by Parliament, of categories of social grants. They are a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid.

[13] The Act authorises the Minister to make regulations in relation to the payment of social grants.[5] The Minister made such regulations.[6] Regulation 21(1), which is material, in un-amended form, read as follows:

'**Method of payment of social assistance**

a) electronic transfers into an account of a beneficiary or institution where the beneficiary resided, subject to written authorisation by the beneficiary, or
b) manual payments at a designated place.'

In terms of regulation 21(2) SASSA was required to pay grants on a monthly basis. Regulation 21(3) required that beneficiaries who receive manual payments should identify themselves by way of an identity document or biometric identification. As can

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[2] See *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2013] ZACC 42; 2014 (1) SA 604 (CC) para 1.
[3] Ibid para 1.
[4] Eligibility for social assistance grants is dealt with in ss 5-13 of the Social Assistance Act 13 of 2004 (the Act), read with regulations 2-9.
[5] See s 32 of the Act.
[6] Regulations relating to the Application for and payment of Social Assistance and the Requirement or Conditions in respect of Eligibility for Social Assistance, GN R898, *GG* 31356, 22 August 2008.

be seen the regulations provided for payment either by way of electronic transfer into the bank accounts of beneficiaries or manual payments at a designated place.

[14] SASSA was established in 2006, in terms of s 2 of the South African Social Security Agency Act 9 of 2004 (the SASSA Act), to 'act, eventually, as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance'.[7]

[15] Against a past during which there were fragmented provincial payment systems, SASSA was established to administer the payment of social grants under a unified, single national authority. SASSA had inherited a flawed payment system. Too many grants were being paid monthly at cash payment points, which necessitated engaging service providers to transport large sums of money to those locations. Fraud was rife, with many persons not entitled thereto receiving payment of social grants. Pay-out points and grant beneficiaries became targets for criminals and cash-in-transit robberies.

The contract between SASSA and Cash Paymaster Services

[16] In 2012, SASSA, in executing its statutory mission and intent on implementing a new payment system that would involve paying beneficiaries, mainly through bank accounts utilising information technology, concluded a contract with Cash Paymaster Services (CPS), a wholly-owned subsidiary of Net1 Applied Technologies South Africa (Pty) Ltd (Net1).[8] In concluding the contract SASSA was outsourcing its payment obligations, which would now be executed by CPS. The latter effectively took over the administration of the payment of social grants. In executing its contractual mandate, CPS, through Net1, contracted with Grindrod, to operate affordable bank accounts for grant beneficiaries.[9]

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[7] See s 3*(a)* of the South African Social Security Agency Act 9 of 2004 (the SASSA Act).

[8] Net1 is a wholly owned subsidiary of UEPS Technologies, Incorporated, a Nasdaq listed company.

[9] The contract was concluded pursuant to a tender process that was later set aside. In this regard see *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2013] ZACC 42; 2014 (1) SA 604 (CC). See also the later judgment of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (4) SA 179 (CC), in terms of which an order was fashioned suspending the order of invalidity, and directing SASSA to initiate a new tender process, with a requirement that personal data in the process remain private. The order of the Constitutional Court also set out further processes to be followed in the event of a tender not

[17] In implementing this system, which is central to the present litigation, SASSA's laudable objective, in accordance with the provisions of the Act, was to ensure that the various categories of beneficiaries received the full extent of the social grants that were their due. In addition the system aimed at facilitating financial inclusion of beneficiaries in the economic mainstream, so that they could transact within the banking system with ease and dignity. It was designed to enable beneficiaries to have access to banking facilities in the same manner as their more affluent compatriots. Beneficiaries as a class had hitherto been largely unbanked or under-banked.

[18] In 2012 and 2013, pursuant to the contract concluded with CPS, bank accounts were opened with Grindrod for over 10 million recipients of social grants. Forty thousand beneficiaries elected to utilise bank accounts other than those held with Grindrod bank. Approximately 1,1 million beneficiaries, who were Grindrod account holders, elected to open EasyPay Everywhere (EPE) accounts with Grindrod from June 2015, when they were first offered as an option. EPE accounts were very similar to other accounts held by grant recipients at Grindrod, except that they offered additional benefits, such as more attractive fees for automated teller machine (ATM) transactions. EPE accounts offered substantially the same banking functionality as other Grindrod accounts and those of other banks. Millions of other beneficiaries of social grants received their grants manually at cash pay points. As at June 2015, according to a SASSA statistical report, an estimated 16 780 488 South Africans were recipients of social grants.

[19] According to the Minister and SASSA the new social grant payment system, the details of which I will advert to shortly, was set up to protect beneficiaries from the greed of money-lenders, who charged exorbitant interest rates, and also to guard against fraud and corruption.

[20] The only deductions from social grants that CPS could legally process, prior to the payment of grants into beneficiaries' accounts at Grindrod or other banks,

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being awarded. Constitutional court orders following on these two judgments are referred to under the heading 'Recent events' later in this judgment.

were those sanctioned by the then regulation 26A, first introduced in 2009, which provided:

‘(1) The Agency may allow deductions for funeral insurance or scheme to be made directly from a social grant where the beneficiary of the social grant requests such deduction in writing from the Agency.

(2) Subject to the provisions of subregulation (1), the Agency may only allow deductions to be made directly from a social grant where the insurance company requiring such deduction or to whom the money resulting from the deduction is paid, is a financial services provider as defined in section 1 of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002) and authorised to act as a financial services provider in terms of section 7 of the Act.

(3) Notwithstanding the provisions of subregulation (1), the Agency may only authorise one deduction for a funeral insurance or for a funeral scheme not exceeding ten per cent of the value of the beneficiary's social grant.’

[21] Regulation 26A was premised on the provisions of ss 20(3) and 20(4) of the Act, which read as follows:

‘(3) A beneficiary must without limitation or restriction receive the full amount of a grant to which he or she is entitled before any other person may exercise any right or enforce any claim in respect of that amount.

(4) Despite subsection (3), the Minister may prescribe circumstances under which deductions may be made directly from social assistance grants: Provided that such deductions are necessary and in the interest of the beneficiary.’

The operation of the Grindrod accounts

[22] Each month SASSA made payments to CPS, into an account held at Nedbank, in the total amount of social grant payments due to beneficiaries. From those payments CPS paid a monthly amount of approximately R10,9 billion into so-called SASSA Funding Accounts at Grindrod. These Funding Accounts were ‘master’ accounts, from which millions of grant payments were made into each grant recipient’s personal bank account held at Grindrod. Deductions in respect of funeral policies under regulation 26A were effected by CPS prior to payment of grants into the recipient’s Grindrod account.

[23] Grindrod issued SASSA branded debit cards to beneficiaries, which were used to access funds in their accounts. Once every month, a grant recipient

presented him or herself at an ATM, a CPS pay-point or a point of sale (POS), ie a merchant, and authenticated the transaction either biometrically or by way of the PIN connected to the bank card issued by Grindrod – the so-called 'proof-of-life'. When this occurred, the information technology system would verify whether there was a grant waiting to be loaded. If there was, the funds would be transferred from the applicable SASSA Funding Account to the grant recipient's Grindrod account, whether an EPE account or not. The cards could then be used either to draw cash or, in the case of merchants with POS machines, to purchase goods.

[24] SASSA had required potential contractors to provide for a beneficiary to access their funds anywhere and anytime. Accordingly, proposals had to provide for payments to shift from a cash to an electronic payment system. They had to cater for financial inclusiveness by allowing beneficiaries to interact through the regulated National Payment System (NPS) under the National Payment System Act 78 of 1998 (the NPS Act). That legislation provides for the management, administration, operation, regulation and supervision of the payment, clearing and settlement systems in South Africa. The South African Reserve Bank (the SARB) oversees the NPS.[10] Any transactions, debits, deductions or purchases conducted using that beneficiary's Grindrod issued card took place within the NPS.

[25] Grindrod does not have a widespread footprint of POS devices and ATMs. Grindrod's bank account holders, however, could use their Grindrod cards to transact at any ATM or POS device owned by other banks. The clearing of payments between Grindrod and other banks arising out of these transactions, was made within the clearing network of the NPS.

[26] In terms of s 3(1) of the NPS Act, the SARB is authorised to recognise a payment system management body (a PSMB), which will organise, manage and regulate the participation of its members in the NPS. The Payment Association of South Africa (PASA) is recognised by the SARB as a PSMB. Its members include banks, mutual banks, co-operative banks, branches of foreign institutions and designated clearing system participants that comply with certain criteria. They

[10] See ss 2-6A, ss 11-13 and s 15 of the National Payment System Act 78 of 1998 (the NPS Act).

agreed to clear payments on behalf of each other, subject to the availability of funds in the bank accounts of account holders.

[27] The NPS connects two or more banks so that they are able to transmit and exchange payment instructions among themselves. Practically, what this means is that a user or collector, for example, a micro-lender or insurance company that banks with bank A can submit debit orders through the interbank payment clearing system for collection against customer accounts held at bank B or any other bank within the interbank clearing system. The system enables seamless transactions across banks.

[28] The SARB, in an explanatory affidavit filed on its behalf, explained that the NPS is impartial about the design of a customer's product and its features and functions:

'Should a product linked to an account, designed by clearing banks, allow for debit orders against such an account, the interbank clearing system would enable users/collectors to collect from such an account.

On the other hand, should a product linked to an account, designed by clearing banks, not allow for debit orders against the account, the bank offering such a product will ensure that no debit orders will be processed against such account.'

The SARB's view was premised, inter alia, on s 6A(1) of the NPS Act, which provides:

'As of 1 July 2006, a person may not change, manipulate, maintain or apply a payment system in any manner that provides preferential treatment to a payment instruction over any other payment instruction in that system, unless such preferential treatment is prescribed by law.'

[29] The terms and conditions governing the cards issued by Grindrod, with the full knowledge of the Minister and SASSA, permitted grant beneficiaries to sign debit order or stop order authorisations. Debit or stop orders could then be processed electronically by other banks for collection from their accounts. The ability to do this lies at the core of the alleged abuses in this case. Once grants were transferred to a beneficiary's Grindrod account, any debit orders loaded against that account were executed.

[30] Concerns about predatory practices by vendors arose on the part of SASSA and the Minister after the introduction of CPS and the Grindrod accounts, which, it had been thought, would provide greater integrity, effectiveness, efficiency and security. This was because of continuing complaints based on the experiences of grant beneficiaries under the social grant payment system. These concerned unauthorised deductions from the Grindrod accounts, which were allegedly premised on non-existing loans, prescribed debt, multiple funeral scheme policies and advance electricity and cellular telephone charges. In some instances, so it was alleged, loans had been advanced to beneficiaries in contravention of prevailing statutory provisions. The Minister, SASSA and civil society were emphatic that the new payment system had opened a new frontier for exploitation. In many cases, so it was alleged, beneficiaries were left with very little or no money after deductions by way of debit orders and EFT payments had been made.

[31] In 2013, the Black Sash, concerned about what it considered to be the ongoing abuse of social grants, wrote to the SARB requesting a directive, in terms of s 12 of the NPS Act[11] in relation to payment of social grants, within what it described as the 'open-loop' NPS payment system, to prevent deductions of any kind other than the limited funeral policy deductions referred to earlier. The SARB declined the request and responded in writing as follows:

'Whilst we note with concern that social grants paid to vulnerable persons are exploited by unscrupulous lending and other commercial practices, after careful consideration the SARB decided against the issuance of such a Directive at this stage. The SARB is of the firm view that a Directive as requested could be challenged legally by other stakeholders in the NPS . . . The SARB has engaged with SASSA, Black Sash and delegates of [the Department of Social Development] and remains willing to continue meeting with the relevant stakeholders and providing input on possible actions that may be undertaken by all parties [concerned], including the SARB, to resolve the matter both in the short and the long term.'

[11] Section 12 provides that the SARB may, from time to time, 'after consultation with the payment system management body, issue directives to any person regarding a payment system or the application of the provisions of this Act'. The grounds upon which directives may be based, are set out in s 12(2) and include aspects relating to 'the integrity, effectiveness, efficiency or security of the payment system'.

[32] In February 2014, the Minister appointed a task team comprising representatives of the Black Sash, the Association for Community Advice Offices in South Africa (ACAOSA), other civil society partners, the Department of Social Development and SASSA. The task team was mandated to investigate the complaints and provide recommendations to prevent abuse.

[33] During August 2014 the task team submitted a report to the Minister with findings and recommendations. It found that since 2012, when the contract was concluded with CPS, the rate of debit order deductions from grant beneficiaries increased significantly. The deductions were made from their Grindrod accounts, including EPE accounts, into which social grants had been paid. According to an affidavit filed on behalf of Grindrod, R550 million worth of debit orders in relation to grant beneficiaries were processed every month.

[34] The task team found evidence that entities with links to Net1 had offered financial products including microloans to grant beneficiaries. It appeared that confidential information related to the Grindrod accounts was leaked and, consequently that there had been a breach of the integrity of the data within the payment system. This was rightly of concern to government as it considered these practices to be in contravention of the Act, the SASSA Act and the regulations thereunder.[12] The allegations concerning a breach of data integrity were denied by Net1 and others. The contract concluded with CPS, in line with the objectives of the Act, obliged CPS to protect the confidential information of beneficiaries, including biometric data, and did not allow for the information to be conveyed to others for

[12] Section 14(4) of the Act reads as follows:
'(4) No person may divulge any personal information of an applicant furnished in respect of an application except-
(a) to a person who requires it in order to perform a function in terms of this Act;
(b) when required to do so by law or by an order of court; or
(c) with the consent of the applicant.'
Section 16(1) of the SASSA Act provides:
'(1) Subject to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and the Promotion of Access to Information Act, 2000 (2 of 2000), no person may disclose any information submitted in connection with any application or instruction for or in respect of a grant, payment, benefit or assistance made available by the Agency, unless he or she is ordered to do so by a court of law or unless the person who made such application consents thereto in writing.'
See also regulation 36.

commercial exploitation. Grant beneficiaries, so it was submitted, were thus susceptible to ambush-marketing and other predatory practices.

[35] Government found it alarming that in some instances deductions had been made from social grants, apparently for payment for water consumption in areas in which water was supplied without charge. The affidavit on behalf of the Minister stated the following:

'The evidence from the case studies presented during the MTT working sessions revealed that "Big Sharks in suits are now in the tank" with almost unrestricted access to funds in the SASSA accounts of grant beneficiaries.'

[36] SASSA and the Minister were notified of cases where beneficiaries who sought to contest unlawful deductions struggled with very little, if any, success to have deductions reversed. Beneficiaries complained that CPS often relied on the biometric safeguards built into the payment system to resist challenges to deductions.

The amended regulations

[37] In light of that background, the Minister and SASSA, troubled that they were failing to meet their constitutional and statutory obligations to pay beneficiaries the full extent of their grants without restriction or limitation, looked to possible legislative amendments to counter the abuse. During February 2016 the Minister proposed a new regulation 26A.[13] For present purposes, the proposed regulation 26A(7) is material. It read as follows:

'(7) Except for a deduction for funeral insurance or scheme, *no deduction shall be permissible from the bank account opened for a social grant beneficiary* to facilitate the payment of a social grant.' (My emphasis.)

After receiving comments on the proposal, including reference to an opinion by senior counsel suggesting that draft regulation 26A(7) was unconstitutional, it was not proceeded with.

[13] Footnote 5 supra.

[38] On 6 May 2016 the Minister promulgated amendments to regulations 21 and 26A.[14] The amended regulations, which were central to the litigation in the court below and material in relation to the applications we are called upon to adjudicate, read as follows:

'21 **Method of payment of social assistance**

(1) 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 subparagraph (i) in person, alternative arrangements must be made with the Agency; or

(b) by the payment method determined by the Agency,

(2) Social assistance must be paid monthly by the Agency or a person appointed by the Agency for that purpose in terms of section 4 of the SASSA Act.

(3) Subject to the provisions of sub regulation (2) –

(a) in the case of manual payments a beneficiary must –

(i) identify himself or herself by means of an identity document or biometric identification;

(ii) personally or via a person appointed by the beneficiary or Agency, take receipt of the social assistance payable to him or her; and

(iii) sign an acknowledgement of the amount received, if he or she receives payment of his or her social assistance manually;

(b) a beneficiary's signature or biometric identification serves as acknowledgement of receipt for the amount received, unless the amount of the social assistance is credited to an account held at a financial institution.

(4) The method of payment contemplated in sub-regulation 1*(b)* shall not allow for any deductions, except for deductions allowed for in terms of this Act.

26A Circumstances under which a deduction may be made directly from a social grant

(1) The Agency may allow only one deduction per month not exceeding 10 per cent of the value of the beneficiary's social grant for a funeral policy issued by an insurer registered

[14] Regulations relating to the Application for and payment of Social Assistance and the Requirement or Conditions in respect of Eligibility for Social Assistance GN R511 *GG* 39978 of 6 May 2016.

under the Long Term Insurance Act, 1998 (Act No. 52 of 1998) to be made directly from a social grant where -

(a) the beneficiary of the social grant consents to such deduction in writing and has submitted such consent in person to the Agency;

(b) a beneficiary is unable to submit the consent contemplated in paragraph (a) in person, alternative arrangements must be made with the Agency.

(2) Despite sub-regulation (1) no deduction may be made in respect of a –

(a) foster child grant;

(b) care dependency grant;

(c) child support grant; and

(d) social grant awarded for a period not exceeding twelve months.

(3) Active deductions for a funeral insurance or a funeral scheme from social grants that are excluded in terms of sub-regulation (2), may continue to be deducted from a social grant for a period not exceeding six months following publication of those Regulations to allow the beneficiaries and funeral service providers to make alternative payment arrangements.'

[39] On the day that the regulations were published the Minister published a press release, the material parts of which appear hereunder:

'. . .

This will put an end to the tide of unauthorised and unlawful deductions and ensure better control of Sections 21 and 26A [sic] which deals [sic] with the payment environment.

. . .

The revised Regulations firstly seek to clarify aspects of the existing regulations, which the industry have found ways to bypass. It now makes it clear that a beneficiary must in person provide written permission to SASSA for a deduction. Where they cannot do this in person, SASSA will assist the beneficiary either through a home visit or other means in accordance to their policies.

. . .

There have always been two options; either the beneficiary's own personal bank account or through the SASSA payment mechanism.

The Agency's use of banking facilities is not equivalent to a beneficiary's personal bank account. Thus this payment method is subject to the provisions of the Social Assistance Act and its regulations. Today the CEO of SASSA will send an instruction to CPS to remove the debit order facility from the SASSA branded card.

We have consulted with the South African Reserve Bank and Payment Association of South Africa and together we believe this is a necessary intervention to stop deductions.'

[40] The Minister and SASSA, in effect, were contending that amended regulation 21, read with 26A, had the same effect as the abandoned proposed regulation 26A(7). On 24 May 2016 the Minister wrote to Grindrod demanding that it cease all EFT debit orders and stop orders. In response to the amended regulations and the Minister and SASSA's attitude in relation thereto and the directive issued to CPS as envisaged in the press release, the applications referred to at the beginning of this judgment, were launched, by the applicants identified in paragraphs 43 and 45 hereafter.

[41] The applicants were all adamant that the amended regulations do not expressly, or otherwise, prohibit any electronic debits, including debit orders, EFT transmissions, POS transactions and money transfers. They submitted that once CPS made payment into the Grindrod account it discharged its duty on behalf of government to pay the full grant and no further restriction could be placed on what a beneficiary did with the money so received. Government's attitude, so they said, amounted to an unlawful restriction on a beneficiary's right to contract and to self-autonomy, which, in turn, was an infringement of their right to dignity. It also ran counter to s 20(3) of the Act, which dictated that social grants be paid without 'limitation or restriction'.

[42] The applicants contended that SASSA and the Minister's interpretation of the regulations, if applied, would jeopardise the operation and viability of the NPS as well as the benefits that usually accrue to the holders of bank accounts. It would, so they said, result in defaults on loans and other obligations on the part of beneficiaries, with concomitant disastrous personal consequences. Furthermore, they continued, it would deprive beneficiaries of inclusion in the banking mainstream. They also asserted that the regulatory rights of the SARB and of PASA were being impinged upon by SASSA and the Minister.

The applications

[43] The first application was brought by Net1, Moneyline Financial Services (Pty) Ltd, a registered credit provider and Manje Mobile Electronic Payment Services, which provides Grindrod with an electronic platform to provide what it calls 'value

added services' such as pre-paid airtime and electricity to grant beneficiaries, seeking declaratory relief as outlined in para 2 above. These applicants (the Net1 applicants) later amended their notice of motion to include the following prayer:

'. . . [T]o the extent that regulations 21 and 26A 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, as amended under Government Notice R.511 in *Government Gazette* 39989 of 6 May 2016, and/or section 20 of the Social Assistance Act 13 of 2004, restrict beneficiaries in the operation of their bank accounts, these provisions are reviewed and set aside and declared to be unconstitutional and invalid.'

[44] In motivating the additional relief sought, the Net1 applicants filed a supplementary affidavit to which SASSA and the Minister responded. The significance of parts of that affidavit and the response thereto will be alluded to in due course. The constitutional challenges to the regulations are set out in brief hereafter. It was contended: that the regulations were not authorised by or contravene ss 23(3) and 23(4) of the Act, that they encroach on the jurisdiction of the SARB, are inconsistent with the constitutional obligation to improve access to social security and assistance, unjustifiably infringe on beneficiaries' right to contractual freedom and self-autonomy, which is an incident of the right to human dignity, protected under s 10 of the Constitution and are irrational and/or unreasonable.

[45] The second application was brought by Finbond Mutual Bank (Finbond), a registered credit provider, which provided loans to social grant beneficiaries. Finbond is repaid by way of debit orders from the accounts of beneficiaries with Grindrod. The Smart Life Insurance Company Limited, a financial services provider that provides what it calls 'cost-effective funeral related insurance products' to grant beneficiaries, was yet another applicant, seeking identical relief to Finbond. Information Technology Consultants (Intecon), which has a business that revolves around the processing of payment instructions (PI's) to transfer funds or to make a payment within the NPS, joined the fray in a separate application, seeking the same relief as Finbond and Smart Life. Its interest, it asserted, was as a systems operator maintaining with others the integrity of the NPS.

[46] Intecon sought a further order in the following terms:

'It is declared that Regulations 21 and 26A of the Regulations Relating to the Application for Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance, as amended under Government Notice R511 ["the SAA Regulations" or "amended Regulations"], published on 6 May 2016 in Government Gazette No. 39978 ("the notice"), read with section 20 of the Social Security Act 13 of 2004 ("the SAA"), do not operate to restrict the legal capacity of a beneficiary to issue a mandate and authority as described in the clearing rules of Electronic Funds Transfer Payment Stream and to permit such debits to be processed against his/her bank account.'

[47] Later, in an amended notice of motion, Intecon sought alternative relief in similar terms to that sought by the Net1 applicants, referred to in para 43. In short, in the event that the court favoured the interpretation contended for by SASSA and the Minister, Intecon sought to have the regulations reviewed and set aside on constitutional grounds.

[48] Intecon explained how, after the new payment system was introduced and it facilitated the use of POS payment processes, beneficiaries were able to use the efficiency of the system to their advantage. It pointed to what it described as the advantage of building up a credit record from having regularly honoured obligations by way of debit order or EFT deductions. In seeking to justify the further orders sought, Intecon contended that if the Minister and SASSA had their way the effect would be that bank account holders other than Grindrod account holders would be able to authorise deductions by way of EFTs or stop-orders, resulting in the latter being discriminated against, which the Constitution does not countenance. The opening by a beneficiary of a second bank account would essentially circumvent the bar unlawfully imposed by SASSA and the Minister which in itself, so it was submitted, proved the fallacy of the prohibition.

[49] Intecon went on to assert that the effect of what the Minister and SASSA sought to impose would be that vendors would be reluctant to contract with beneficiaries on the basis that they do not have the security of debit or stop orders in respect of re-payment. Beneficiaries would thus be prejudiced in relation to the rest of their compatriots. In effect, beneficiaries would be impaired in their contractual ability. According to Intecon, being forced to effect cash withdrawals more regularly

than others with risks and costs and time consequences, was another factor that weighed against the case made by SASSA and the Minister. Government's attitude would also affect available credit with economic consequences for the individual and the country's economy.

[50] Collectively, across all the applications launched in the court below, the following respondents were cited: The Chief Executive of SASSA, SASSA itself, the Minister, Grindrod Bank, the South African Reserve Bank, the Payment Association of South Africa, the Financial Services Board and the Registrar of Long Term Insurance. Grindrod and PASA made common cause with the applicants. The SARB did not support or oppose the relief sought, but filed an explanatory affidavit to 'red-flag' certain issues. That affidavit is of importance and I shall, in due course, allude to it. As stated earlier, the Minister, the CEO of SASSA and SASSA opposed the relief sought by the various applicants.

[51] Grindrod supported the relief sought by the applicants. It participated in the proceedings, so it alleged, in order to obtain clarity on its legal duties and obligations. Grindrod disavowed any connection to or links with Net1 or associated entities. It was adamant that it was opposed to exploitative practices on the part of unscrupulous vendors, but was equally insistent that the stance assumed by SASSA and the Minister was not the proper manner to protect grant recipients. Such protection, it submitted, could best be achieved by enforcing consumer protection legislation such as the NCA. Besides complaining that the integrity of the NPS would be jeopardised, Grindrod alleged that it would be impossible for it to immediately comply with the Ministerial instruction. In order to comply it would need to make extensive changes to its systems which would take several months. It would also take some time to test the changes to the system. On the other hand, failure to comply with the instruction by SASSA and/or the Minister might render it susceptible to criminal prosecution.[15] Grindrod aligned itself with the applicants in relation to the interpretation of the Act and the amended regulations and the relief sought by them.

[15] Section 14 of the NPS Act.

[52] In opposing the relief sought by the applicants, SASSA and the Minister set out the ills visited upon social grant beneficiaries. SASSA and the Minister said that they had sought to engage with CPS and with Net1, in order to address their legitimate concerns, with no success, leaving the Minister to resort to the amended regulations, which were a legitimate measure to prevent abuse and end debit deductions. SASSA and the Minister were equally adamant that the deductions by way of stop orders or otherwise were in contravention of ss 20(3) and 20(4) of the Act.

[53] The Minister and SASSA took the view that the Grindrod accounts were special SASSA accounts falling within the ambit of regulation 21(1)*(b)* and were not accounts contemplated by regulation 21(1)*(a)*, namely, bank accounts of beneficiaries and that consequently the provisions of regulation 21(4), which prohibit deductions in relation to a payment method that falls under regulation 21(1)*(b)*, applied.

The SARB's attitude

[54] I now turn to deal with further specific parts of the explanatory affidavit by the SARB. At the outset, the SARB acknowledged that it was not the 'custodian' of the regulations which govern the payment of social grants, but was emphatic that it was the custodian of the NPS. It strongly supported any initiative by government to curb debit order abuse and supported lawful measures to curb the abuse. However, the SARB took the view that if deductions were to be summarily terminated against beneficiary bank accounts with Grindrod it would be disruptive of the NPS. In such circumstances, creditors would have to find alternative means of collecting what was their due and debtors would have to find other means of paying what was owed. This might necessitate making payments in cash with resultant risks and additional costs. The SARB suggested that there were other means of curbing abuse, such as identifying fraudulent collectors of debit orders or EFT deductions and then, through PASA, preventing collections from those so identified. The SARB urged extensive beneficiary education campaigns so as to alert beneficiaries that complaints could be lodged so as to identify those guilty of abuse.

[55] The SARB was concerned that the stance adopted by SASSA and the Minister would adversely affect the NPS. It stated that it had engaged with the ministry in relation to the regulations and 'flagged' concerns about the impact on the NPS. It complained that the Minister and SASSA had not involved it in the reshaping of a payment system, which had to take into account the imperatives of the NPS. It also suggested that thought should be given to whether entities such as Net1 should be involved in the payment of grants as well as the marketing of services to beneficiaries. It made the following additional suggestions:

'The future curbing of debit order abuses may be dealt with in two ways:

Beneficiaries should have the option of selecting their own account and banks should compete for the provision of services to beneficiaries;

A SASSA defined basic account enabling SASSA to co-brand with any bank to define the basic account and product offering including limitations on debit order deductions.'

The intervention application

[56] In seeking leave to intervene and the relief set out in para 7 above, the Black Sash relied, inter alia, on the Constitution, International Human Rights Instruments and covenants to which South Africa is a signatory. The Black Sash clearly has an interest in protecting the poor and the vulnerable, including beneficiaries of social grants. It will be recalled that it formed part of the ministerial task team investigating complaints of abuse and has featured a number of times as amicus curiae in the Constitutional Court and in other courts. It brought the application to intervene on its own behalf, in the public interest and in the interest of grant beneficiaries who are unable to litigate. The Black Sash voiced its concern about the shareholding connection between Net1, Finbond and Smart Life and the likelihood of marketing that made use of confidential information of grant beneficiaries. It questioned the security of the electronic platform provided by Manje Mobile.

[57] The second to sixth applicants who aligned with the Black Sash, were recipients of old-age grants and the seventh received a child support grant. They all related their experiences of exploitative practices, including unauthorised deductions and short payment.

The court below

[58] In the court below, Van der Westhuizen AJ considered the new regulations 21 and 26A and had regard to relevant provisions of the Act. He held that collectively they only prohibited deductions *prior* to a social grant being paid into a beneficiary's bank account, including the ones held at Grindrod. The court below rejected the submission on behalf of SASSA and the Minister that the Grindod account was a 'special one' from which no deductions could be made.

[59] At para 22 of the judgment the following appears:

'In my view, from the foregoing procedure, it is clear that once the grant is transferred into the recipient's account at Grindrod, it operates as any bank account at any Commercial Banking Institution. There is clearly no difference and SASSA equally has no control over such account with Grindrod as it does not have control over any account with a Commercial Bank. For the foregoing [reasons], there is no merit in the submission on behalf of the first, second and third respondents that the Grindrod bank accounts are not bank accounts chosen by the beneficiaries, but is *"a method of payment chosen by the Agency"*.' (Emphasis in original.)

[60] Van der Westhuizen AJ sought to reinforce that conclusion as follows (at para 29):

'The first, second and third respondents correctly concede that where recipients hold bank accounts with other commercial banking institutions, their aforesaid interpretation of sub-regulations 21 and 26A does not and cannot apply. In my view that concession puts paid to the first, second and third respondents' arguments. The procedure of payment of the grant amount into the beneficiary's account with Grindrod outlined above, is no different to that where the grant amount is paid into a recipient's bank account with a Commercial Bank. Accordingly, the first, second and third respondents' interpretation is contrived, forced and untenable.'

[61] The court below also said the following at para 28:

'Furthermore, it is common cause that neither SASSA, nor the Minister of Social Development, [has] extended regulatory power under the Act that would empower them to regulate and impose rules and restrictions relating to electronic payment. Such powers are deferred to the SARB.'

[62] In light of the above the court did not find it necessary to consider the constitutionality of the provisions on the bases raised by Intecon and the Net1 applicants. It refused the applications to intervene and the applications to be admitted as amicus curiae and stated the following in relation thereto:

'I am of the view that those applications should not be granted. The relief sought in those applications are not relevant, nor appropriate, to the approach adopted in this judgment and particularly in view of the relief sought by the applicants and the relief I intend granting.'

[63] It is against the conclusions referred to in the preceding paragraphs and the resultant orders that the present applications for leave to appeal are directed.

Recent events

[64] I now turn to recent events and will later consider their effect on the applications for leave to appeal. It recently became publicly known that CPS's extended contract with SASSA was due to expire on 31 March 2018, that is, upon the expiry of the suspension of the Constitutional Court's declaration of invalidity of the contract. On 8 December 2017, SASSA and the South African Post Office (SAPO) entered into a service level agreement (SLA) for the administration of the payment of grants, to take effect on 1 April 2018. Under the SLA (clause 5), SAPO was required to provide the following services to SASSA from 1 April 2018:

'5.1 Electronic banking services, including:

5.1.1 Corporate Control Account (Holding Account);

5.1.2 Special Disbursement Accounts.

5.2 "On-boarding" of new beneficiaries: Instance Account Opening and card issuance at SASSA local offices and SAPO outlets.

5.3 Biometric Authentication of beneficiaries . . .

5.4 Development of software: Development, in conjunction with such other state capabilities, including the State Information Technology Agency (SITA) and the Council for Scientific and Industrial Research (CSIR) as may be required, of the software solution to replace Net1/CPS in the incumbent disbursement model.'

[65] On 5 February 2018, SASSA applied to the Constitutional Court for an order extending the 'cash pay point' payment services CPS was providing to SASSA – ie the distribution of grants at cash pay points designated by SASSA – for a further six

months, expiring on 30 September 2018. In all other respects, the declaration of invalidity of the SASSA-CPS contract came into effect on 1 April 2018.

[66] On 23 March 2018, the Constitutional Court granted an order declaring that CPS had a constitutional obligation 'to ensure payment of grants to beneficiaries who are paid in cash' for a period of six months from 1 April 2018. The Constitutional Court extended its suspension of the declaration of invalidity of the SASSA-CPS contract 'in relation to cash payment of social grants to beneficiaries who are paid in cash', and directed CPS to continue to provide this specific payment service 'on the same terms and conditions as those in the current contract'.

[67] On 11 May 2018, the following notice was published in the *Government Gazette* by SASSA, purportedly acting in terms of s 4(2)*(a)*[16] of the SASSA Act and in terms of regulation 21(1)*(b):*

'The South African Social Security Agency (SASSA) is a government agency set up to ensure the efficient and effective management, administration and payment of social assistance. Section 4(2)(a) of the South African Social Security Agency Act, 2004 (Act No. 9 of 2004) requires the Agency to: "with the concurrence of the Minister enter into an agreement with any persons to ensure effective payments to beneficiaries . . ." In order to give effect to this Section of the SASSA Act, SASSA has entered into an agreement with the South African Post Office.

In terms of Regulation 21(1)*(b)* made under the Social Assistance Act, 2004 (Act No. 13 of 2004), SASSA hereby gives notice that the "method of payment determined by SASSA" is the payment of social grants through an integrated social grant payment system, into the special disbursement accounts held with the South African Post Office, in line with the Implementation Protocol signed on 17 November 2017 and the Services Agreement signed on 8 December 2017.'

[68] On 19 July 2018, approximately a month before the present applications were heard, the registrar of this court issued the following directive to the parties:

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[16] Section 4(2)*(a)* of the SASSA Act provides:
'(2) The Agency may –
(a) with the concurrence of the Minister enter into an agreement with any person to ensure effective payments to beneficiaries, and such an agreement must include provisions contemplated in subsection (3).'

'The parties are required as a matter of urgency to inform the Court, preferably by way of an agreed statement of facts, about the new SASSA payment procedures and their impact, if any, on the issues in the [applications for leave to appeal].'

[69] In response to the directive, the Black Sash provided the following basic agreement by the parties in relation to the new payment methods:

'After the current transition period, the following payment methods will be available to social grant beneficiaries –

Direct payments into beneficiaries' chosen bank accounts with commercial banks.

Payment through the Postbank of the South African Post Office.

Payments through merchants in retail shops.

Manual payments at pay points.'

[70] The response by the Minister and SASSA was especially significant. It confirmed that SASSA had concluded an agreement with the SAPO for the payment of social grants on its behalf. The remaining paragraphs of the statement in relation to the new payment procedures are set out hereafter:

'4.1 In the first instance, SAPO may effect payment to a beneficiary by way of payment into the bank account held by a beneficiary with any commercial bank of their choice. This method of payment is the method of payment envisaged in the amended Regulation 21(1)*(a)*(i) which provides that:-

(1) "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."

4.2 *Where the beneficiary* has chosen this method of payment i.e. the method of payment envisaged in Regulation 21(1)*(a)* and *has authorised SASSA in writing to have their social grant paid into their own bank account held with the commercial bank of their choice, the payment of such beneficiary's grant goes through a "straightforward" banking process.*

4.3 The second method of payment as per the agreement, involves the provision of a SASSA/SAPO card to a grant beneficiary and this card is linked to a beneficiary's Special Disbursement Account operated and held by SAPO(SDA). The Special Disbursement Account operates as a debit card and is endorsed by VISA. *The SDA can*

only accept deposits of social grant money and does not allow any EFT debits, stop orders or any other financial transactions, apart from withdrawals, and debits for goods purchased at point of sale. This, in SASSA's view is in accordance with Regulation 21(4).

4.4 The payment process involves SASSA depositing social grants into SAPO accounts through the normal banking process. Upon receipt of the social grant money, SAPO would then disburse the amounts into the beneficiaries special disbursements account. The beneficiary is then able to access the money through various payment channels namely:-

4.4.1 The point of sale devices at merchants for cash withdrawals;

4.4.2 Point of sale devices at merchants for purchases;

4.4.3 Bank ATM's for cash withdrawals;

4.4.4 Over the counter withdrawals at Post Office outlets; and lastly.

4.5 The last method of payment is a cash payment at a limited number of identified pay points which would ordinarily be situated far from the national payment infrastructure. This method of payment entails payment of money by SASSA into SAPO bank account through the normal banking process and thereafter SAPO disbursing the said amounts through cash payment at the identified pay points.' (My emphasis.)

[71] In dealing with the impact of the new payment procedures on the applications for leave to appeal, SASSA and the Minister stated the following, (at para 6):

'At the outset we highlight that the payment method as envisaged in Regulation 21(1)*(a)* i.e. where the grant beneficiary elects to have their social grant paid into their own bank account held with a commercial bank of their choice is not an issue in this matter. It is common cause between the parties that in so far as this method of payment is concerned, the grant beneficiary is at will to authorize debit deductions, if he or she so wishes. It is emphasized that by selecting own bank account held with [a] commercial bank, it is implicit in that choice that the beneficiary has established a banking relationship with a bank of their choice and are able to manage all aspects of their account.'

[72] Notwithstanding the highlighted part of para 4.3 of the statement, set out in para 70 above, SASSA and the Minister went on to state the following:

'The judgment of the court a quo, properly construed, implies that the beneficiaries' Special Disbursement Account opened and operated by SAPO would be treated in the same manner as the Grindrod bank account and therefore such bank account cannot be said to operate to restrict the beneficiaries in the operation of their accounts. Put differently, it is implicit in the

judgment of the court a quo that notwithstanding that the payment of grants is now disbursed through SAPO and through a Special Disbursements Account, the Applicants and many other service providers may continue to demand that SAPO should honour the debit orders presented to it as against that Special Dispensation Account.'

The Minister and SASSA consequently took the view that the new payment procedures had no impact upon the issues in the applications for leave to appeal. Apparently they did so because they believed that the judgment might in some way impact upon the restrictions attaching to the Special Disbursement Account with SAPO. There was no basis for that concern, which was inconsistent with the evidence of the SARB that a bank was free to stipulate the terms on which it would operate a bank account.

[73] The Net1 applicants, in their response, referred to what is set out in paras 69-72 above, but considered it necessary to set out the further undisputed material facts, which appear in the following four paragraphs.

[74] SAPO has been paying beneficiaries through the 'electronic banking services' described in the SASSA-SAPO SLA. For each beneficiary who chooses to be paid by SAPO, SAPO creates a 'special disbursement account'. The special disbursement account allows only limited transactions. No EFT debits or stop orders are allowed against these accounts. They had been specifically set up in this manner.

[75] Grant recipients are entitled to receive payment of grants into a bank account of their choice, including the bank accounts held at Grindrod Bank. During July 2018, a total of 9 236 945 grant beneficiaries received their grants through direct ACB payment into their accounts held at various commercial banks, including Grindrod. Of those commercial bank accounts, 5 589 506 are Grindrod SASSA accounts.

[76] Unless the beneficiary account-holder elected to close his or her Grindrod account and to migrate to a SAPO account or to another bank, the Grindrod account would remain open. Those beneficiaries who continued to use these accounts are responsible (as account holders) for paying all bank charges associated with these accounts.

[77] CPS has continued to pay beneficiaries at cash pay points designated by SASSA, and will continue to do so until 30 September 2018, as per the Constitutional Court order. This payment channel continues to be relied on by beneficiaries living in remote rural areas, where there is limited ATM infrastructure or post offices. These beneficiaries' accounts are subsidised by SASSA in terms of the extended SLA. As can be seen, the Net1 parties and SASSA and the Minister are in agreement on what is set out in the preceding paragraphs.

[78] The Net1 applicants set out the parts of the Minister and SASSA's statement which they disputed, as follows:

'The Minister and SASSA state that "SAPO may effect payment to a beneficiary by way of payment into the bank account held by a beneficiary with any commercial bank of their choice". This does not reflect the current practice, which involves SASSA directly effecting payments into beneficiaries' commercial bank accounts from its PMG account, held by SASSA with the South African Reserve Bank. Currently, SAPO only directs payment into the special disbursement accounts that it controls. The SASSA-SAPO SLA also does not provide for SAPO to process grants payments to commercial banks.

The Net1 respondents disagree with the statement that "the payment process as regulated by the agreement between SAPO and SASSA does not differ much from the previous dispensation, ie, when the payment was effected through Cash Paymaster or Grindrod bank. The grant monies are distributed in the same manner as previously except that the payment is now effected through SAPO and not through Cash Pay Master and/or Grindrod bank as it were". The nature of the payment process implemented by SAPO is fundamentally different. SAPO operates a restricted account, which does not allow for any electronic banking (including debit-orders or EFTs). In contrast, the beneficiary accounts that Grindrod bank provided to beneficiaries operated like any commercial bank account, with full electronic banking functionalities and interoperability in the NPS.'

As stated earlier, the Net1 applicants took the view that the new SAPO administered payment system has rendered the application for leave to appeal by the Minister and SASSA moot.

[79] For a fuller picture, it is necessary to have regard to relevant parts of a report filed by the Minister and SASSA in July 2018, in the Constitutional Court, in accordance with that court's reporting requirements in terms of its order dated 23

March 2018, referred to in para 66 above. The report showed a progressive decrease in cash payments made by CPS. The number of beneficiaries to be paid in cash in August 2018 was 1 098 669. There also appeared to be a progressive increase in the number of beneficiaries choosing to have their grants paid into accounts held with commercial banks other than Grindrod. As at June 2018 approximately 6 970 925 of the 9,2 million grant beneficiaries, were paid through Grindrod. The number of beneficiaries using Grindrod bank accounts reduced by approximately 743 528 in July 2018. Contemplated payments for August 2018 reflected that the number of beneficiaries using the Grindrod account would reduce to 5 589 506. The number of beneficiaries paid through commercial bank accounts, excluding Grindrod and SAPO, was approximately 1 340 148 in July 2018. That number increased to 1 663 083 in August 2018. It appeared that, following on the provision of information related to the payment options available to beneficiaries, SASSA received numerous requests for grant payments into personal bank accounts with commercial banks.

[80] To complete the picture it is necessary to deal with what was asserted by the Net1 applicants in their supplementary affidavit presaged in para 44 above, and the Minister and SASSA's response thereto. The Net1 applicants said the following at para 20 of their supplementary founding affidavit:

'The SASSA-branded bank accounts held by beneficiaries are fully functional bank accounts that operate in the National Payment System ("NPS"). Any electronic transaction that is conducted using the Grindrod bank account and the SASSA-branded Mastercard (including debits and purchases) takes place within the NPS and its interbank clearing system. This is confirmed by Grindrod and the SARB.'

[81] SASSA responded to what is set out in the preceding paragraph by admitting those allegations and went on to say the following:

'When the Minister concurred to the agreement concluded by SASSA and with CPS for the distribution of the grant payments, it was not anticipated that the entry of the SASSA payment card into the open loop banking system would provide for a new frontier of exploitation of the most vulnerable members of the South African Society. The CPS payment solution was intended to facilitate the access by social grant recipients to banking facilities that would allow them to access their funds safely and within the framework of the financial infrastructure that all South Africans enjoy.'

The Minister also admitted the allegations set out in para 80 above.

[82] Finally, I note that although Finbond participated fully in the proceedings in the court below, it did not participate in the proceedings before us. That then is the complete background against which the issues before us fall to be decided.

Conclusions

[83] A convenient starting point is the least contentious aspect, namely, whether the Black Sash and its co-applicants ought to have been granted leave to intervene. In the court below, none of the parties, save for Smart Life, had any objection to the Black Sash and their co-applicants being granted leave to intervene and for the Black Sash to be admitted as amicus curiae. At the outset of proceedings before us, all the respondents agreed that the order of the court below, in that regard, should be reversed. Consequently, the Black Sash and their co-applicants participated in the hearing.

[84] The concessions by the respondents set out in the preceding paragraph were rightly made. A primary consideration in an application to intervene, generally, is whether a party seeking to do so 'has a direct and substantial interest in the subject-matter of the litigation'.[17] The Constitutional Court, in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 11, emphasised that the overriding consideration is whether it is in the interests of justice for a party to intervene, and that a direct and substantial interest is a high-ranking consideration though not determinative. If one has regard to the role the Black Sash plays in relation to social grant beneficiaries and to its involvement in the processes described above, preceding litigation, then it is quite clear that it had a direct and substantial interest and that the interests of justice dictated that the application for leave to intervene and to be admitted as amicus curiae should have been granted.[18] The refusal of the application for leave to intervene is all the more peculiar in the light of the fact that the Black Sash had been permitted to address the court below on the issues it considered pertinent.

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[17] M du Plessis et al *Constitutional Litigation* (2013) 1 ed at 50 *and United Watch and Diamond Company (Pty) Ltd & others v Disa Hotels Ltd & another* 1972 (4) SA 409 (C) there cited.

[18] See *ITAC v SCAW* for a discussion of all the considerations to be taken into account in determining the interests of justice inquiry, at para 12.

[85] I now turn to deal with the requirements that have to be met in order for an application for leave to appeal to succeed. Section 17(1) of the Superior Courts Act 10 of 2013 provides:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

Section 16(2)*(a)* reads as follows:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[86] It will be recalled that in response to this court's directive, the Net1 applicants were adamant that the new payment system rendered the present applications moot and that a decision by this court on the issues decided in the court below would have no practical effect. It is to that submission that I now turn. This entails a consideration of relevant decisions about the approach to be taken in relation to the provisions of s 16(2)*(a)*(i) of the Superior Courts Act. In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21, the Constitutional Court observed, with reference to its earlier decision in *JT Publishing (Pty) Ltd & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC), that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist, if a court is to avoid giving advisory opinions on abstract propositions of law. In *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* 2005 (4) SA 319 (CC), the Constitutional Court, in hearing an application for leave to appeal against a decision

of this court[19] and considering the provisions of s 21A(1) the Supreme Court Act 59 of 1959, that empowered this court to dismiss an appeal on the grounds that an order would have no practical effect or result, repeated the observations in *National Coalition* and *JT Publishing*, and held that this court had been correct in dismissing the appeal before it on that ground alone.

[87] Scrutiny of the statement by the Minister and SASSA, filed in response to this court's directive, clearly revealed that their primary objective of ring-fencing the principal accounts into which Treasury pays social grants, distinct from the choice made by social grant beneficiaries to receive payment of their grants into accounts held at commercial banks, has been achieved. This was achieved by virtue of the SLA with SAPO,[20] creating the special disbursement accounts from which no deductions are permitted, which inexplicably was not the case with the prior SLA with CPS. The special disbursement accounts are a payment method in terms of regulation 21(1)*(b)* of the amended regulations. There is no dispute about that.

[88] It is also common cause between the parties that no bar on debit orders and similar transactions operates in respect of commercial bank accounts held by grant beneficiaries. This means that, where beneficiaries have elected to receive their social grant payments through accounts held with commercial banks, they are free to operate those accounts at will. There can also be no doubt that, under the new payment regime, Grindrod is to be considered a commercial bank through which beneficiaries may now receive payment. It is uncontested that up to this stage many millions of beneficiaries have elected to continue to have their social grants paid into their accounts with Grindrod. The Minister and SASSA, in their statement in response to this court's directive, must be taken to accept that beneficiaries are now receiving their social grant payments either through the special disbursement accounts held at SAPO, which do not operate through the 'open-loop' clearance system, or through commercial banks, which are NPS interactive. The remainder continue to receive their grant payments manually at cash pay points. That number

[19] *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA).
[20] In line with the order in the second judgment of the Constitutional Court (*Allpay*), referred to in note 8 above.

is declining. The number of beneficiaries electing to migrate from Grindrod to other banks is also increasing.

[89] It follows compellingly, from what is set out in the preceding paragraphs, that there is no longer a live justiciable issue in relation to the Grindrod accounts. An interpretation of the amended regulations will have no practical effect as Grindrod SASSA accounts no longer exist and there is no likelihood at all of a similar situation arising in future as government has learnt lessons from the past. The Minister and SASSA's contentions to the contrary are without merit. There is no dispute about whether the special disbursement account falls within the provisions of regulation 21(1)*(b)* and that there is justification for that special form of payment. Put differently, there is no challenge to the special disbursement account.

[90] It is so, that abstract challenges might, in appropriate circumstances, be entertained by courts. In *Corruption Watch NPC & others v The President of the Republic of South Africa & others; Nxasana v Corruption Watch NPC & others* [2018] ZACC 23, Madlanga J dealt with public interest litigation where abstract challenges might be entertained. He referred to a prior decision of the Constitutional Court, namely, *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), in which the following were considered to be relevant factors: the nature of the relief sought, the extent to which it would be of general and prospective application and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.[21]

[91] A consideration of those factors against what is set out in para 89 above leads to the ineluctable conclusion that there is no likelihood of a prospective application calling for a decision on the interpretation of the amended regulations on the grounds relied on by the applicants or on the basis of the opposition by SASSA and the Minister. It follows that the applications for leave to appeal ought to be dismissed solely on the grounds that a decision will have no practical effect or result.

[21] See also *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 16.

[92] There is, in any event, in my view, in addition, no reasonable prospect of success of the application for leave to appeal against the lower court's interpretation of the regulation in question for the reasons set out briefly hereafter.

[93] It emerges clearly from the supplementary affidavit of the Net1 applicants, referred to above, and the Minister and SASSA's response thereto, that the CPS contract had been concluded with no party thereto being under any illusion that the Grindrod accounts permitted debit orders and like deductions. The conditions of the Grindrod account were known to all the relevant parties. Those conditions, in clearly spelt out terms, catered for and permitted authorised debits by way of EFT and stop orders.

[94] The complaints about predatory practices are what stirred the Ministry and SASSA from their inertia. Initially, there was resort to the now abandoned draft regulation 26A(7). When that failed, the amended regulations were promulgated, from government's perspective, to achieve what regulation 26A(7) set out to do. One is left with the impression that it was a well-intentioned, but desperate and not well thought through, attempt to protect social grant beneficiaries against predatory practices.

[95] There is force in the submissions on behalf of the applicants that the amended regulations 21(1)*(a)* and 21(1)*(b)* entail different payment methods – in other words, the two categories are mutually exclusive, which is why the two regulations are linked by the disjunctive 'or'. It was submitted that the prohibition in regulation 21(4) refers to the payment method set out in s 21(1)*(b)* and does not apply to a bank account of a beneficiary into which a social grant is paid. Payment into the Grindrod account constituted payment 'into the bank account of the beneficiary' and was therefore not subject to the debit bar.

[96] Further to the submissions set out in the preceding paragraph, it was contended that regulation 21(4) barred deductions before the grants were paid into a beneficiary's bank account and not after. There is justification for the criticisms on behalf of all the applicants that the manner in which the Minister and SASSA sought to have the regulations interpreted and applied amounted to an unwarranted

interference with a social grant beneficiary's right to conduct a mainstream bank account in his or her name and to operate within the mainstream banking system.

[97] Moreover, there are the statutory difficulties, policy considerations and practical problems in relation to the NPS alluded to by the SARB that militate against the Minister and SASSA's position. The new payment regime has achieved what was suggested by the SARB as a measure to combat abuse, namely, ring-fencing, via the SAPO Special Disbursement Accounts, which permits no deductions.

[98] For all the reasons set out earlier there is, in my view, no reasonable prospect of success on appeal and, there are no other compelling reasons why an appeal should be heard.

[99] Counsel on behalf of the Black Sash, recognising the difficulties faced by the Minister and SASSA concerning the interpretation of the amended regulations, chose not to associate with their position and engage on the question of the interpretation of the amended regulations. It was submitted before us that the Black Sash sought leave to intervene and for admission as amicus curiae to highlight the State's obligation, constitutionally, statutorily and in relation to international covenants to which it is a signatory, to protect social security rights. In this regard, reliance was placed on s 27(2) of the Constitution which obliges the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights in s 27(1) of the Constitution. Those rights give citizens the right of access to social security 'including, if they are unable to support themselves and their dependents, appropriate social assistance'. We were referred to Article 9 of the International Covenant on Economic, Social and Cultural Rights which provides that 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'. It was submitted that in the implementation of its obligations to the Covenant, South Africa is obliged to use 'all appropriate means, including particularly the adoption of legislative measures' in taking whatever steps are necessary to ensure that everyone enjoys

the right to social security.[22] It was contended that, as a matter of logic, enjoyment of the right requires protection against the depletion of the social assistance which is provided.

[100] One cannot, in principle, argue against the submissions concerning the State's obligations set out in the preceding paragraph. The Black Sash, however, recognising that the declaratory order it had sought in the court below and in its heads of argument in this court, merely stating that the law requires what is set out above would be nebulous and without any real value. It also accepted that what is required are policy decisions and ensuing legislation that provide clearly defined enforceable protective measures to ensure that social grants are not unlawfully depleted. Such steps are within the domain of the two other arms of government and are not for the court to impose. It is a further reason why the Black Sash rightly did not persist in seeking a declaratory or mandatory order. We were urged by counsel on behalf of the Black Sash, in this judgment, to direct government's attention to the necessity for careful and urgent consideration of the need for legislative intervention. In that process, the recommendations by the SARB, the Black Sash and, indeed, even the applicants, fall to be considered. Amongst those were recommendations concerning limitations on the granting of credit facilities to social grant beneficiaries. Reference was made to the National Credit Act and the Consumer Protection Act. These are matters that call for deliberation by the other arms of government.

[101] Counsel on behalf of the Minister and SASSA, informed the court that his clients took comfort from this court's indication, during debate, that instead of an order directing government to take measures, it might suggest to government that it consider taking legislative steps to protect social grant beneficiaries. The Minister and SASSA were thus not averse to what is contained in the preceding paragraph. Consequently, the Minister, is requested to have regard to what is set out therein.

[102] In light of the conclusions set out above, save for the Black Sash's limited success in reversing the refusal to admit it and its co-applicants, the applications for leave to appeal fall to be dismissed. There appears to be no justification for the Black

[22] South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 18 January 2015. It entered into force on 12 April 2015.

Sash's submission that, at the very least, Smart Life should be held liable for its costs based, on the latter's opposition to its participation in the proceedings in the court below. Smart Life did not object to the Black Sash and its co-applicants participating in the proceedings before us and agreed with the other respondents that the order of the court below refusing the applications for leave to intervene and admitting the Black Sash as amicus curiae should be reversed. The participation of the Black Sash was useful but its effect was limited to the inclusion of paragraphs 99 and 100 of this judgment. I see no need to interfere with the order of the court below, save to the extent agreed to by the respondents.

[103] The following order is made:

Case No 825/2017:

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

Case No 752/2017:

1 The appeal is upheld to the following limited extent.

2 Part (c) of the order of the high court is set aside and replaced by the following:

'The application for intervention by the Black Sash Trust and others is granted.'

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M S Navsa

Judge of Appeal

Appearances:

For the Applicants:	V Maleka SC (with him H A Mpshe) Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein
For the First to Third Respondents:	A Cockrell SC (with him J Bleazard) Instructed by: Lewies Attorneys, Johannesburg Webbers Attorneys, Bloemfontein
For the Seventh Respondent:	L J Morrison SC (with him M Chauke) Instructed by: Mosterts Inc, Peyper Attorneys, Bloemfontein
For the Applicants:	R Michau SC (with him A Liversage) Instructed by: Lewies Attorneys, Johannesburg Webbers Attorneys, Bloemfontein
For the Applicants:	G Budlender SC (with him G Snyman and Z Ngwenya) Instructed by: Centre for Applied Legal Studies, Johannesburg McIntyre van der Post, Bloemfontein