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SIFTING THROUGH THE MUDDLE TO MAKE SENSE OF SECTION 27

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In a decisive and often scathing judgment on Friday, 17 March 2017, the Constitutional Court ruled that “SASSA and CPS are under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity *other than CPS* (own emphasis) can do so and that a failure to do so will infringe upon grant beneficiaries’ rights of access to social assistance under section 27(1)(c) of the Constitution”.

The judgment has been widely analysed and there appears to be consensus that under the circumstances, the Court’s decision to suspend the declaration of invalidity for 12 months was the most practical and least disruptive.

The judgment placed a marked emphasis on the fact that there was a constitutional obligation on “both SASSA and CPS as organs of state performing a constitutional function for a considerable period to not end on 31 March 2017”. The emphasis on constitutional duty and reference to both as state organs is key to an understanding of the firm order made by the Court, notwithstanding the fact that CPS is a private entity. Bolder still was the request that CPS hand over its audited statements for Court scrutiny by end April 2017. This, to ascertain the quantum CPS made since 2013 from the illegal and invalid contract, with the prospect looming of the company having to return up to R1 billion.

The whys and wherefores notwithstanding, Judge Froneman, in delivering an unanimous judgment of the Bench, unequivocally reaffirmed the intention and letter of section 27 of the Constitution, “one of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In so doing it has given some content to the core constitutional values of dignity, equality and freedom”.

That almost 17 million grant recipients are taken to the brink by the “absolute incompetence” of the Minister, in the words of Chief Justice Mogoeng Mogoeng, and that the President of the country attempts to shut down the outcry with an offhand comment that there is no crisis, is testimony of the lack of concern for the millions dependent on grants who are merely voting fodder come local and national elections.

The judgment was a powerful commentary on what the counsel for the applicant referred to as, “the painful truth is that the executive failed to meet obligations. And the painful truth is that Parliament has failed to exercise oversight”. That Minister Bathabile Dlamini survives to tell the tale is in no small part attributable to her support for President Zuma and especially her part in aiding his campaign to choose his successor to ascend the Presidency.

The sad and sorry SASSA saga however highlights a more fundamental breach of relations between the Executive and the electorate that ought to be sacrosanct - that of a constitutional, legal, moral and ethical duty of accountability. It is now well-documented that



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under the Minister's directive, SASSA officials exercised the Goldilocks principle with the public and mostly the Constitutional Court, giving the latter not too much truth, nor too many lies, just enough to ensure that the Court would relinquish its supervisory jurisdiction per the original 2013 judgment.

Judge Froneman's scathing comment on the casual commitment to accountability by the Minister and officials of SASSA is powerfully captured in the judgment and reads as follows, "Accountability is a central value of the Constitution. It accompanies the conclusion of procurement contracts for the procurement of public functions. This judgment is the judicial part of that accounting. It is founded on the commitment to openness and responsiveness the Constitution requires. It is important to note that this particular role, at this particular time, is not one of the Court's choosing. The sole reason for the litigation leading to this judgment is the failure of SASSA and the Minister to keep the promise to this Court and to the people of South Africa".

The decision of the Court to sift through the muddle and act decisively to ensure grants are paid on 1 April was welcomed, not least by almost 17 million grant recipients.