

Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)
(CCT48/17) [2017] ZACC 20

Date of hearing: 10 May 2017

Delivered: 15 June 2017

In this matter, the Black Sash Trust brought an application before the Constitutional Court in which it sought to have a costs order granted against the erstwhile Minister of Social Development, Ms. Bathabile Dlamini, in her personal capacity for any role she might have played in the social grants saga. In this regard, the 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.

After considering all the affidavits filed by the former Minister, the Chief Executive Officer (CEO) of the South African Social Security Agency (SASSA) and the Director-General of the Department of Social Development, the Court had to decide on two issues, namely whether the Minister ought to be joined in the proceedings and whether a costs order should be granted against the Minister.

On the question of joinder, the Court held that there was compelling reason for the Minister to be joined in her personal capacity since there was a possibility of a personal costs order against her. The Court reasoned that joining her to the proceedings would give her an opportunity to advance reasons why a cost order should not be granted against her.

On the issue of the costs order, the Court clarified that personal costs orders against persons acting in a representative capacity were based on conduct that was motivated by bad faith or gross negligence. The Court further reasoned that costs orders against state officials in their personal capacities were grounded in the values of accountability and responsiveness that founded our constitutional democracy. 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. Members of the executive are responsible for powers and functions delegated to them by the President and must therefore act in accordance with the Constitution.

The affidavits revealed that when SASSA had become aware that it would not be able to meet the 1 April 2017 court-ordered deadline to award a new tender for the payment of social grants to another service provider, they obtained legal advice to approach the Court to request directions as to whether it wished to resume its supervisory jurisdiction. That legal opinion was received on 10 June 2016 but the then Minister averred that she only saw it after October 2016. There was no indication in the Minister's affidavit what, if anything, she had done

to keep up to date with the progress of awarding a new tender between April 2016 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.”

Moreover, the affidavits exposed the Minister’s decision to appoint workstreams and work stream leaders reporting directly to her and not to the executive board of SASSA. In doing so, she had by-passed the SASSA executive committee including the erstwhile acting CEO and contravened governance protocol. This in turn gave the workstreams, essentially independent consultants, direct access to the Minister, creating parallel reporting structures.

Importantly, the Minister’s affidavit failed to mention both of the aforementioned facts. This, according to the Court, was a strong factor in determining whether she had acted in good faith or not.

Nonetheless, the Court held that despite the above, there was not enough information to put it in a position to grant a cost order against the Minister in her personal capacity. The Court held that it could not make an adverse order against the Minister on the basis of allegations that are untested and which she had not had the opportunity to challenge. In order to determine whether or not the member of Cabinet acted in bad faith, and for the Minister to explain her conduct to the Court, it was held that the parties must be given the opportunity to agree to a process under section 38 of the Superior Courts Act, 10 of 2013. Failing which, the Court would determine the process to be followed in terms of the same provision.

The Court therefore ordered that:

1. The Minister be joined as a party to the proceedings in her personal capacity.
2. The parties must, within 14 days of the judgment, report to the Court whether they have agreed to a process in terms of section 38 of the Superior Courts Act in order to determine the issues relating to the Minister’s role and responsibility in the establishment and functioning of the workstreams referred to in the affidavits filed in the proceedings.
3. Failing agreement, the Court would issue directions determining the process.