



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/17

In the matter between:

BLACK SASH TRUST Applicant

FREEDOM UNDER LAW Intervening Party

and

MINISTER OF SOCIAL DEVELOPMENT First Respondent

**CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN SOCIAL SECURITY AGENCY** Second Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY Third Respondent

MINISTER OF FINANCE Fourth Respondent

NATIONAL TREASURY Fifth Respondent

CASH PAYMASTER SERVICES (PTY) LIMITED Sixth Respondent

INFORMATION REGULATOR Seventh Respondent

BATHABILE OLIVE DLAMINI Eighth Respondent

and

CORRUPTION WATCH (NPC) RF First Amicus Curiae

SOUTH AFRICAN POST OFFICE SOC LIMITED Second Amicus Curiae

Neutral citation: *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others* [2018] ZACC 36

Coram: Mogoeng CJ, Zondo DCJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J.

Judgments: Froneman J (unanimous)

Decided on: 27 September 2018

Summary: Costs of suit — Personal liability — Minister liable for costs — Gross negligence

ORDER

The following order is made:

1. The first, second and third respondents are to pay 80% of the costs of Black Sash Trust and Freedom Under Law in the application, including the costs of two counsel.
2. Ms Bathabile Olive Dlamini (Minister Dlamini) is, in her personal capacity, ordered to pay 20% of the costs of Black Sash Trust and Freedom Under Law in the application, including the costs of two counsel.
3. The Registrar of this Court is directed to forward a copy of the Inquiry Report in terms of section 38 of the Superior Courts Act 10 of 2013: Referee: B M Ngoepe JP and this judgment to the National Director of Public Prosecutions, to consider whether Minister Dlamini lied under oath and, if so, whether she should be prosecuted for perjury.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Zondo DCJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] This judgment deals with the issue of costs left open in *Black Sash 1*.¹ In that judgment costs were reserved and the then Minister of Social Development (Minister Dlamini) was called upon to show cause on affidavit as to why she should not be joined to the proceedings in her personal capacity and why she should not pay the costs of the application out of her own pocket.² In response, affidavits were filed that raised conflicts of fact in relation to an alleged parallel process of responsibility initiated by Minister Dlamini.

[2] Following upon this, the Court in *Black Sash 2*,³ ordered that Minister Dlamini be joined in her personal capacity and that the parties report to this Court on whether

¹ *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash 1*).

² Id at para 76 the following order was made:

- “13. The Minister is called upon to show cause on affidavit on or before Friday 31 March 2017 why—
- 13.1 she should not be joined in her personal capacity; and
- 13.2 she should not pay costs of the application from her own pocket.
14. Costs are reserved until conclusion of these proceedings.”

³ *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash 2*) at para 24 the following order was made:

- “1. The Minister is joined as a party to the proceedings in her personal capacity.
2. The parties must, within 14 days of this judgment, report to this Court whether they have agreed to a process in terms of section 38 of the Superior Courts Act 10 of 2013 in order to determine the issues relating to the Minister’s role and responsibility in the establishment and functioning of the work streams referred to in the affidavits filed by the Minister, Mr Magwaza and Mr Dangor.
3. Failing agreement the Court will issue directions determining the process.”

they agreed to a process in terms of section 38 of the Superior Courts Act⁴ to determine the issues relating to Minister Dlamini's role and responsibility in establishing the

⁴ 10 of 2013. One of the objects of the Superior Courts Act is to rationalise the law pertaining to Superior Courts (which includes the Constitutional Court) and to bring their administration and structure within the transformative imperatives of the Constitution. Section 38 of the Superior Courts Act provides:

- (1) The Constitutional Court and, in any civil proceedings, any Division may, with the consent of the parties, refer—
 - (a) any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or
 - (b) any matter which relates wholly or in part to accounts; or
 - (c) any other matter arising in such proceedings,

for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.
- (2) Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the proceedings in question.
- (3) Any such referee shall for the purpose of such enquiry have such powers and must conduct the enquiry in such manner as may be prescribed by a special order of the court or by the rules of the court.
- (4) For the purpose of procuring the attendance of any witness (including any witness detained in custody under any law) and the production of any document or thing before a referee, an enquiry under this section shall be deemed to be civil proceedings.
- (5)(a) Any person summoned to attend as a witness or to produce any document or thing before a referee and who, without sufficient cause—
 - (i) fails to attend at the time and place specified;
 - (ii) fails to remain in attendance until the conclusion of the enquiry or until he or she is excused by the referee from further attendance;
 - (iii) refuses to take an oath or to make an affirmation as a witness; or
 - (iv) having taken an oath or made an affirmation, fails to—
 - (aa) answer fully and satisfactorily any question put to him or her; or
 - (bb) produce any document or thing in his or her possession or custody, or under his or her control, which he or she was summoned to produce,

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.
- (b) Any person who, after having taken an oath or having made an affirmation, gives false evidence before a referee at an enquiry, knowing such evidence to be false or not knowing or believing it to be true, is guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.
- (6) Any referee is entitled to such remuneration as may be prescribed by the rules or, if no such remuneration has been so prescribed, as the court may determine and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any

parallel decision-making and communication processes. The parties agreed on a referee and retired Judge President Ngoepe (Ngoepe JP) was appointed to conduct the fact finding inquiry.⁵

[3] The Inquiry was to investigate:

- “(a) Whether [Minister Dlamini] sought the appointment of individuals to lead ‘work streams’ who would report directly to her, as set out in the letter, annexure “A” to the affidavit of Mr Magwaza filed in relation to the personal costs issue.
- (b) If these individuals were appointed, the following information is required:
 - (i) When they were appointed;
 - (ii) Whether they reported directly to the Minister;
 - (iii) Full details of the dates and content of their reports to the first respondent in relation to the objectives stated in the third respondent’s (SASSA) report filed with the Court on 5 November 2015; and
 - (iv) The reason why the Minister [Dlamini] did not disclose to this Court that these individuals were appointed at her instance and that they had to report directly to her.”⁶

Ngoepe JP’s findings

[4] A full investigation took place and the Inquiry Report in terms of section 38 of the Superior Courts Act 10 of 2013: Referee: B M Ngoepe JP (Inquiry Report) by Ngoepe JP was delivered to this Court. The Inquiry Report was released to the public and the parties were invited to file submissions on whether, in light of the Report, Minister Dlamini ought to be liable for costs out of her own pocket.

[5] Ngoepe JP found that:

such remuneration and expenditure must be taxed by the taxing master of the court and shall be costs in the cause.”

⁵ Order of this Court dated 2 August 2017.

⁶ Id.

- (a) Minister Dlamini did appoint individuals to lead parallel work streams as per the letter dated 9 July 2015 and did so with immediate effect. These individuals would account directly to her during the implementation process. During the inquiry the answer to this question was common cause.
- (b) And that:
 - (i) After receiving the Minister Dlamini's letter of 9 July 2015 directing her to appoint work streams and their leaders, Ms Virginia Petersen (then CEO) set the process in motion and further letters to the individuals identified by the Minister herself were written on 11 May 2016.⁷
 - (ii) They reported directly to the Minister, through Ms Mvulane, who was the project manager.
 - (iii) The individuals appointed did not file any written reports on their duties, but reported directly to the Minister.

[6] In relation to the last question, namely “[t]he reason why [Minister Dlamini] did not disclose to this Court that these individuals were appointed at her instance and that they had to report directly to her,” the report was diplomatic but nevertheless damning. In essence it found that Minister Dlamini had failed to make full disclosure to this Court. It is necessary to quote it in full:

“14.1 The Minister’s answer to the question is the following: She did not understand the Court’s request as asking of her to give an overview of the work during 2016. She says her focus was on what she understood the call to be, namely, why she should not be made to pay the applicant’s costs personally. She denies that the reason she did not disclose the appointment of the individuals to work streams, and that they reported to her, was because she was responsible for the crisis experienced in March 2017. It is also submitted for the Minister that this question is predicated on the premise that the work streams reported to the

⁷ See Inquiry Report at para 9 at 13-4.

Minister and not to SASSA. This aspect has already been dealt with above: the work streams did report directly to the Minister and not to SASSA, which was why Mr Magwaza, the CEO, complained; as did Mr Dangor.

- 14.2 To answer the question ‘why’, I have to, inevitably, consider the Minister’s explanation for the non-disclosure of the information in question. Her explanation is unconvincing and therefore falls to be rejected: The appointment of work streams and their role was central to the whole exercise of meeting the deadline. Therefore, in dealing with any aspect relating to the crisis, it is difficult to understand how the Minister could justifiably leave out the issue of the appointment of work streams, their role, who appointed them, when and to whom they reported; especially when she was the one who had instructed that they be appointed, identified specific individuals to be appointed and ordered that they report to her directly. Add to that the fact that Ms Mvulane reported to her regularly about her activities.
- 14.3 Back to the question ‘why’: In contesting the Minister’s reasons for the non-disclosure, her opponents came up with a variety of reasons; for example, fear of loss of office, fear of loss of standing in the public’s eye and within own party, protecting the government and own political party, reluctance to take the blame for the crisis and of course fear of being personally mulcted in costs. Mr Semenya argued that all these were mere conjecture. He argued that the Minister furnished the inquiry with a certain set of facts, which constituted her explanation. Those facts, he argued, could not be contrasted with mere conjecture. Therefore, he argued, in the event the Minister’s explanation fell away, I would be left with no answer to the question ‘*why*’; under those circumstances, he argued, I should declare myself unable to tell the reason for the non-disclosure, and report [same to] the Court. I disagree. I have been asked ‘*to enquire and report on*’ . . . the ‘*reason why the Minister did not disclose.*’ The Inquiry’s mandate can’t simply be restricted to recording the explanation given. To complete the mandate ‘*to enquire and report,*’ I must look into the soundness or otherwise of the reason given. If it is good, I so report. If it is not, I don’t just stop there; I must, on the evidence I took the trouble to listen to, establish the real reason for the non-disclosure if that is possible, and report accordingly. I therefore proceed to deal with what appears to be the reason why the Minister did not disclose the information in question.

14.4 There were two things, and two things only, which the Minister was called upon by the Court to fend off: being joined in her personal capacity, and, that happening, being mulcted in costs in her personal capacity. The reason for not giving the information in question can therefore only be related to these two things. In contrast, all other conceivable reasons, conjectures etc, fear of the two is therefore not something sucked from the thumb. We now know that the Minister has already been joined in her personal capacity; but at the time she made the affidavit which did not disclose the information sought, this was of course not yet the case. Fear of being joined must therefore be factored in.

14.5 The two issues were the only ones the Minister was answering to. On the face of it, the information not disclosed was inimical to the Minister's case in fending them off; the fear of them as the reason for the non-disclosure therefore commends itself more readily to mind than any other reason. That then, to me, is *'the reason why the Minister did not disclose . . . that these individuals were appointed at her instance and that they had to report directly to her'.*"

Submissions in this Court

[7] Minister Dlamini did not directly address the contents of the Inquiry Report and the adverse findings made against her. She submitted that to hold her personally liable for the costs of suit would constitute a breach of the separation of powers principle. She submitted further that this Court lacks the authority to hold a cabinet minister to account by ordering her or him to pay costs out of her or his pocket.

[8] Black Sash Trust submitted that Minister Dlamini's actions amounted to bad faith. This was on the basis of five factors arising out of the findings of the report, all of which relate to the Minister's failure to disclose the truth relating to her interference with governance in relation to the work streams, despite filing affidavits under oath with this Court.

[9] Freedom Under Law submitted similarly, that the non-disclosure by Minister Dlamini evinces her bad faith.

Discussion and analysis

[10] Minister Dlamini's argument that a personal costs order against her would offend the separation of powers has no merit.⁸ When courts make costs orders they do not make judgments on the political accountability of public officials. They do so only in relation to how the rights of people are affected by the conduct of a public official who is not open, transparent and accountable and how that impacts on the responsibility to a court by those involved in the litigation. And as explained in *Black Sash 2*, the common-law rules for holding public officials personally responsible for costs are now buttressed by the Constitution:

“Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order.”⁹

[11] This Court explained the serious import of the factual dispute about the alleged parallel process:

“These are serious allegations. If it is correct that the Minister appointed the members of the work streams and that they reported directly to her in contravention of governance protocol, then her failure to disclose this to the Court bears strongly on whether she has acted in good faith or not.”¹⁰

[12] The Inquiry Report's finding that the Minister's failure to disclose this information was her fear of being joined in her personal capacity and being mulcted personally in costs has not been, and cannot, be faulted.¹¹ The inference that she did not act in good faith in doing so is irresistible. At best for her, her conduct was reckless and grossly negligent. All that is sufficient reason for a personal costs order.

⁸ *South Africa Social Security Agency v Minister of Social Development* [2018] ZACC 26 at para 38.

⁹ *Black Sash 2* above n 3 at para 9.

¹⁰ *Id* at para 20.

¹¹ See section 38(2) of the Superior Courts Act above n 4.

[13] This conclusion is a serious and sad one, especially in the context of the provision of social grants to the most needy in our society. But if it is not to happen again, consequences must follow.

[14] It has been a sorry saga and it is proper that Minister Dlamini must, in her personal capacity, bear a portion of the costs. It would account for her degree of culpability in misleading the Court – conduct which is deserving of censure by this Court as a mark of displeasure – more so since she held a position of responsibility as a member of the Executive. Her conduct is inimical to the values underpinning the Constitution that she undertook to uphold when she took up office.

[15] The report by Ngoepe JP revealed that the Minister misled the Court to protect herself from the consequences of her behaviour. She allowed a parallel process to occur knowing that she withheld information that would lead to her being held personally liable for the social grants disaster. The office which she occupied demands a greater commitment to ethical behaviour and requires a high commitment to public service.¹² The Department of Social Development (Department) is as much responsible for the realisation of rights outlined in the Constitution as this Court and she used her position as Minister of the Department to place herself between constitutionally enshrined rights and those entitled to them.

[16] It is difficult to determine the proper extent of the personal costs order. The determination is a discretionary one. We have to consider Minister Dlamini's personal responsibility, arising from the parallel process she set in motion, and her shielding this truth from the Court, against the fact that ordinarily state officials do not bear personal

¹² Section 195 of the Constitution sets out the basic values and principles governing public administration. It is given effect to by Public Administration Management Act 11 of 2014 (pending proclamation of commencement) which states that its objectives are amongst others to “promote a high standard of professional ethics in the public administration” and to “facilitate the eradication and prevention of unethical practices in the public administration”. Chapter 2 of the Act lays down the basic values and principles governing public administration, all of which have been disregarded by Minister Dlamini in respect of this matter.

responsibility for the good faith performance of their official functions. It is a novel matter to hold a cabinet minister personally responsible for the costs of litigation. In the circumstances it will be appropriate to order that she must pay 20% of the taxed costs. These costs exclude the costs of the Ngoepe JP Inquiry as the parties agreed that the remuneration and reasonable expenditure of the referee would be borne by SASSA.

[17] A last and unedifying matter remains. The Inquiry Report's findings suggest very strongly that some of Minister Dlamini's evidence under oath in the affidavits before this Court and orally before the Inquiry was false. The Registrar of this Court must be directed to forward a copy of the Inquiry Report and this judgment to the National Director of Public Prosecutions, to consider whether Minister Dlamini lied under oath and, if so, whether she should be prosecuted for perjury.

Order

[18] In the result the following order is made:

1. The first, second and third respondents are to pay 80% of the costs of Black Sash Trust and Freedom Under Law in the application, including the costs of two counsel.
2. Ms Bathabile Olive Dlamini (Minister Dlamini) is, in her personal capacity, ordered to pay 20% of the costs of Black Sash Trust and Freedom Under Law in the application, including the costs of two counsel.
3. The Registrar of this Court is directed to forward a copy of the Inquiry Report in terms of section 38 of the Superior Courts Act 10 of 2013: Referee: B M Ngoepe JP and this judgment to the National Director of Public Prosecutions, to consider whether Minister Dlamini lied under oath and, if so, whether she should be prosecuted for perjury.

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