

A contract is a contract, like it or not - SASSA ruling

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In our [analysis](#) on the hearing of the matter of *Black Sash Trust v Minister of Social Development and Others*, we cautioned that private entities would be well-advised to seek guidance and advice regarding the obligations they intend to undertake in terms of public sector tenders.



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On Friday, 17 March 2017 the Constitutional Court (Court) delivered [judgment](#) in the case and illustrated how far a private company's obligations may reach when acting as an organ of state and performing constitutional obligations.

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 its judgment, the Court found that the constitutional obligations on SASSA and Cash Paymaster Services (CPS) do not terminate together with the current contract for the payment of social grants to beneficiaries on 31 March 2017.

The threatened breach of the right to social security of the beneficiaries engages the Court's remedial power to make a just and equitable order under s172(1)(b) of the Constitution. In exercising this power to protect the right, the Court extended the validity of the extant contract between SASSA and CPS for a further 12 months on the same commercial terms.

The extension of the contract is a significant finding for private sector companies tendering for public sector work. It shows that where a company assumes constitutional powers and obligations, the Court may step into the commercial arrangement and order fulfilment of those obligations, notwithstanding the company's commercial interests. More specifically, the company will be liable for costs for which it may not have budgeted and, as is the case here, there may be no certainty regarding price escalation.

In its order, the Court made provision for CPS to approach Treasury to renegotiate the financial terms of the contract. In retaining its supervisory jurisdiction, Treasury must report its recommendations to the Court for approval. Ultimately though, the price escalation lies in the hands of the Court. This is not an ideal commercial arrangement for private companies in this position.

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