



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 48/17

In the matter between:

**BLACK SASH TRUST**

Applicant

**FREEDOM UNDER LAW NPC**

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

**BATHABLE OLIVE DLAMINI**

Eighth Respondent

and

**CORRUPTION WATCH (NPC) RF**

First Amicus Curiae

**SOUTH AFRICAN POST OFFICE SOC LIMITED**

Second Amicus Curiae

**Neutral citation:** [2017] ZACC 20

**Coram:** Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J

**Judgment:** Froneman J (unanimous)

**Decided on:** 15 June 2017

**Summary:** Joinder — personal liability of state officials — disputed facts on affidavit before this Court — section 38 of the Superior Courts Act

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## ORDER

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The following order is made:

1. The Minister is joined as a party to the proceedings in her personal capacity.
2. The parties must, within 14 days from the date 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.

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## JUDGMENT

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FRONEMAN J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

### *Introduction*

[1] In the main judgment<sup>1</sup> the first respondent (Minister) was called upon to show cause on affidavit why she should not be joined to the proceedings in her personal capacity and why she should not be ordered to pay the costs of the application out of her own pocket. She filed an affidavit. In the main she sought to place the blame for what went wrong on officials from the third respondent (SASSA) and the Department of Social Development (Department).

[2] Two of these officials, the current Chief Executive Officer of SASSA (Mr Magwaza) and the erstwhile Director-General of the Department (Mr Dangor), then sought and were granted leave to file affidavits to defend themselves. The thrust of their affidavits is that the Minister had established parallel decision-making and communications processes that bypassed SASSA and Department officials. The Minister said little, if anything, of this in her own affidavit.

[3] Before dealing with the contents of the affidavits it is, however, necessary to determine whether our law allows for a state official to be personally joined as a party in a matter involving the performance of official duties and to be personally mulcted in costs in relation to the performance of those duties and in the conduct of litigation in relation thereto.

### *Joinder*

[4] Joinder is the easier issue to resolve. If the possibility of a personal costs order against a state official exists, it stands to good reason that she must be made aware of the risk and should be given an opportunity to advance reasons why the order should not be granted. Joinder as a formal party to the proceedings and knowledge of the

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<sup>1</sup> *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (5) BCLR 543 (CC).

basis from which the risk of the personal costs order may arise is one way – and the safest – to achieve this.<sup>2</sup>

### *Personal costs orders*

[5] The common-law rules for granting a personal costs order against persons acting in a representative capacity were based on what this Court in *Swartbooi* described as conduct that was “motivated by malice or amount[ed] to improper conduct”.<sup>3</sup> In many cases the formulation of Innes CJ in *Vermaak’s Executor*,<sup>4</sup> that the representative’s “conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable”, has been followed.<sup>5</sup>

[6] When public officials were guilty of acting in *mala fides* (bad faith), courts have in the past made personal costs orders against them. Costs orders have been given against judicial officers where they have acted in bad faith. In *Regional Magistrate Van Winsen* AJ held that it “is the existence of *mala fides* on the part of the judicial officer that introduces the risk of an order of costs *de bonis propriis* being given against him”.<sup>6</sup> A similar approach was taken in *Moeca*<sup>7</sup> in which an order to pay costs *de bonis propriis* (from his or her own pocket) was made against an administrative official. He had handled this enquiry so badly and had made an order so inappropriate that the Court held that, on the assumption that *mala fides* must be shown, that it had.<sup>8</sup>

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<sup>2</sup> *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) at paras 14-5 and *Member of the Executive Council for Health, Gauteng v Lushaba* [2016] ZACC 16; 2016 (8) BCLR 1069 (CC); 2017 (1) SA 106 (CC) at paras 18-9. See also *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) and *Occupiers of Erf 101, 102, 104 and 112, Short Retreat Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* [2009] ZASCA 80; 2010 (4) BCLR 355 (SCA) at paras 11-2.

<sup>3</sup> *Swartbooi v Brink* [2003] ZACC 25; 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC) at para 7.

<sup>4</sup> *Vermaak’s Executor v Vermaak’s Heirs* 1909 TS 679 at 691.

<sup>5</sup> See, for example, *Retief v Du Preez t/a Ardu Transport* [2005] ZAGPHC 84; *Baphalane ba Ramokoka Community v Minister of Agriculture and Land Affairs* [2010] ZALCC 29; *Brown v Papadatis And Another* NNO 2009 (3) SA 542 (C) at 545J-546D; and *Blom v Brown* [2011] ZASCA 54; [2011] 3 All SA 223 (SCA).

<sup>6</sup> *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) at 853H (*Regional Magistrate*). See also *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N) at 485D-C and 485G-486A.

<sup>7</sup> *Moeca v Addisionele Kommissaris, Bloemfontein* 1981 (2) SA 357 (O).

<sup>8</sup> Id at 366B-C.

[7] These rules are now buttressed by the Constitution. Accountability and responsiveness are founding values of our democracy.<sup>9</sup> All organs of state must provide effective and accountable government.<sup>10</sup> The basic values and principles governing public administration include: the promotion and maintenance of a high standard of professional ethics; the promotion of efficient, economic and effective use of resources; public administration must be development-orientated; people's needs must be responded to; public administration must be accountable; and transparency must be fostered by providing the public with timely, accessible and accurate information.<sup>11</sup> Cabinet members are responsible for the powers and functions of the executive assigned to them by the President<sup>12</sup> and they must act in accordance with the Constitution.<sup>13</sup> All constitutional obligations must be performed diligently and without delay.<sup>14</sup>

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<sup>9</sup> Section 1(d) of the Constitution reads:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...

- (d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government to ensure accountability, responsiveness and openness.”

<sup>10</sup> Section 41(1)(c) of the Constitution.

<sup>11</sup> Section 195(1) of the Constitution, in relevant part, reads:

“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.  
 (b) Efficient, economic and effective use of resources must be promoted.  
 (c) ...  
 (d) Services must be provided impartially, fairly, equitably and without bias.  
 (e) ...  
 (f) Public administration must be accountable.  
 (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”

<sup>12</sup> Section 92(2) of the Constitution.

<sup>13</sup> Section 92(3)(a) of the Constitution.

<sup>14</sup> Section 237 of the Constitution.

[8] The question of what would constitute improper conduct can be answered with reference to two linked issues: institutional competence and constitutional obligations. From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position.<sup>15</sup> Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution,<sup>16</sup> but in most cases there will be an overlap.<sup>17</sup>

[9] 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.

#### *The affidavits*

[10] The Minister seeks to explain her conduct as not being wilful and does not address any other degree of possible irregularity on her part. She identifies and deals with eight aspects of the main judgment that are said to require an answer from her. Underlying all of them is her understanding of the factual background, which she sets out in her affidavit. The important part is, of course, what transpired after this Court discharged its supervisory order on 25 November 2015.

[11] In September 2014 the Minister personally appointed a Ministerial Advisory Committee (Ministerial Committee) to advise her on the best way to give effect to the promise made to the Court that SASSA would perform the payment of social grants after 31 March 2017. The Ministerial Committee's final recommendations were made

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<sup>15</sup> *MEC for the Department of Welfare v Kate* [2006] ZASCA 49; 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) at paras 3 and 6.

<sup>16</sup> Compare Plasket "Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials" (2000) *SALJ* 151.

<sup>17</sup> For example, state officials who act in a "high-handed manner" or who "play the victim in litigation" might be held personally liable, and this would not necessarily or always be linked to a "flagrant disregard of constitutional norms". See *Gauteng Gambling Board v MEC for Economic Development* [2013] ZASCA 13; 2013 (5) SA (SCA) at para 54.

in a report dated 31 October 2014 “in terms of which the Committee identified the creation of work streams designed to focus on specific deliverables to ensure that SASSA would meet the court imposed deadline”.<sup>18</sup> The involvement of these “work streams” will become a crucial and disputed part of what happened next.

[12] The Minister is rather coy about her personal involvement in the process. She refers to the minutes of the SASSA Executive Committee up to April 2016 to indicate what progress was being made. She states that during April 2016, in preparation for this deadline, she met with SASSA officials and the government printing works regarding the printing of beneficiary cards. Notwithstanding this, however, it was clear to SASSA officials that, based on their progress at that stage, SASSA would not be able to meet the 1 April 2017 deadline. They obtained legal advice to approach this Court to request directions as to whether it wished to resume its supervisory jurisdiction. That legal opinion was received by the project manager of the work streams on 10 June 2016, but the Minister says she never saw it “until after October 2016”.

[13] There is no indication in the Minister’s affidavit what, if anything, she did to keep up to date with progress between April and October 2016. On her version she did not do anything because she “assumed that the existing reporting chain and communication channels were working and that [she] would be informed if anything of consequence arose”. On her version this was never done, despite SASSA officials becoming aware in April 2016 that the deadline could not be met; that legal opinion suggested seeking further directions from this Court; and that the work streams were formally appointed in June 2016.

[14] Her affidavit contains more detail of what she did after October 2016. It apparently became clearer that the deadline would not be met, but again this came to her attention only towards the end of October 2016. On 1 November 2016

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<sup>18</sup> It is to be noted that the Court did not impose this deadline – it accepted the assurance from SASSA that it would be able take over the payments of social grants by the date indicated by SASSA.

Mr Magwaza officially commenced as the new Chief Executive Officer (CEO) of SASSA. In December 2016 she urged him to report to this Court that SASSA would not be able to pay the grants, but he refused to file an affidavit in December 2016 and indicated that he needed more time and that he would rather report to the Court in January 2017. Despite this, she continued to explore further possibilities “and remained conscious that the approach to the Court may require deviation as well as a defined alternative to the November 2015 plan”.

[15] On 22 February 2017 the Minister informed Parliament that SASSA would not make an application to this Court, but would report to this Court before 31 March 2017 in relation to the state of affairs at SASSA. Before any report, Mr Magwaza, without consulting her, instituted an application on 28 February 2017 in this Court requesting its assistance in ensuring that Cash Paymaster Services (Pty) Limited (CPS) could continue making payment of the grants after 1 April 2017 for a further period of one year. She instructed that the application be withdrawn. Black Sash Trust instituted proceedings on 28 February 2017.

[16] The Minister also urges the Court to take into account the “turnover of leadership at SASSA between 2012 and 2016”. In May 2016 the then CEO stepped down and an acting appointment was made until 31 October 2016, before Mr Magwaza took over. His failure “to engage comprehensively” with her during this critical time contributed, in the Minister’s view, to the delays in implementation.

[17] Enter Mr Magwaza himself, with leave of the Court to join the fray.<sup>19</sup> He starts off with something the Minister did not deal with in her affidavit, namely her personal

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<sup>19</sup> The Chief Justice issued the following directions, dated 5 April 2017:

- “1. The Chief Executive Officer of the South African Social Security Agency, Mr Thokazani Magwaza, may, if so advised, file an affidavit in response to the First Respondent’s affidavit, dated 29 March 2017, by 12h00 on Friday, 7 April 2017.
2. All parties may, if so advised, file written submissions of no longer than ten pages by 15h00 on Wednesday, 12 April 2017, on the issues of joinder of the Minister in her personal capacity and her personal liability for the costs of the application.
3. Further directions may be issued.”

decision to appoint work streams and work stream leaders. In support of the allegation a letter from her to the previous CEO, dated 9 July 2015, was attached to his affidavit.<sup>20</sup> From this letter it appears that the Minister appointed individuals as part of the work streams and that they reported directly to her, and not to the executive board of SASSA. Mr Magwaza asserts that the process to implement SASSA's plan to pay the social grants itself "was derailed once the Minister directed SASSA to

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<sup>20</sup> This letter reads:

"Dear Ms Petersen

**IMPLEMENTATION OF THE RECOMMENDATIONS OF THE [MINISTERIAL] ADVISORY COMMITTEE ON THE FUTURE PAYMENT [SYSTEM] OF SOCIAL GRANTS FOR SOUTH AFRICA**

The above subject matters refers.

As you are aware, the last meeting of the Ministerial Advisory Committee (Committee) held jointly with the Executive Management of SASSA on 21 May 2015 agreed to proceed with the implementation of the recommendations of the Committee as set out in the document entitled: *Final Report and Recommendations for Way Forward*, dated December 2014.

As you will recall, it was agreed in the aforementioned meeting that to expedite the implementation of the Committee's recommendations, we must establish various work streams that will focus on key aspects.

Given the foregoing and the challenges confronting the Agency on all fronts, including but not limited to the Constitutional Court processes, I am of the firm view that critical steps for the implementation of the Committee's recommendations without any further delays.

I have decided that in order to roll out implementation process diligently, we need to retain the collective knowledge and institutional memory of the key members of the Committee. Given their knowledge and expertise, these members will lead the work streams and work jointly with you and the SASSA Executive Management team so as to ensure that the various work streams are adequately resourced to executive (sic) their respective mandates in a speedy manner without any disruption, and to minimise delays in the implementation of the third recommendations.

To this end, I have decided to retain the services of the following individuals who were part of the Committee for the implementation of the third recommendations: Mr Andile Nyonyha (Team Leader), Mr Tim Suzuki (Legal), Ms Tankiso Parkies (Social Benefits), Mr Sizwe Shezi (Economic Development) and Mr Patrick Monyeki (Information Communication Technology). Although tis panel will account directly to me during the implementation process, I request SASSA appoints hosts, provide resources and compensates the panel on behalf of the Department, subject to the applicable laws.

I envisage that the implementation will take place over a 3-year period, and as such the aforesaid individuals must be appointed for the duration of that period. This process must be actioned with immediate effect so as to enable the panel to immediately assume the task at hand.

I trust that all is in order and I [a]wait your immediate response to the issues raised in this letter.

Yours sincerely  
Ms BO Dlamini, MP  
Minister of Social Development  
Date 09.07.15"

appoint the work streams in accordance with her directive set out in her letter of 9 July 2015". He also directly disputes other aspects of the Minister's affidavit.

[18] Mr Magwaza said that he called upon Mr Dangor to file an affidavit to assist the Court in coming to a "just and equitable decision". Mr Dangor's affidavit confirms that the work streams differed from the governance protocol "insofar as it by-passed the SASSA executive committee including the acting CEO by giving Ms Mvulane [project manager] and the independent consultants direct access to the Minister. This created parallel reporting structures".

[19] After setting out a fairly detailed version of the events between October 2016 and March 2017, Mr Dangor states:

"These processes serve to confirm that Mr Magwaza cannot be blamed for non-compliance with filing a document with the Constitutional Court as suggested in the Minister's affidavit. It further serves to strengthen the views that Mr. Magwaza, others and I held that the parallel decision-making structures in the form of work-streams may have been deliberate to ensure a continued relationship with CPS under conditions favourable to CPS, through a self-created emergency."

Mr Dangor's affidavit also refers to other instances showing that the Minister must have been aware of the inability of SASSA to comply with the 31 March 2017 deadline earlier than October 2016.

[20] 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. For the moment, however, the allegations stand untested. That raises the question: how must the affidavit evidence before us be approached in determining whether a personal costs order against the Minister is justified?

*Approach to undisputed and disputed allegations*

[21] This Court cannot make an order adverse to the Minister on the basis of allegations that are untested and which she has not had an opportunity to challenge. It was argued in written submissions, however, that her own undisputed version is in itself sufficient to conclude that she acted in bad faith or, at the very least, in flagrant disregard of her statutory and constitutional obligations.

[22] There may be merit in these submissions, but it is not advisable to dispose of the matter piecemeal. The issue of the Minister's conduct surrounding the work streams needs to be resolved before coming to a final decision. The question whether a Cabinet member may have acted in bad faith when called upon to explain her conduct to this Court cannot be left alone. It must be resolved.

[23] In order to do that the parties will be given an opportunity to agree to a process under section 38 of the Superior Courts Act<sup>21</sup> to resolve the issue, failing which the Court will determine the process to be followed.<sup>22</sup>

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<sup>21</sup> 10 of 2013.

<sup>22</sup> Section 38 of the Superior Courts Act reads:

- “(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 may adopt the report of any such referee, either wholly or in part, and either 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.

*Order*

[24] The following order is 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.

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- (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 not 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 such remuneration and expenditure must be taxed by the taxing master of the court and shall be costs in the cause.”

For the Applicant:

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