

16 MARCH 2017

DISPUTE RESOLUTION ALERT

SPECIAL EDITION

IN THIS
ISSUE

**ADMINISTRATIVE AND PUBLIC LAW:
PRIVATE SECTOR BEWARE: CURRENT SASSA/
CPS SAGA IS A SIGNIFICANT CASE STUDY FOR
PUBLIC-PRIVATE PARTNERSHIPS**

On Wednesday, 15 March 2017 the Constitutional Court (Court) heard the matter of *The Black Sash Trust v Minister for Social Development and Others*. The Court was asked to make an order to ensure that the South African Social Assistance Agency (SASSA) complies with its constitutional obligation to provide social assistance to the beneficiaries of social grants.

ADMINISTRATIVE AND PUBLIC LAW: PRIVATE SECTOR BEWARE: CURRENT SASSA/CPS SAGA IS A SIGNIFICANT CASE STUDY FOR PUBLIC-PRIVATE PARTNERSHIPS

The Court made the significant finding that as CPS had undertaken a constitutional obligation and was performing a public power under the Constitution, it too is considered to be an organ of state in fulfilment of those obligations.

Private sector companies tendering for public sector work may get more than they bargained for when awarded a tender.



On Wednesday, 15 March 2017 the Constitutional Court (Court) heard the matter of *The Black Sash Trust v Minister for Social Development and Others*. The Court was asked to make an order to ensure that the South African Social Assistance Agency (SASSA) complies with its constitutional obligation to provide social assistance to the beneficiaries of social grants.

In 2012 SASSA entered into a contract with Cash Paymaster Services (Pty) Ltd (CPS) for the payment of social grants to beneficiaries after being awarded a tender to do so. The award of the tender was [declared](#) invalid by the Court in 2013; however, the order of invalidity was suspended pending a determination of a just and equitable remedy.

In 2014, in [AllPay Consolidated Investment Holdings \(Pty\) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 \(4\) SA 179 \(CC\)](#) (Allpay 2) the Court declared the contract concluded with CPS invalid and ordered the tender process to be re-run with no disruption to the payment of existing social grants to beneficiaries. In doing so, the Court maintained its jurisdiction to supervise the matter and suspended the declaration of invalidity pending a decision by SASSA to award a new tender.

In coming to its conclusion in *AllPay 2*, the Court made the significant finding that as CPS had undertaken a constitutional obligation and was performing a public power under the Constitution, it too is considered to be an organ of state in

fulfilment of those obligations. This finding was made notwithstanding the fact that CPS is a private company.

The 2017 SASSA hearing reiterated the import of this finding in an exchange between the justices of the Court and counsel for CPS. In this exchange, the Court – primarily through Chief Justice Mogoeng – explored the possibility of stepping into the commercial arrangement between SASSA and CPS and going beyond the terms of the contract between the two parties. The Court put it to counsel that it may be in a position to authorise CPS to fulfil its constitutional obligations beyond 31 March 2017 (when the current contract expires) even without a new contract having been agreed and despite the fact that it will not be commercially beneficial to CPS to do so.

The manner in which the SASSA/CPS saga is currently unfolding (the highlighted debate in particular) together with the finding in *AllPay 2* could mean that private sector companies tendering for public sector work may get more than they bargained for when awarded a tender. It is crucial to bear in mind that where a private company is awarded a tender in which



CLICK HERE to find out more about our Administrative and Public Law team.

ADMINISTRATIVE AND PUBLIC LAW: PRIVATE SECTOR BEWARE: CURRENT SASSA/CPS SAGA IS A SIGNIFICANT CASE STUDY FOR PUBLIC-PRIVATE PARTNERSHIPS

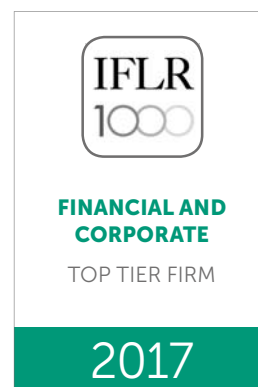
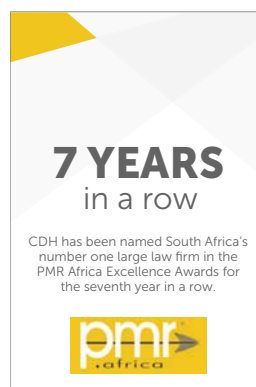
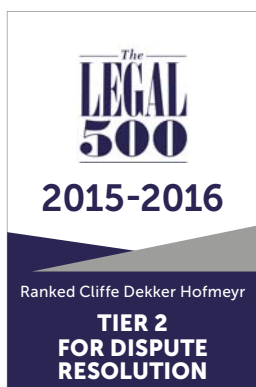
CONTINUED

Private sector clients would therefore be well-advised to seek guidance and advice regarding the obligations they intend to undertake in terms of tenders.

it will perform public functions under a public power – such as the payment of social grants or the supply of prepaid electricity meters (see [City Power v Grinpal Energy Management Services](#)) – it will be treated as an organ of state in respect of those functions and powers. The judgment issued by the Court in the current matter should provide useful further guidance on this issue.

Private sector clients would therefore be well-advised to seek guidance and advice regarding the obligations they intend to undertake in terms of tenders.

Lionel Egypt, Sarah McGibbon and Yana van Leeve



- CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.
- Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.
- Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.
- Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.
- Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.



Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)21 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1561/MAR

