

***Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others***

**(CCT 48/17) [2018] ZACC 36**

**Date of Hearing: 15 March 2017**

**Date of Judgment: 27 September 2018**

This judgement deals with the question of whether the erstwhile Minister of Social Development, Minister Bathabile Dlamini, ought to pay, in her personal capacity, for the costs involved in the case of *Black Sash Trust v Minister of Social Development*<sup>1</sup>, in which the issue of costs was left open and reserved.

In order to ascertain whether the Minister ought to pay for the costs out of her own pockets, the parties agreed to participate in a process in terms of section 38 of the Superior Courts Act whereby retired Judge President Ngoepe would conduct a fact finding inquiry to determine Minister Dlamini's role and responsibility in creating parallel decision-making and communication process at SASSA and the Department of Social Development that contributed to the social grants crisis.

A full investigation took place and the section 38 Inquiry Report authored by Ngoepe JP was released to both the parties and the public. The report in essence found that Minister Dlamini had failed to make a full disclosure to the Constitutional Court, in that:

- (i) The Minister did appoint individuals to lead parallel work streams;
- (ii) These individuals reported directly to the Minister; and
- (iii) The reason the Minister did not disclose this information to the Court was that she was afraid that she would be blamed for the social grants crisis and that a personal cost order would be awarded against her.

The parties were invited to make submissions to the Constitutional Court on whether, in light of the Inquiry Report, Minister Dlamini ought to be liable for costs out of her pocket.

Minister Dlamini argued that holding her personally liable to pay the costs of the proceedings would constitute a breach of the principle of separation of powers, and that the Constitutional Court lacked the authority to hold a member of the executive to account by ordering them to pay legal costs out of their pocket. The Black Sash Trust (the Applicant) and Freedom Under Law (as the intervening party) both argued that the Minister acted in bad faith by failing to disclose the truth about her interference with the governance of the work streams, despite filing affidavits under oath to the Constitutional Court.

In its judgment, the Constitutional Court held that the Minister's argument that a personal costs order against her would offend the separation of powers had no merit. Instead, the test for holding public officials personally responsible for costs is simply bad faith and gross negligence in the context of litigation. Accordingly, the Court held that the contents of the section 38 Inquiry report were sufficient for a personal costs order against the Minister.

The conduct of the Minister was held to be reckless and grossly negligent. She occupied a position as Minister of Social Development that demanded a greater commitment to ethical behavior and required a high commitment to public service. The Minister failed at this commitment when she used her position to place herself between constitutionally enshrined rights and those entitled to them being social grant beneficiaries. The report by Ngoepe J revealed that the Minister misled the Court to protect herself from the consequences of her behavior.

---

<sup>1</sup> Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC)

She allowed a parallel process to occur knowing that she withheld information that would lead her to being held personally liable for the social grants disaster.

In determining the extent of the personal costs order, the Court emphasized that this was a discretionary determination which required considering Minister Dlamini's personal responsibility arising from the parallel processes she set in motion, and her shielding this truth from the Court, against the fact that ordinarily state officials do not bear personal responsibility for the good faith performance of their official functions. The Court then, historically and for the first time, ordered that Minister Dlamini pay 20% of the taxed costs.

The Court also found that the Inquiry Report strongly suggested that Minister Dlamini had lied under oath in her affidavits filed in the Constitutional Court and orally in evidence given before the section 38 Inquiry. The Court thus directed the Registrar to forward a copy of the Inquiry Report to the National Director of Public Prosecutions who are to determine whether to prosecute the Minister for perjury.