THE CUSTODIAL ROLE OF THE CONSTITUTIONAL COURT AT PLAY:

A Critical Analysis of the Case of *Black Sash Trust v Minister of Social Development* [2017] ZACC 8

1 Introduction

The Constitutional Court, on 17 March 2017 handed down judgment in the case of *Black Sash Trust v Minister of Social Development* (South African Social Security Agency (SASSA) case). The case dealt with the payment of social grants, which, in accordance with the South African Agency Act, is the responsibility of SASSA.

The Court made a number of orders, including an order that "(SASSA) and Cash Paymaster Services (Pty) Limited (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 is able to 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." This order was made despite the fact that 1. There was no valid contract between SASSA and CPS and 2. That CPS is a private entity, which, in the ordinary course of events, is not the primary duty-bearer in so far as human rights are concerned. Indeed, the Court itself conceded that this order pushes at the limits of its exercise of a just and equitable remedial power. A number of interesting legal issues are brought sharply into focus in light of this court order. Firstly, what is the nature and weight of the right to social security? Secondly, could the private entity (CPS) be placed under legal obligation to guarantee the rights entrenched in the Bill of Rights, in particular, where no valid contract exists between a private entity and a state organ? Thirdly, what are the implications of the Court's order against CPS for the laws of contract? As the SASSA decision was only handed down in March 2017, it has not been unpacked fully. The purpose of this article, therefore, is to critically assess how these questions played out, in particular, how the Constitutional Court, against all odds, played its role as the custodian of the Constitution.

It would however, be premature to embark on such detailed discussion without getting to grips with the decision in the SASSA case. For this purpose, the SASSA decision is briefly discussed with a view to setting the stage for the detailed analysis of the issues.

2 Summary of the SASSA case

In March 2017, the Constitutional Court was tasked to decide a case relating to the payments of social grants. The case was brought before the country's highest court by the Black Sash Trust and Freedom under Law, both of which are NGOs, against several respondents, including South African Social Security Agency (a government organ) and a private company, Cash Paymaster Services (CPS). SASSA had contracted CPS to pay out social grants to grant recipients. As a background, however, the Constitutional Court had, in an earlier related decision on 29 September 2013, in the case of *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* (2014 (1) SA 604 (CC), hereinafter *"AllPay 1"*) declared the contract between CPS and SASSA invalid (*AllPay 1* par 98). The Constitutional Court, in another related case, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* (2014 (4) SA 179 (CC), hereinafter *AllPay 2*), suspended the declaration of invalidity (*AllPay 2* par 78(2)). Upon suspending the declaration of invalidity, the Court ordered that either a new five-year tender be awarded after a proper procurement process, or, SASSA itself takes over the payment of social grants when the suspended contract with CPS ended on 31 March 2017 (*Black Sash Trust v Minister of Social Development* [2017] ZACC 8 par 16). In November 2015, SASSA reported that instead of awarding a new tender, it was going to take over the payment of social grants itself (*SASSA case* par 11). The Court responded by withdrawing its supervisory jurisdiction over the social grants payments (*SASSA case* par 11).

An anomaly, however, arose. SASSA was reportedly unable to pay out social grants as earlier indicated (*SASSA case* par 21). This dilemma was however, not communicated to the Court in time despite the grave consequences anticipated from non-payment of social grants. It was only in February 2017 that this predicament was brought to the Court's attention. By February 2017, when a formal communication was made to the Court, there wasn't any formal agreement between CPS and SASSA as to who would pay out social grants after 31 March 2017. Despite the absence of such arrangement, the Minister and SASSA informed the Constitutional Court in 2017 that CPS was the only entity capable of paying grants for the foreseeable future after 31 March 2017 (*SASSA case* par 7). All this created uncertainty pertaining to the payment of grants since after 31 March 2017, the suspension of invalidity of the contract was meant to lapse. It was this dilemma that ultimately led to the decision of the Constitutional Court, in which SASSA and CPS were placed under a constitutional duty to continue paying out social grants after 31 March 2017 (*SASSA case* par 76(4)). In handing down this order, the Constitutional Court drew inspiration from its decision in the *AllPay 2* case, ruling that "SASSA and CPS were organs of state in relation to the contract and that this entailed constitutional obligations for both entities" (*SASSA case* par 40). The Court added that it bore "remedial power under section 172(1)(b)(ii) of the Constitution" (*SASSA* case par 40). The Court noted further CPS also bore obligations under section 8(2) of the Constitution because it had performed a constitutional function for a significant period already. Thus, the constitutional obligation

persisted to ensure that a workable payment system remains in place until a new one is operational (*SASSA* case par 40). Using its powers in terms of section 172 of the Constitution, the Court further suspended the order of invalidity of the contract between CPS and SASSA for a period of 12 months and ordered CPS to continue paying out social grants during that duration on the same terms and conditions as those in the contract that was to expire on 31st March 2017 (*SASSA* case par 50).

Having briefly relayed the facts and decision in the *SASSA* case, it is timeous to now engage with the substantive issues that form the crux of this article which are: the nature and weight of social security rights, the legal obligations of private entities (CPS in this case) in so far as the rights entrenched in the Bill of Rights are concerned, and the implications of constitutional obligations of private entities for the law of contract. These three issues are discussed chronologically in the subsequent sections.

3 The nature and weight of social security rights

3 1 An international and national law perspective

The right to social security, like many rights has grounding in international law. Different instruments, both international and regional, recognize social security as a human right. The Universal Declaration of Human Rights (UDHR) (Article 22 of the UDHR) states that every person, by virtue of being a member of society, has the right to social assistance and this right is to be realized through national effort and international cooperation. Since the UDHR is not a treaty but an expression of the fundamental values that are shared by all members of the international community, it thus has had a profound influence on the development of human rights law in South Africa. Additionally, South Africa signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1994, later acceding to it in 2015 ("The Government of South Africa ratifies the ICESCR" 2015-01-20 https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr (accessed 2017-07-10). By virtue of accession, South Africa is now fully bound by the provisions of the ICESCR. The covenant obliges state parties to recognize everyone's right to social security (Article 9 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)). Article 11 stretches the right to social security further by placing a duty on state parties to ensure an adequate standard of living for every person and his or her family. This right as indicated by Lamarche ("Social Security as a Human Right" in Brand and Russel (eds) *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* (2002) 126–127) may be construed to mean that states must at least provide social assistance and other needs-based forms of social benefits in cash or in kind to anyone without adequate resources.

The right to social security is so fundamental and not surprisingly, the Committee on Economic, Social and Cultural Rights (CESCR) has suggested that failure to guarantee it is tantamount to violation of the right to dignity (Committee on Economic, Social, and Cultural Rights, General Comment 19. The right to social security (art. 9) (Thirty-ninth session, 2007),

U.N. Doc. E/C.12/GC/19 (2008)). The CESCR is of the view that this right is pivotal to guaranteeing human dignity particularly for persons who lack the capacity to fully realize socio-economic rights (CESCR, General Comment 19. The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008)). The emphasis placed on this right has major implications for state parties to the ICESCR, South Africa included. For these States, there is an unequivocal obligation on their part as duty-bearers to ensure the enjoyment of this right by among others, refraining from actions that interfere, directly or indirectly, with its enjoyment (CESCR, General Comment 19. The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008)). The threshold of protection is even higher when children are involved. Notably, the UN Convention on the Rights of the Child, to which South Africa has been party since 1995, mandates South Africa to ensure that every child has the right to benefit from social security (Article 23 of the UN Convention on the Rights of the Child). The consequences of failure to ensure access to social security and social assistance for children cannot be overemphasized. Poverty is an inevitable consequence of failure to guarantee this right for children. The effect of poverty on children is indeed dire as their well-being is wantonly undermined (Viviers *General Comments of the Committee on the Rights of the Child: A Compendium for Child Rights Advocates, Scholars and Policy Makers* (2014)). Under these circumstances, children's social inclusion, self-esteem and opportunities for learning and development are all placed at risk.

The obligations that flow from the various international treaties to which South Africa is party to are not to be taken lightly. This is in light of the fact that under the law of treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (Article 26 United Nations, *Vienna Convention of the Law of Treaties* 23 May 1969). Moreover, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27 of the Vienna Convention Law of Treaties 1969). The Constitution of South Africa, also constituting the supreme law of the land, adds persuasive momentum to the weight to be attached to the obligations that flow from international law, stipulating in unambiguous terms that when interpreting the Bill of Rights, international law must be considered (S 39(1)(b) of the Constitution). This, of course, implies that international law needs to inform any interpretation pertaining to the right to social security. Considered together, therefore, South Africa is obliged to take necessary measures to fully realize the right to social security including that of children. It also goes without saying that South Africa, as a member state to various international instruments relevant to social security, is placed under an international obligation to comply with these duties, as is the case for all other member states (Van Rensburg and Lamarche "Rights to Social Security and Assistance" (undated) http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HeynsxBrand_Socio-Economic_Rights_Social_Security__PRINT_.pdf (accessed 2017-07-11)).

From a national law perspective, since the coming into force of the Constitution, social security has gained human rights status in South Africa. The right to social security is based on the premise that social security is not charity, some form of handout, relief or favour. Rather, it is an entitlement that accrues to an individual by virtue of being human (Olivier, Dupper and

Govindjee *The Role of Standards in Labour and Social Security Law: International, Regional and National Perspective* (2013)). States realize and implement this right differently and thus far, South Africa stands out as one of the few States that explicitly recognises and positions social security at the heart of the numerous rights that are available to individuals. The South African Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance (S 27(1)(c) of the Constitution). The term social security, though not defined in the Constitution, is understood to be an umbrella term including social assistance and social insurance. The International Labour Organisation (ILO) Convention, Social Security (Minimum Standards) 102 of 1952 defines social security as the protection which society provides for its members through a series of public measures against economic and social distress that would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death. These measures have stretched to encompass even the provision of subsidies for families with children.

Since this article is strictly devoted to analysing the *SASSA* case, the focus is placed on the social assistance aspect of social security, as this is the aspect that featured prominently in this case. Social assistance is mainly given on a needs-basis and is often subject to a means test (Olivier and Mpedi *Understanding Social Security Law* (2009)). It strives to ensure a minimum income as well as to provide assistance to vulnerable groups who cannot support themselves. In South Africa, social assistance is the exclusive responsibility of the state. The Department of Social Development, an organ of the State in South Africa, is responsible for the provision of social grants. The Social Assistance Act (SAA) (Act 13 of 2004) provides for several grants, including the old age grant, the child support grant, the disability grant, the care-dependency grant, the foster-child grant, the war-veterans grant and Grant-in-aid. As already indicated in the brief facts, the *SASSA* case dealt with the payment of the foregoing social grants.

The unfolding of the SASSA case underscored the critical nature of the right to social security. It is perhaps the weight attached to this right that inspired the decision of the Court, in particular, the imposition of human rights obligations on a private entity that under ordinary circumstances would not be bound. It will suffice to note that South Africa's history, which is characterised by inequality and poverty (Wilson "Historical Roots of Inequality in South Africa" 2011 26 *Journal Economic History of Developing Regions*), warrants the special position that the right to social security essentially holds under the Constitution (Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1; Malan "The Performance of the Right to have Access to Social Security" 2009 2 *Law, Democracy and Development* 71 81; Jorens (ed) *HIV and Social Security Law: The SADC Region* (2013) 105). Given this country's history, it seems defensible to conclude that the society would never be sufficiently transformed without the inclusion of social security and social assistance as basic human rights. It is, however, not enough for these rights to be entrenched in the Constitution. Their realization is part and parcel of the overall goal of transformation. It would, therefore, cogently follow that proper and efficient administration of

social security are prerequisites to the full realization of these rights, especially among the indigents who are on the extreme end of the vulnerability continuum. Worthy to note also, social assistance mainly deals with the realization of the rights of the poor and vulnerable members of the society, who, although the Constitution strives to transform, have been without a voice to express their plight (Narayan *Voices of the Poor: Can anyone hear us?* (2000) 276; Liebenberg *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 110). Their vulnerability automatically makes them candidates for special attention. It, therefore, becomes incumbent on the government to ensure that their rights are protected, respected, and realized.

Narrowing the discussion down to the *SASSA* case, failure to pay social grants would have caused gross and irreparable damages to millions of recipients, especially the most vulnerable in society such as children. The Constitutional Court rightly recognized the vulnerable position of children, going as far as to rule that any decision pertaining to the issue of social grants had to give due weight to the interests of grant beneficiaries "and particularly child grant recipients" (*Allpay* 1 par 56). The firm position taken by the Court, especially in underscoring the vulnerable position of children is to be welcomed. Significant to note, moreover, the Court's stance with regard to the rights of children was not in the abstract. The ruling finds grounding in the Constitution, which entrenches the principle that in all decisions pertaining to children, the best interest of the child is to be given paramount importance (S 28(2) of the Constitution). This principle has time and again been buttressed by the Constitutional Court, a case in point being the case of *Government of the Republic of South Africa v Grootboom* (2000 (11) BCLR 1169 (CC), hereinafter *"Grootboom* case") where the Constitutional Court placed this principle in proper context with regard to vulnerable children. Anchoring its decision in the principle of the best interest of the child, the Court in the *Grootboom* case noted, *inter alia*, that while the primary responsibility of maintaining and providing for children rests on their parents, in cases where parents are without means to take care of their children, the government is to assist (*Grootboom* case par 76).

By analogy, it may be argued persuasively, and as the Court rightly did, that despite the predicament that arose out of failure on the part of the government to exercise due diligence to make a proper plan for payment of social grants after 31 March 2017, the rights of children were not to be undermined. Social security was so important a right that the gross irregularity on the part of the government, if not addressed, would have had dire consequences for children who were dependent on social grants as their main, if not, sole means of survival. The decision of the Court to order, as it did, that CPS and SASSA were under a constitutional obligation to ensure payment of social grants to beneficiaries, without a doubt, was a furtherance of the rights of the most vulnerable, in particular, the best interest of the children involved. The fact that the parents or guardians of these children, as the case was in the *Grootboom* case, could not afford to fend for their children, meant that failure of the Court to step into the breach to guarantee the right to social security would have amounted to a disregard of the best interest of the child, a principle, which already mentioned, is of paramount importance. Fortunately, the Constitutional Court was alive to the

weight of this principle, accordingly making orders that ensured that children's rights are guaranteed.

It will suffice to note that section 7(2) of the Constitution mandates the State to respect, protect, promote and fulfil the rights in the Bill of Rights including the right to social security. The facts of the *SASSA* case, however, reveal that had the Constitutional Court not intervened through the orders it made, the risk was high for the rights of grant recipients that would have been undermined. It begs the question: Did SASSA, as an organ of the State, live up to its constitutional obligations under section 7(2)? This question is briefly discussed in the next section with a view to advancing the argument that SASSA failed to give due cognizance to the right to social security, yet, its realization rested on it. Briefly discussing the contours of enforcement of socio-economic rights and subsequently showing how SASSA failed to operate within these contours advances this argument.

3 2 Enforcement of socio-economic rights and the SASSA case

As noted, section 7 of the Constitution requires the State to respect, protect, and fulfil human rights. At the international level, these obligations are similarly echoed by the International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (26 January 1997, hereinafter "Maastricht Guidelines"). The Maastricht Guidelines constitute guiding principles on acts and omissions, which constitute violations of socio-economic rights. They were developed by a group of experts in 1997 in Maastricht, thus, exemplifying their name – Maastricht Guidelines. Though merely constituting guidelines and as such not binding in the strict sense of the term, the said Guidelines have persuasive force, leading some commentators to contend that they constitute a useful framework under international law to measure states' compliance with obligations enshrined under international treaties (Desierto and Gillespie "A Modern Integrated Paradigm for International Responsibility Arising from Violations of Economic, Social, and Cultural Rights" 2014 3 *Cambridge Journal of International and Comparative Law* 556 561; Heyns "Introduction to Socio-Economic Rights in the South African Constitution" 1998 2 *Law, Democracy and Development* 153 157). The Guidelines impose three obligations on states with regard to economic, social and cultural rights, which are the obligation to respect, protect and fulfil. The obligation to respect requires states to refrain from interfering with the enjoyment of economic, social and cultural rights (Maastricht Guidelines par 6). This obligation means that the State must not thwart the efforts of individuals to realise the right ("South African Human Rights Commission, 4th Annual Economic and Social Rights Report: 2000–2002" (undated) http://www.gov.za/sites/www.gov.za/files/4th_esr_0.pdf (accessed 2017-07-07)). The State is also mandated to remove barriers to the realisation of the rights (http://www.gov.za/sites/www.gov.za/files/4th_esr_0.pdf (accessed 2017-07-07)).

The government's actions and inactions under the Minister of Development in the *SASSA* case show a clear violation of the "obligation to

respect" as elaborated in the Maastricht Guidelines. The government, instead of protecting the economic and social rights, may be said to have interfered with the enjoyment of the said rights. Of course, one could argue that ultimately, grant recipients were able to receive grants after 31 March 2017. Accordingly, it could be submitted, persuasively so, that no violation arose whatsoever. The foregoing argument would, however, have to be taken with a pinch of salt or perhaps even dismissed. It is to be emphasised that the said payments only arose after the Constitutional Court made an order. Arguably, had the Constitutional Court, as the custodian of the Constitution, not stepped into the breach to order such payments, the rights of the vulnerable would have been jeopardized. Moreover, even though the Court ultimately ordered both CPS and SASSA to ensure that social grants were paid out to grant recipients after 31 March 2017, the uncertainty that these grants recipients had to contend with, in particular, as to whether or not they would receive payments, of itself, was unacceptable, to say the least. Such uncertainty is not to be taken lightly and taking the argument to its logical extremes, this too can be labelled failure of the state (SASSA) to live up to its obligation to respect the right to social security.

The obligation to protect requires the State to protect individuals from violations by non-state actors (Maastricht Guidelines par 6). This obligation is not discussed any further than this because it did not feature glaringly in the *SASSA* case. Turning to the obligation to fulfil, therefore, the Maastricht Guidelines direct states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights (Maastricht Guidelines par 6). Credit is to be given where it is due. First, South Africa guarantees the right to social security under Section 27 of the Constitution. There is also legislation in place, the Social Assistance Act, which elaborates on this right further. This progress is praiseworthy and is to be acknowledged. Furthermore, in terms of judicial measures, the decision of the Constitutional Court in the *SASSA* case is an affirmation of courts' preparedness to give meaningful content to the requirements of the Constitution and the Maastricht Guidelines, in particular, the obligation to fulfil. In the *SASSA* case, the court went "all out" to do "damage-control" with a view to ensuring that the right to social security was fulfilled. The Constitutional Court had to come up with a groundbreaking judgment in order to remedy the situation and to ensure compliance. As the court itself fittingly put it, its order to impose constitutional obligations upon both SASSA and CPS pushed at the limits of its exercise of a just and equitable remedial power (*SASSA* case par 51). Yet, for the sake of ensuring that this right was fulfilled, this limit had to be pushed.

Considered together, the decision of the Court in the *SASSA* case, among others, highlighted the nature and weight of the right to social security as guaranteed under both international law and Section 27 of the Constitution. The actions taken by the various organs of the state, in particular, the judiciary, were a clear indication of the courts preparedness to not only guard the Constitution but also, to ensure that the various international standards relevant to the realization of the right to social security are upheld. Of course, some organs of the state, such as SASSA, did not fair too well, with the above discussion clearly showing that more could have been done by SASSA to ensure that the weight due this right is upheld. Be that as it

may, the intricacies surrounding this case did not just involve state organs. Private entities, in this case, CPS, were right in the middle of the crossfire. CPS' involvement raises a number of interesting issues warranting discussion. Suffice it to note that in recent times, states are increasingly delegating the delivery of basic services to private entities. Often, this arrangement is not questioned until/unless the arrangement backfires. In light of the prevalence of these arrangements, the next section discusses the obligations of private entities in these arrangements, in particular, where human rights are threatened. Again, since this article's focus is the *SASSA* case, the analysis in this section is conducted with reference to this case.

4 Private entities and human rights obligations

It is to be reiterated that the Constitutional Court, in the *SASSA* case, made a number of groundbreaking orders, one notable one being that: CPS (a private entity) is under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 and that a failure to do so is a violation of the right to social security as guaranteed under section 27 (1)(c) of the Constitution (*SASSA* case par 4). It will suffice to note here that under international human rights law, it remains debatable whether or not human rights obligations accrue to non-state actors. This controversy notwithstanding, the Constitutional Court took the position that CPS, a private entity, bore human rights obligations. The ruling of the Constitutional Court on the obligations of CPS highlights a number of issues relating to: firstly, whether, from a domestic perspective, it is feasible for human rights obligations to be imposed on non-state actors despite the controversial nature of these obligations under international human rights law. Secondly, whether it is feasible for human rights obligations to be imposed on private entities in situations where a private entity is merely in partnership with the state. Thirdly, whether the fact that a private entity is not making profits absolves a private entity of human rights obligations. These three issues are resolved with a view to answering the overarching question – can human rights obligations be effectively imposed on private entities at the national level?

4 1 Private entities under international human rights law

Traditionally, the state has been envisaged as the entity primarily obligated to guarantee human rights (Quadri *Cours général de droit international public 113 Recueil des cours de l'Académie de Droit International* (1964) 383; Jagers *Corporate Human Rights Obligations: In search of Accountability* (2002) 1–5. See also Reinisch "The Changing International Legal Framework for dealing with Non-state Actors" in Alston (ed) *Non-state Actors and Human Rights* 2005 37; Waldron "Duty-bearers for Positive Rights" 2014, http://lsr.nellco.org/cgi/ viewcontent.cgi?article=1497&context= nyu_plltwp (accessed 2017-07-11) 9–11; "Office of the High Commissioner for Human Rights *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation* (2006)" 4 (undated) http://www.ohchr.org/Documents/Publications/FAQen.pdf (accessed 2017-07-07)). Thus, under international law, the status of non-state actors or

private entities is a subject that remains profoundly debated. The fact that only states are parties or rather sign up to international human rights treaties has further left the status of private actors obscure and extremely difficult to resolve (Article 26 of the Vienna Convention on the Law of Treaties 1969 establishes the "Pacta Sunt Servanda" rule. In accordance with this rule, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." It could be argued, in accordance with the foregoing provision that non-state actors are not necessarily bound by treaties because they do not sign up to them. See also discussion by Waldron "Duty-bearers for Positive Rights" (2014) 10 on this issue). The status of private entities is made more complicated by the fact that under international law, states (rather than private actors) are routinely deemed to be in breach of their international human rights law obligations in respect of violations by private entities (On this issue see eg, Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc. E/C.12/2011/1 of 20 May 2011, par 1; The Committee further states as follows: "States Parties have the primary obligation to respect, protect and fulfil the Covenant rights of all persons under their jurisdiction in the context of corporate activities, undertaken by state-owned or private enterprises"; Danailov "The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations" 1998 http://citeseerx.ist.psu.edu/viewdoc/ download?doi=10.1.1.461.3550&rep=rep1&type= pdf (accessed 2017-07-12) 16–22). States' liability in the foregoing regard is often grounded in the failure of states to take steps to prevent violations by non-state actors (see also United Nations Office of the High Commissioner *Guiding Principles on Business and Human Rights* (2011). Notably, Foundational Principle 1 of these Principles buttresses this viewpoint as follows: "States are not *per se* responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse."). Generally, the international human rights framework, as traditionally envisaged, sought to protect individuals from the abuse of power by states. Human rights obligations were state-centred, with states perceived as the primary duty-bearers in so far as human rights obligations were concerned.

In the current discourse, however, the assumption that power vests only in the state in so far as human rights obligations are concerned is being questioned increasingly. Non-state actors are wielding as much power as states (or even more) in a number of respects, with transnational companies constituting a notable example of private entity influence. These entities, though hardly falling within the ambit of state organs, are shaping the scope and nature of human rights enjoyed by individuals, leading some commentators to contend that imposition of obligations upon these actors is warranted (Jessup *A Modern Law of Nations* (1946) 236; d'Aspremont, Nollkaemper, Plakokefalos and Ryngaert "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction" 2015 62 *Netherlands International Law Review* 49–67; Chirwa "In Search of Philosophical Justifications and Suitable Models for the Horizontal

Application of Human Rights" 2008 8 *African Human Rights Journal* 294–311; Clapham *Human Rights Obligations of Non-State Actors* (2006) 25–56; De Brabandere "State-Centrism and Human Rights Obligations Challenging 'Stateless' Approaches towards Direct Corporate Responsibility" 2009 1–10 https://ghum.kuleuven.be/ggs/projects/non_state_actors/publications/de_ brabandere.pdf (accessed 2017-07-11); Danailov http://citeseerx.ist.psu.edu/ viewdoc/download?doi=10.1.1.461.3550&rep= rep1&type=pdf 27–32; Taylor "The Privatization of Human Rights: Illusions of Consent, Automation and Neutrality" 2016 https://ourinternet-files.s3.amazonaws.com/publications /no24_web_2.pdf (accessed 2017-07-12) 2). The Nigerian Shell case in which the rights of the Ogoni people were violated by a Multinational Company is just the tip of the iceberg in terms of how much power and harm these entities can wield and cause respectively (*Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001). In this case the African Commission and Human and Peoples' Rights found the government of Nigeria in breach of its obligations to protect the people of Ogoni land from the human rights violations including the right to good, shelter, health and life as a result of the of activities of a private corporation (Shell). See also generally, Orentlicher and Gelatt "Public Law, Private Actors: The Impact of Human Rights on Business Investors in China" 1993 14 *Northwest Journal of International Law and Business* 1 66; Saunders "Rich and Rare are the Gems they War: Holding De Beers accountable for Trading Conflict Diamonds" 2001 24 *Fordham International Law Journal* 1402). Not surprisingly, commentators have long vehemently challenged the traditional conceptualisation of states as the exclusive duty-bearers in so far as international human rights law is concerned (Jessup *A Modern Law of Nations* 236; d'Aspremont, Nollkaemper, Plakokefalos and Ryngaert 2015 62 *Netherlands International Law Review* 49–67; Chirwa 2008 8 *African Human Rights Journal* 294–311; Clapham *Human Rights Obligations of Non-State Actors* 25–56; De Brabandere https://ghum.kuleuven.be/ggs/ projects/non_state_actors/publications/de_ brabandere.pdf (accessed 2017-07-11); Danailov http://citeseerx.ist.psu.edu/viewdoc/download?doi= 10.1. 1.461.3550&rep=rep1&type=pdf 27–32; Taylor 2016 https://ourinternet-files.s3.amazonaws.com/publications/no24_web_2.pdf (accessed 2017-07-12) 2). Realizing the extent of power that private entities such as multinational companies wield, the United Nations has developed guidelines to guide private business entities in conducting business in a manner that gives due cognizance of human rights (see United Nations Office of the High Commissioner *Guiding Principle on Business and Human Rights*). These, however, as the names suggest, are mere guidelines, lacking binding force in so far as obligations on the part of private entities under international law are concerned.

Arguments have also been advanced to the effect that international human rights treaties, though ratified by states, do not exclude non-state actors from being bound by the obligations entrenched therein (Jessup *A Modern Law of Nations* 236; d'Aspremont, Nollkaemper, Plakokefalos and Ryngaert 2015 62 *Netherlands International Law Review* 49–67; Chirwa 2008 8 *African Human Rights Journal* 294–311; Clapham *Human Rights Obligations of Non-State Actors* 25–56; De Brabandere https://ghum. kuleuven.be/ggs/projects/non_state_actors/publications/de_brabandere.pdf

(accessed 2017-07-11); Danailov http://citeseerx.ist.psu.edu/viewdoc/ download?doi=10.1.1.461.3550&rep=rep1&type=pdf 27–32; Taylor 2016 https://ourinternet-files.s3.amazonaws.com/publications/no24_web _2.pdf (accessed 2017-07-12) 2). For instance, although not constituting a treaty, the Universal Declaration of Human Rights, under its article 30 provides that "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" (Article 30 Universal Declaration of Human Rights 1948). Provisions such as the foregoing have been relied on by some commentators to buttress the view that non-state actors or private persons have obligations under international human rights law (Danailov http://citeseerx.ist.psu.edu/viewdoc /download?doi=10.1.1.461.3550&rep=rep1& type=pdf 33, eg, submits as follows: "if we look at certain provisions found in the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights as well as the Covenant on Political and Civil Rights, it seems that the responsibilities of private actors to uphold the human rights of individuals are also addressed by these instruments."). According to some commentators, however, given its non-binding nature, the UDHR forms a very weak basis for imposing international human rights obligations on private entities (Rodley "Can Armed Opposition Groups Violate Human Rights?" in Mahoney and Mahoney (eds) *Human Rights in the Twenty-first Century* (1993) 307). Aside from the UDHR, some international treaties have made the role of non-state actors explicit. For instance, the Convention on the Prevention and Punishment of Genocide provides that it applies to "constitutionally responsible rules, public officials or private individuals" (Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948), while the Convention on Apartheid also imposes obligations on individuals (Articles 2 and 3 of International Convention on the Suppression and Punishment of the Crime of Apartheid adopted by the General Assembly of the United Nations on 30 November 1973). None the less, despite the binding nature of these treaties, the challenge of non-state actors not signing up to international treaties remains a visible elephant in the room.

Commentators, however, submit that despite the debatable status of private entities under international law, the burgeoning effort by various organs to develop codes of conduct, imposing human rights obligations on non-state actors, is a demonstration of a new era of accountability (Danailov http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.461.3550&rep=rep 1 &type=pdf 39. In Danailov's view, "If we can prove that conviction is present – as well as the practice – then we are definitely able to posit the emergence of a new custom of direct applicability of international human rights norms on TNCs' behaviour."). These codes of conduct have become a point of reference for commentators, to augment the argument that perhaps such obligations, in fact, exist implicitly. Notable codes of conduct creating a link between human rights and private entities include the United Nations Guiding Principles on Business, and Human Rights adopted in 2011, and the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted in 1977.

Efforts taken by non-state actors to also develop their own codes of conduct are further testament of the conviction and willingness of some non-state actors to be bound by human rights obligations (see eg, Reebok International's *Human Rights Production Standards* (1992) and The Royal Dutch/Schell Group of Companies, *Statement of General Business* (March 1997)). Considered together, however, despite the persuasive arguments advanced by various commentators on the status of private entities under international human rights law, this issue remains a subject of doctrinal debate. Thus, it cannot be submitted, without equivocation, that private entities are bound to guarantee the rights entrenched in the various international human rights treaties. In principle, these obligations rest on states, lacking horizontal application in regard to relationships between individuals and private entities. The negative implication of such orthodox view, of course, cannot be overemphasized. In so far as international human rights law is concerned, such a view creates an accountability gap, with the liability of private entities remaining in balance.

The fact that the imposition of human rights obligations upon private entities remains controversial under international human rights law could lead to the assumption that the same position holds true at the national level. Salient in the decision of the Constitutional Court in the *SASSA* case is the fact that CPS, despite constituting a private entity, was placed under a constitutional obligation to ensure that Section 27 of the Constitution on the right to social security was realized (*SASSA* case par 4). A question arises here: Does the SASSA case suggest that a possibility exists for the controversy surrounding the human rights obligations of private entities to be resolved at the national level? Put differently, can human rights obligations be imposed on private entities at the national level despite the controversial nature of this issue under international human rights law? Drawing inspiration from the *SASSA* decision, this possibility is comprehensively explored in the subsequent sections. It would, however, be inchoate to engage in the foregoing discussion without understanding why private entities should be placed at the centre of debates surrounding human rights obligations. For this purpose, prior to the discussion on human rights obligations at the national level, background information on the increasing role of private entities in the delivery of human rights-related services is discussed.

4 2 The increasing role of private entities and human rights

The deliberate action by states to transfer some of their functions to private entities is not a new phenomenon. The roles performed traditionally by states in terms of delivery of public goods and services are increasingly being assumed by private entities (In South Africa, private corporations have been involved in the provision goods and services including water, health, electricity, transport and more recently, social grants. For a further discussion, see generally Mfuku *Privatisation and Deregulation Policies in South Africa* (Unpublished Masters Dissertation, University of the Western Cape 2006) 58–81; McDonald and Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005); Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective' 2004 4 *African Human*

Rights Law Journal 218). This practice has been visible in almost all states and across a range of sectors including prison management (as apparent in states such as the United States of America), the education sector, the health sector, the supply of water, and the supply of electricity (Momani "The Spread of Privitisation" https://www.cigionline.org/articles/spread-privatization (accessed 2017-07-12); Haque "Public Service under Challenge in the Age of Privitisation" http://profile.nus.edu.sg/fass/polhaque/ governce.pdf (accessed 2017-07-12); McDonald and Ruiters *The Age of Commodity: Water Privatization in Southern Africa*). The roles or tasks often transferred to private entities vary, ranging from financing, management, delivery, and decision making in regard to these public goods or services (Marphatia "Are Public-private Partnerships the Way to Achieve the Right to Education in India?" 2011 *Commonwealth Education Partnerships* 21–23; Open Society Foundation "The Challenges of Public-Private Partnerships in Realising the Right to Education" 1–14 1 http://ohrh.law.ox.ac.uk/the-challenges-of-public-private-partnerships-in-realising-the-right-to-education-online-workshop/ (accessed 2017-07-12); UNICEF (2011) 17; Novelli *Public-Private Partnerships in Education in Crisis and conflict-affected conflicts: A framing Paper* (2016) 6–8). The nature of the arrangement between states and private entities has also varied (Marphatia 2011 *Commonwealth Education Partnerships* 21–23; Open Society Foundation http://ohrh.law.ox.ac.uk/the-challenges-of-public-private-partnerships-in-realising-the-right-to-education-online-workshop/ (accessed 2017-07-12); UNICEF (2011) 17; Novelli *Public-Private Partnerships in Education in Crisis and conflict-affected conflicts: A framing Paper* (2016) 6–8). In some cases, the tasks traditionally assumed by states are transferred wholly to private entities (Marphatia 2011 *Commonwealth Education Partnerships* 21–23; Open Society Foundation http://ohrh.law.ox.ac.uk/the-challenges-of-public-private-partnerships-in-realising-the-right-to-education-online-workshop/ (accessed 2017-07-12); UNICEF (2011) 17; Novelli *Public-Private Partnerships in Education in Crisis and conflict-affected conflicts: A framing Paper* (2016) 6–8). The transfer may be temporary or permanent (Marphatia 2011 *Commonwealth Education Partnerships* 21–23; Open Society Foundation http://ohrh.law.ox.ac.uk/the-challenges-of-public-private-partnerships-in-realising-the-right-to-education-online-workshop/ (accessed 2017-07-12); UNICEF (2011) 17; Novelli *Public-Private Partnerships in Education in Crisis and conflict-affected conflicts: A framing Paper* (2016) 6–8). In other instances, some tasks are vested in a private entity, with the state retaining some roles (Marphatia 2011 *Commonwealth Education Partnerships* 21–23; Open Society Foundation http://ohrh.law.ox.ac.uk/the-challenges-of-public-private-partnerships-in-realising-the-right-to-education-online-workshop/ (accessed 2017-07-12); UNICEF (2011) 17; Novelli *Public-Private Partnerships in Education in Crisis and conflict-affected conflicts: A framing Paper* (2016) 6–8). The latter form of arrangement is popularly referred to as a public-private partnership (PPP), with this terminology signifying the integral role played by both the public sector and the private sector in the delivery of public goods or services (Verger and Moschetti "Public-Private Partnerships as an Education Policy Approach: Multiple Meanings, Risks and Challenges" 2017 *Education Research and Foresight*

Working Papers 1 2). A notable example is the arrangement between SASSA and CPS in which overall obligations in regard to the right to social security were not transferred to CPS, but merely the task of paying out grants to grant recipients. Both CPS and the state organ had a role to play in so far as the realization of the right under Section 27 of the Constitution was concerned. Considered together, it is hard to precisely define the nature of agreements that states often enter into with private entities as these vary considerably. However, a common feature among most states today is the increasing role of private entities in the delivery of public goods and services, many of which have a direct bearing on human rights or actually pertain to the realization of rights guaranteed under the states' constitutions.

The increasing role of private entities in the delivery of public services and goods has been driven by multiple factors. Perhaps, the most prominent argument advanced pertains to the need to ensure efficiency in the delivery of public goods and services while using the most cost-effective means (Osborne and Gaebler *Reinventing Government: How the Entrepreneurial Government is Transforming the Public Sector* (1992); Patrinos, Barrera Osorio and Guáqueta *The Role and Impact of Public-Private Partnerships in Education* (2009); Verger "Framing and Selling Global Education Policy: The Promotion of Public-private Partnerships for Education in Low-income Contexts" 2012 27 *Journal of Education Policy* 109–130; LaRocque *Public-Private Partnerships in Basic Education: An International Review* (2008); Ernie "The Power of Public-Private Partnerships in Eradicating Child Sexual Exploitation" http://globalstudysectt.org/wp-content/uploads/2016/04/Expert-Paper-ECPAT-Public-Pvt-partnerships.pdf (accessed 2017-07-12); UNICEF (2011) 18–19; Rendón "The Economic-Constitutional Principles in Public-Private Partnerships in the Framework of Human Rights" 2015 6 *Modern Economy* 1270 1271). The argument has been advanced that governments incur very high running-costs to deliver public goods and services, yet, the quality of the said services and goods is wanting ((Osborne and Gaebler *Reinventing Government: How the Entrepreneurial Government is Transforming the Public Sector*; Patrinos, Barrera Osorio and Guáqueta *The Role and Impact of Public-Private Partnerships in Education*; Verger 2012 27 *Journal of Education Policy* 109–130; LaRocque *Public-Private Partnerships in Basic Education: An International Review*; Ernie http://globalstudysectt.org/wp-content/uploads/2016/04/Expert-Paper-ECPAT-Public-Pvt-partnerships.pdf (accessed 2017-07-12); UNICEF (2011) 18–19; Rendón 2015 6 *Modern Economy* 1270 1271). Bringing private entities on board, it has been contended, ensures that the failings of governments are addressed. As Coomans and de Wolfe put it, private entities have been "hailed as a way to counter what is perceived to be a failure of governments to provide services in a cost-effective and efficient way" (Coomans and de Wolfe "Privatization of Education and the Right to Education" in de Feyter and Isa (eds.) *Privatization and Human Rights in the Age of Globalization* (2005) 229 242). Worthy to note, under international law, States are not restricted as to how the international human rights treaties they are party to should be enforced at the national level (Notably, under the article 26 of the Vienna Convention, already quoted, states are merely required to enforce

treaties they are party to in good faith. Note here, the test is "good faith" with or without involvement of non-state actors). Thus, whether or not private entities increasingly get involved in the delivery of public goods is not so much an issue. Rather, the point made consistently by commentators and human rights monitoring bodies is that states cannot abdicate their international human rights obligations by privatizing the delivery of public goods and services (Open Society Foundations 11; UNICEF (2011) 5; Amnesty International "Human Rights and Privatization" 2005 1 and 5 https://www.amnesty.org/download/ Documents/88000/ pol340032005en.pdf (accessed 2017-07-12)). With particular regard to the right to social security, the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization has made some observations regarding the issue of social security (see eg, Committee of Experts on the Application of Conventions and Recommendations: Individual Observation concerning Convention No. 102, Social Security (Minimum Standards), 1952. Spain ratified this treaty in 1988 and the CEACR made these observations in 1996. See specifically par 1 of the observations. In the Context of South Africa, see generally Olivier and Mpedi *Understanding Social Security Law* 35–36; Taylor Report "Transforming the Present Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa" (2002) http://www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed 2017-07-12)). Notably, however, other than buttressing the view that states remain bound under international human rights law despite states' decision to privatize certain aspects in regard to the right to social security, this committee has not, even once, suggested or made any explicit ruling to the effect that privatization of certain aspects of the right to social security is unacceptable ((see eg, Committee of Experts on the Application of Conventions and Recommendations: Individual Observation concerning Convention No. 102, Social Security (Minimum Standards), 1952. Spain ratified this treaty in 1988 and the CEACR made these observations in 1996. See specifically par 1 of the observations. In the Context of South Africa, see generally Olivier and Mpedi *Understanding Social Security Law* 35–36; Taylor http://www.cdhaarmann.com/Publications/Taylor%20report.pdf (accessed 2017-07-12)). Essentially, states are sovereign and as such, they do enjoy some discretion in terms of how they choose to deliver on their international human rights obligations at the national level.

Despite the increasing role of private entities in the delivery of public goods and services, not all commentators or organs share the view that their increased involvement leads to positive outcomes, some opponents contending that these arrangements are not as rosy as many paint them to be. Critiques argue that since PPPs are profit-oriented, they may not always strike a proper balance between the vulnerable populations in desperate of public goods or services (which often a have a direct bearing on the enjoying of fundamental rights) and profit-making (Wettenhall "The Rhetoric and Reality of Public-private Partnerships 2002 3 *Public Organization Review: A Global Journal* 77–107; Development Alternatives With Women For a New Era "Public-Private Partnerships and Gender Justice in the context of the 3rd

UN Conference of Financing for Development" https://dawnnet.org/feminist-resources/sites/default/files/articles/ffd3_julyppp.pdf (accessed 2017-07-12); UNICEF *Non-State providers and Public-Private partnerships in Education for the poor* (2011 UNICEF Thailand) ix, 19, 20; Novelli (2016) 10–20). This, it is contended, causes a situation where the rights of the most vulnerable of the population are sacrificed at the altar of profit-making ((Wettenhall 2002 3 *Public Organization Review: A Global Journal* 77–107; Development Alternatives With Women For a New Era https://dawnnet.org/feminist-resources/sites/default/files/articles/ffd3_julyppp.pdf (accessed 2017-07-12); UNICEF *Non-State providers and Public-Private partnerships in Education for the poor* (2011 UNICEF Thailand) ix, 19, 20; Novelli (2016) 10–20). It has also been argued that since PPPs are grounded in the need to advance more cost-effective mechanisms, often the rights of recipients hardly feature in the overall arrangements between State organs and private entities ((Wettenhall 2002 3 *Public Organization Review: A Global Journal* 77–107; Development Alternatives With Women For a New Era https://dawnnet.org/feminist-resources/sites/default/files/articles/ffd3_july ppp.pdf (accessed 2017-07-12); UNICEF *Non-State providers and Public-Private partnerships in Education for the poor* (2011 UNICEF Thailand) ix, 19, 20; Novelli (2016) 10–20). Thus, the desired goal of cost-effectiveness often turns out to be a far-reaching goal with recipients often left wishing the delivery of a good or service in question reverted back to the state. Moreover, some commentators are of the opinion that cost-effectiveness is often a sham since in the event of failings of a PPP, the state, as a partner to the PPP often steps into the breach to address the failings of the private entity (Verger and Moschetti 2017 *Education Research and Foresight Working Papers* 5; Rosenau "The Strengths and Weaknesses of Public-Private Policy Partnerships" 1999 43 *American Behavioral Scientist* 10–34; Schaeffer and Loveridge "Toward an Understanding of Types of Public-Private Cooperation" 2002 26 *Public Performance and Management Review* 169–189). In doing so, states often incur additional costs, thus, watering down the argument of cost-effectiveness. To some critiques, therefore, although PPPs are generally portrayed as novel solutions to the failings of governments, the fact that private entities in these partnerships are profit-oriented undermines the would be benefits of these arrangements (Verger and Moschetti *Education Research and Foresight Working Papers 5*; Open Society Foundations 8–10).

Another issue of concern for critiques is accountability. The argument has been made that although public and the private entities in a PPP are ideally viewed as partners, the public partner often carries the greater, if not, the entire burden in terms of obligations (Minow "Public and Private Partnerships: Accounting for the New Religion" 2003 116 *Harvard Law Review* 1229–1270; Verger and Moschetti 4; Verger and Moschetti 6; Amnesty International "Rights before Profit: Recommendations on Corporate Accountability from the Co-convenors of the Post-2015 Human Rights Caucus" 2015 https://www.awid.org/publications/rights-profit-recommendations-corporate-accountability-co-convenors-post-2015-human (accessed 2017-07-12); Marphatia 2011 *Commonwealth Education*

Partnerships 21; Latham "Achieving Public-Private Partnership in the Education Sector" (2002), cited in Marphatia 2011 *Commonwealth Education Partnerships* 21). Private entities, it is argued, often slip through the punctured hands of accountability because they are not often subjected to the same measure of obligations and scrutiny as public partners (Minow 2003 116 *Harvard Law Review* 1229–1270; Verger and Moschetti 4; Verger and Moschetti 6; Amnesty International https://www.awid.org/publications /rights-profit-recommendations-corporate-accountability-co-convenors-post-2015-human (accessed 2017-07-12); Marphatia 2011 *Commonwealth Education Partnerships* 21; Latham "Achieving Public-Private Partnership in the Education Sector", cited in Marphatia 2011 *Commonwealth Education Partnerships* 21). Ultimately, states often end up being the primary and only duty-bearers despite their partnership with private entities. Essentially, since the horizontal application of human rights remains problematic and far from clear in some states, critiques worry that even at the national level, private entities performing roles that have a direct bearing on fundamental rights cannot be obliged to guarantee rights under international human rights law and national constitutions (Minow 2003 116 *Harvard Law Review* 1229–1270; Verger and Moschetti 4; Verger and Moschetti 6; Amnesty International https://www.awid.org/publications/rights-profit-recommendations-corporate-accountability-co-convenors-post-2015-human (accessed 2017-07-12); Marphatia 2011 *Commonwealth Education Partnerships* 21; Latham "Achieving Public-Private Partnership in the Education Sector", cited in Marphatia 2011 *Commonwealth Education Partnerships* 21). A failure on the part of a private entity to perform certain tasks with regard to the realization of a right in issue could have dire consequences for the vulnerable population. Such, for instance, would have been the position in the *SASSA* case. Any interruption arising from CPS' failure to pay out social grants would have had calamitous consequences on the rights of the most vulnerable in society, most notably, the rights of children (*SASSA* case par 36 and 56). In these circumstances, a question that would fall to be answered is, can human rights obligations be imposed on private entities at the national level despite the controversial nature of this obligation under international human rights law? This question forms the crux of the subsequent sub-sections.

4 3 Private entities and human rights at the domestic level: Placing the SASSA case in perspective

The increasing role of the private sector in the delivery of public goods brings to the fore the principle of horizontal application of human rights (Traditional, human rights have been known to apply to states (vertically), with regard to relationships between the state and private persons. With horizontal application, application of the bill applies with regard to relations between private persons, hence the notion, "horizontal application"). Given the complex nature of PPPs, coupled with the controversy surrounding obligations of private entities under international law, it would arguably be reasonable for one to question whether or not a private entity can be placed under an obligation to guarantee the human rights at the national level. As a

background, almost all Constitutions in Africa contain a section fully devoted to fundamental human rights (see Constitutions of all States generally). The parts of these constitutions devoted to this cause have a fairly broad catalogue of human rights, encompassing both socio-economic rights and civil and political rights. Although all state Constitution's guarantee rights, there are some variances in content; one such variance pertaining to who suffices as a duty-bearer in so far as the application of the rights entrenched in these constitutions is concerned (very few constitutions explicitly recognize the application of the Bill of Rights to non-state actors examples of States with explicit constitutional provisions on this issue in Africa include Kenya, South Africa, Cape Verde, The Gambia, Ghana and Malawi).

What, however, was the position of the Constitutional Court in the *SASSA* case on the application of the Bill of Rights? Does the approach of the Court, in fact, concretize the position that at the national level, human rights obligations can be imposed on private entities and that these entities cannot hide behind the cloak of PPPs to evade these obligations? It will suffice to note here that in the *SASSA* case, the imposition of human rights obligations on CPS was far from obvious. Notably, the lines of accountability were blurry for a number of reasons: (i) States are the primary duty-bearers of human rights obligations; (ii) In principle, private entities are not under obligation, at least under international law, to guarantee the rights entrenched under international human rights treaties; (iii) The right to social security was not privatized by SASSA; rather, the paying out of grants was, thus, the state remained a duty-bearer (iv) The task to be performed by CPS required resources (i.e. an obligation to fulfil human rights); (v) There was no valid contract between SASSA and CPS so logically, CPS could have simply "walked away". Considered together, there was a real possibility that SASSA would exclusively shoulder the obligations of the rights under section 27 including the task of paying out the grants as of 1 April 2017. The Constitutional Court, however, took a less obvious position, placing both SASSA and CPS under a constitutional obligation to pay out social grants to grant beneficiaries from 1 April 2017 (*SASSA* case par 4). CPS, though constituting a private entity, was required to take part in the burden of ensuring that the right guaranteed under section 27 is realized. The issue arises here, on what basis was CPS placed under obligation to guarantee the right entrenched under article 27 despite the established position that the state is the primary duty-bearer?

Particularly salient, in applying the Bill of Rights to both SASSA and CPS, the Constitutional Court drew inspiration from section 8 of the Constitution. Section 8(1) of the Constitution makes provision for the applicability of the Bill of Rights to state organs such as SASSA while section 8(2) sanctions the application of human rights to private entities such as CPS (S 8 of the Constitution of the Republic of South Africa, 1996, in part, reads as follows: Application 8 (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right). These provisions, read together with section 172(1)(b) of the Constitution (which empowers the Constitutional Court to order any just and equitable remedy), founded a

basis for the Constitutional Court's ruling to the effect that CPS was under a constitutional obligation to guarantee the right under section 27 (*SASSA* case par 40). In applying the Bill of Rights on CPS, the Constitutional Court invoked both section 8(1) and section 8(2), drawing inspiration from the position taken in the *All pay* case in which the Constitutional Court ruled categorically that:

> "SASSA and CPS were organs of state in relation to the contract and that this entailed constitutional obligations for both entities; that this Court's remedial power under section 172(1)(b)(ii) of the Constitution allowed it; and that CPS also bore obligations under section 8(2) of the Constitution because it had performed a constitutional function for a significant period already, the constitutional obligation persisted to ensure that a workable payment system remains in place until a new one is operational." (*SASSA* case par 40).

It can be garnered from the above ruling that CPS was placed under a constitutional obligation to perform a constitutional function in two capacities, as a state organ in terms of section 8(1) and as a private entity in terms of section 8(2). It could be argued that placing CPS within the ambit of section 8(1) (a state organ), CPS was automatically stripped it of its capacity as a private entity since it was considered a state organ. The Constitutional Court's ruling above, however, demonstrates, clearly so, that a private entity can be placed under obligation both as a state organ and as a private entity concurrently. Considered together, the decision that the Constitutional Court arrived at in terms of the applicability of the Bill of Rights to CPS is a testament to the role that a clear constitutional provision can play in shaping courts' decisions. Arguably, were the Constitutional Court to be faced with a constitutional provision such as Burundi's where the applicability of the Bill of Rights to private entities remains in balance, it would have been an up-hill task or even close to impossible to place CPS under the obligation to perform a constitutional function. In effect, the Court's decision concretizes the viewpoint that human rights obligations can be imposed on private entities at the national level despite the controversial nature of these obligations under international human rights law. A caveat to take note of, however, is that whether or not a private entity will be placed under a constitutional obligation to guarantee human rights will very much depend on the extent to which the Constitution or other binding national law makes provision for such obligation. However, up to this point, an issue that remains largely unclear is, should the obligations on a private entity prevail over the entity's profit-making goals?

4 4 Private entities as duties bearers: How far should their obligations be stretched?

A typical PPP, as was the one between SASSA and CPS often bears commercial elements (see above on the profit-oriented nature of most PPPs). The ruling of the Constitutional Court, however, clearly shows that the fact that a PPP has aspects of business or profit-making does not place the State and the private entity beyond the realm of human rights obligations. Essentially, the tasks that were meant to be performed by the State in so far as the realization of the right under section 27 was concerned did not change their nature merely because a profit-oriented private entity

was managing some aspects of that service. Put another way, the right guaranteed under section 27 did not translate into a commercial venture on account of CPS' involvement. Thus, CPS, though constituting a private entity, was still under constitutional obligation to perform tasks relevant for the realization of the right under section 27. In the *SASSA* case, one of the issues that the Constitutional Court had to resolve was whether it would have been just and equitable to place a constitutional obligation on CPS in circumstances where profit-making was not guaranteed (*SASSA* case par 50). The Constitutional Court ruled emphatically "[n]o party has any claim to profit from the threatened invasion of people's rights" (*SASSA* case par 50). In so ruling, the Constitutional Court appeared to suggest that private business entities are not absolved of their obligations merely because the obligations do not generate profits.

The question may, however, be asked, what happens if CPS does not have sufficient resources to perform tasks relevant to the realization of the right under section 27? Stated differently, to what extent should a private entity, such as CPS, be considered a state organ in terms of section 8(1) of the Constitution? Should, for instance, these obligations suffice even in situations where the fulfilment of the right under section 27 would cause CPS to make losses? The Constitutional Court appears to have addressed this dilemma, ruling firmly "no one should usually be expected to be out of pocket for ensuring the continued exercise of those rights" (*SASSA* case par 50). This ruling suggests that it is not expected of private entities to be under undue burden in so far as the realization of guaranteed rights is concerned. Rather, as Gwanyanya aptly submits, "[c]ompanies need to also realize that the relationship with the citizenry is no longer about getting only the best terms out of the […] contract" (Gwanyanya "The South African Companies Act and the Realization of Corporate Human Rights Responsibilities" 2015 18 *Potchefstroom Electronic Law Journal* 3102–3132 3123). Of course, this is not to suggest that States are now absolved of their role as primary duty-bearers. Absolutely not. Rather, it is that depending on the nature of a given right or duty, private entities can be placed under the obligation to deliver on the rights guaranteed under the Constitution. Moreover, these obligations are imposed within certain parameters. It would, for example, have been problematic for the Constitutional Court to have ordered that CPS performs tasks that do not fall within the expertise of CPS. To do so would have been to unduly burden CPS. As the Constitutional Court itself ruled with regard to the order requiring CPS to pay out social grants, CPS bore constitutional obligations "because it had performed a constitutional function for a significant period already, the constitutional obligation persisted to ensure that a workable payment system remains in place until a new one is in operation" (*SASSA* case par 40).

To summarize this section briefly, it is apparent that the roles traditionally performed by states in terms of delivery of public goods and services are increasingly being taken on by private entities. In most instances, the goods and services being delivered by private entities are having a direct bearing on human rights. Under international law, private entities are strictly speaking, not under obligation to guarantee human rights. This analogy, however, may not be extended to private entities at the national level, in particular, where the Constitution of a given state makes the applicability of

the Bill of Rights to private entities explicit. This section, while drawing inspiration from the Constitutional Court decision in the *SASSA* case, has demonstrated that although critiques express concern that arrangements such as PPPs create a loophole via which private entities in partnership with states can escape liability, it is practicable for human rights obligations to be imposed on private entities. Unlike states without explicit constitutional provisions on the applicability of the Bill of Rights to private entities, in the context of South Africa, sections 8(1), 8(2) and 172 constitute powerful weapons at the disposal of the Constitutional Court to wield creatively with a view to ensuring that the accountability gap bemoaned by critiques of PPPs is addressed. However, while it is settled, as per the apparent discussion, that private entities can be placed under a constitutional obligation to guarantee human rights, some issues remain far from obvious. For instance, there was no valid contract between SASSA and CPS after 31 March 2017. Under the law of contract, obligations only arise in respect of a valid contract between the parties. How then does one reconcile the order that the Constitutional Court made with the conventional principles of contract law? The next section addresses the implications of the order such as the one made in the *SASSA* case for the laws of contract.

5 Constitutional obligations arising from contracts

In the *SASSA* case, the Constitutional Court found itself between a rock and a hard place. One could question: How? To answer, this court had to live up to its role as the custodian of the Constitution in regard to the right to social security; in circumstances where the actual duty-bearer of obligations relating to this right was unclear. The Court had to come up with a solution to ensure that by 1 April 2017 the section 27 right is guaranteed. An approach short of this was not an option since the livelihood of millions of social grant beneficiaries was at stake. To reiterate in the *AllPay 1* case (*Allpay 1* par 98) the same court declared the contract between SASSA and CPS constitutionally invalid, in that it was inconsistent with section 217 of the Constitution, which states that:

> "When an organ of the state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective." (S 217(1)).

The Court ruled that the process of awarding the tender for payment of social grants to CPS by SASSA was unlawful based on two grounds. First SASSA failed to ensure that the empowerment credentials claimed by CPS were objectively confirmed (*Allpay 1* par 72). Secondly, SASSA did not specify with sufficient clarity in the Bidders Notice 2 what was required from the bidders in relation to biometric verifications (*Allpay 1* par 91). As it turned out, CPS became the only company competent for consideration in the second round of the process and it was consequently awarded the tender. Therefore, the court reasoned that this rendered the process uncompetitive and it also defeated the objective of comparative cost-effectiveness (*Allpay 1* par 86). The court declared the contract unlawful and therefore invalid (*Allpay 1* par 98). However, in the interest of protection of section 27 rights, the Court invoked its power in terms of section 172 (this provision empowers

the Constitutional Court to make an order suspending a declaration of invalidity for any period and on any condition to allow for correction of the defect by relevant authority) to suspend the order of invalidity of the contract in order to ensure, among others, that there was no disruption in the paying out of social grants (*Allpay 2* par 78(2)). Significant to note, although the Constitutional Court had suspended the invalidity of the contract between CPS and SASSA in the *AllPay 2*, this suspension was to expire on the 31 March 2017 if a new tender was not awarded (*Allpay 2* par 78(4)).

Although the invalidity of the contract was suspended, SASSA was required to rectify the irregularity arising from the contractual process, by either re-running the process or, taking on the task of paying out social grants. SASSA did not re-run the process; rather, it opted to take over the payment of the social grants as of 1 April 2017. Unfortunately, as briefly elaborated in the brief facts of this case, at the time the matter came up for hearing before the Constitutional Court, it was clear that SASSA was not in a position to pay out the grants by 31 March 2017. With the lives of millions of individuals at stake, the Court, as the custodian of the Constitution had to determine how the social grants would be paid out and by whom. It is this predicament that exemplifies the proverbial position – “between a rock and a hard place” that the Constitutional Court found itself. Seeing as SASSA was incapable of taking over payments by April and that after 31 March 2017 there was no valid contract to oblige CPS to pay out social grants, a question remained open- who bore the duty to ensure the fulfilment of section 27 rights? The answer to this question became even imminent, taking into account that there were other constitutional rights at stake such as children’s rights as guaranteed under section 28. More questions arose- Should the court involve CPS again? Was there a constitutional obligation on CPS to continue to pay out social grants after the 31 March 2017? Can a private entity, which is party to a contract with the state, bear the duty to perform a constitutional function even after the said contract has expired? In light of the fact that the contract was later declared constitutionally invalid (*AllPay 1* par 98), did the invalidity of the contract consequently absolve CPS of its constitutional obligations? It is these perplexing questions that warrant discussion.

At first glance, it could be argued that the answers to these questions seem obvious. However, on closer scrutiny, answers are far from obvious in light of the fact that there are conventional principles of contract at play. As a starting point, the law of contract is based on agreements that create certain legally enforceable obligations for the parties (*animus contrahendi*) (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2009) 4). These obligations are often for the benefit of the contracting parties (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4). For a contract to be legally enforceable, it has to be valid (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4; Christie *The Law of Contract in South Africa* (2006); Joubert *The General Principles of Contract* (1987)). Where a contract is found or declared invalid, such a contract cannot continue to exist and consequently, all obligations that arise from it will also fall away (Visser, Pretorius, Sharrock and Van Jaarsveld *Gibson: South African Mercantile and Company Law* (2003) 9; Bhana, Bonthuys and Nortjie *Students Guide to the Law of Contract* (2007) 14). Under common law, an

obligation is a legal bond obliging one to give, do or refrain from doing something to or for the other party. An obligation gives rise to rights and corresponding duties in a contract (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4; Visser *et al Gibson: South African Mercantile and Company Law* 2011; Christie *The Law of Contract in South Africa* 10). Therefore, in any lawful and valid contract, the parties have to discharge their obligations for the duration of that particular contract (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4; Visser *et al Gibson: South African Mercantile and Company Law* 2011; Christie *The Law of Contract in South Africa* 10). Viewed from the conventional principles of contract, after the suspension of invalidity elapsed on 31 March 2017, CPS was not under any obligation to pay out grants to grant recipients. This position would be defensible, at least in so far as; the law of contract is concerned, because as of 31 March 2017, there was no valid contract between SASSA and CPS. Yet, amidst this state of affairs, the Constitutional Court still deemed it fit to impose a constitutional obligation of CPS to pay out grants to grant recipients since in the Court's view, CPS' obligations did not end on 31 March 2017 (*SASSA* case par 41). Questions arise – What did the court imply when it ruled that the constitutional obligation to perform a constitutional function by SASSA and CPS did not end on 31 March 2017? Could it be that the existence or non-existence of a contract mattered less where guaranteed rights were at stake? Put differently, could it be said that regardless of the invalidity of the contract or lack of a contract thereof, there still remained a constitutional obligation (arising from what one would call a constitutional contract) on CPS to ensure that the social grants payments were made because it had the means to do so at that particular time? When the rights of the vulnerable are at stake, what ought to take precedence; a valid contract or, the nature of right and duty at issue?

This state of affairs raises more questions than answers. However, perhaps, the answers lie in an understanding the implication of the Constitution of South Africa for other laws, including the rules governing contracts. It is important to note that under the new constitutional dispensation, every law, principle and conduct needs to reflect and align itself with the values of the Constitution (S 2 and S 39(1)(a)). The Constitution of South Africa, being the supreme law of the country, declares any other law inconsistent with it invalid and therefore unenforceable (S 2). Section 7 of the Constitution declares the Bill of Rights to be the cornerstone of the South African democracy since it enshrines the rights of all people and affirms the democratic values, which are human dignity, equality and freedom (S 7(1)). It is the duty of the state and all its organs to ensure the respect, protection, promotion and fulfilment of all the rights in the Bill of Rights (S 7(2)). The weight of the Bill of Rights is such that it applies to all law including the law of contract. Where a right contained in the Bill of Rights is threatened or need to be realized, such a right must be given imminence and must be protected from violation and unreasonable limitation by any other law or conduct. So strictly speaking, under the law of contract, CPS was not under any obligation to pay out social grants to recipients after 31 March 2017. However, the issue is not as simplistic as that. Cognizance here had to be taken of other constitutional provisions, to which the principles of contract are subject.

Notably, section 8(2) of the Constitution states that the provisions in the Bill of Rights bind all natural and juristic persons, to the extent that such provisions are applicable, taking into account the nature of the right and the nature of any duty imposed by the right. In terms of section 8(2), the Constitution imposes obligations on private entities, to give effect to the rights guaranteed under the Constitution. CPS assumed a constitutional obligation when it entered into a contract with SASSA. It is important to note that the nature of the contract in question imputed a constitutional function on CPS (*AllPay 2* par 52–60; *SASSA* par 40). Therefore, the intricacies surrounding validity or existence of a contract crumble if section 8(2) is brought into perspective. This is because the wording of section 8(2) is silent on the issue of contracts, rather; it places emphasis on the nature of the right and the nature of duty imposed by the right. Indeed, since a number of constitutional rights were at stake, including those guaranteed under section 27(1)(c) and 28(1)(c) after 31 March 2017, the Court opted to suspend the declaration of invalidity of the contract further. The court did this in order to give shape to the *modus operandi* for the payment of the grants by CPS until such time that proper and lawful means for the payment of grants was secured by SASSA and the Department of Social Development.

From this decision, one may say that the Constitutional Court decided like a responsible parent in its capacity as custodian of the Constitution. The court had to ensure that the integrity and values of the Constitution were not undermined and jeopardized in any way. Even though the contract between CPS and SASSA was declared invalid, the fact that the purpose of such a contract at the time of its existence was for the realization and fulfilment of a fundamental right, the intricacies surrounding the validity or invalidity of the contract between CPS and SASSA did not suffice. Essentially, the constitutional obligation entrenched in section 8(2) took precedence over the orthodox rules of contract. The ruling of the Court, in this case, serves as a cautionary tale to private entities considering partnerships with state organs on issues having a bearing on human rights. Based on this decision, it is apparent that some contracts may create constitutional obligations for the private parties involved. Where the contract has a bearing on constitutionally guaranteed rights, the conventional principles governing the law of contract may have to lose their grip to pave way for the realization of guaranteed rights. Under these circumstances, and as was the case with CPS, a private entity can be placed under a constitutional obligation to guarantee fundamental rights in the absence of a valid contract. Put differently, under these circumstances, a constitutional obligation would not necessarily depend on a contract to be enforced, rather; it would depend on the constitutional mandate in terms of section 8(2) of the Constitution.

The *SASSA* case is distinguishable from a number of law of contract-cases the Constitutional Court has had to deal with. In *Barkhuizen v Napier* (2007 (5) SA 323 (CC), hereinafter "*Barkhuizen* case"), for instance, the Constitutional Court held that where a contract is inimical to the values of the Constitution, such a contract would be invalid and therefore unenforceable (*Barkhuizen case* par 15). In the foregoing case, the Court merely stopped at invoking the Constitution to render the contract at issue invalid. The approach in the *SASSA* case, however, presents a unique set of criterion. The Court, having declared the contract between CPS and SASSA invalid

on account of transgressing the values of the Constitution, took a step quite puzzling – it suspended the invalidity of the contract which it had, itself, declared invalid. However, in this puzzle, what makes the decision of the *SASSA* Court even more interesting and unique is the reasoning the Court advances for the suspension of the invalidity of the contract. Salient in the decision of the Court to suspend the contract between CPS and SASSA was the need to guarantee the rights of the millions of individuals whose rights to social security were at stake. In as much as the Court had the option to decline enforcement of a contract which is in conflict with the Constitution, it chose the less obvious route, choosing to enforce a contract that is inconsistent with the principles of the law of contract and the Constitution, but, necessary to ensure the respect, protection, promotion and fulfilment of a right so fundamental – the right to social security. It is to be noted cautiously that the contract was not validated. It remained suspended for the purposes of discharging a constitutional function and obligation that the parties had assumed by virtue of the nature of contract and rights involved. The Court reasoned that failure to do so would amount to an infringement upon the grant beneficiaries among which are children (*AllPay 1* par 56). In light of the foregoing standpoint, one of the questions that arises is: Did the Court create a special type of contract (a "constitutional contract")? Could this mean that where a contract creates a constitutional obligation for the parties, such a contract could be regarded immune from certain general principles and requirements that regulate the law of contract in order to fulfil the constitutional function and obligation that arise from it? These are questions that the authors leave to the reader to ponder about, picking an example from the overall analysis canvassed in this article.

6 Conclusion

There were so many odds the Constitutional Court had to go against to see to it that the right to social security was guaranteed, starting from standing up to the executive arm of government (The SASSA in this case) to taking a firm grip of a private entity (CPS) which got caught up in the crossfire of constitutional obligations. There was a subtle clash between two arms of government-the executive and the judiciary, with a private entity (CPS), often known as an innocent bystander, being dragged onto the battlefield to take part in a war that saw human rights win the day. The most vulnerable population (social grant beneficiaries), whose interests mattered the most were this war to be lost, could only look on, given their lack of power to engage effectively. They could not fight but they counted on and desperately hoped that one of the parties to this battle (the Constitutional Court) would identify with their plight and accordingly be inspired to fight on to the end. As a custodian of the Constitution, the Constitutional Court did not disappoint. There were rights at stake; there were desperate grant recipients in need, and so critical was this fight that some rules of war (contract rules for example) had to be set aside for a smile to be finally encrypted on the faces of the most vulnerable in South Africa's society. The battle was not an easy one, many toes had to be stepped on, but one can argue that in the end, the Constitutional Court's fight was worth it and the Court is to be commended for living up to its role as the custodian of the Constitution. Grant beneficiaries left with a smile but the same may not be said of SASSA and

CPS who arguably left with bruises. Bruises or smiles, they were certainly lessons to be learned by the various players upon leaving the battleground. It is unfeasible to discuss all the lessons, but some are worth highlighting. First, social security, like any other right under the Bill of Rights, is a fundamental right and the Constitutional Court as the custodian of the Constitution will stop at nothing to guarantee it. Secondly, it is practicable for private entities to be placed under constitutional obligation if human rights are at stake, and last but far from least, the Constitution may override conventional rules of contract where fundamental rights are at risk of being undermined.

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