



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **The Black Sash Trust v The Minister of Social Development and Others**

**CCT 48/17**

**Date of hearing: 15 March 2017**

**Date of judgment: 15 June 2017**

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#### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court handed down a judgment following upon an earlier urgent application brought by The Black Sash Trust.

That judgment had declared that SASSA and CPS were under a constitutional obligation to ensure continuing payment of social grants to grant beneficiaries from 1 April 2017, until an entity other than CPS was able to do so. The initial declaration of invalidity of the contract, in this Court's *AllPay (No 2)* judgment, was further suspended for a 12-month period.

The Court had also issued a rule *nisi* calling on the Minister to give reasons why she should not be ordered to pay the costs of the application in her personal capacity.

The Minister had filed an affidavit arguing that officials from SASSA and the Department of Social Development were to blame. The Minister asserted that, following the Court's initial supervisory order of 25 November 2015 (supervisory order), she had assumed that the existing reporting and communications channels had remained the same at both SASSA and the Department, and that it was Mr Magwaza's failure as CEO of SASSA "to engage comprehensively" with her which resulted in the delay in implementing the Court ordered deadline for payment of grants.

In response, Mr Magwaza and Mr Dangor, the former Director-General of the Department of Social Development, sought and were granted leave to file affidavits. These affidavits argued that the Minister had created "work streams" in June 2016, on the recommendation of a Ministerial Committee created in response to this Court's

supervisory order. These “work streams” differed from the regular governance protocols, and effectively served as parallel decision-making and communication processes that bypassed the SASSA executive board and departmental officials. Functionaries within the “work streams” reported directly to the Minister. In his affidavit, Mr Dangor further alleged that these processes may have resulted in a deliberate “self-created emergency” intended to benefit CPS and maintain its relationship with the Department of Social Development.

In a unanimous judgment written by Froneman J, the Court first held that formally joining a state official to proceedings would serve to make the Minister aware of the risks and give her a further opportunity to argue why a personal costs order should not be granted against her.

The Court held that common-law rules for granting a personal costs orders against persons acting in a representative capacity were based on what this Court in *Swartbooi v Brink* [2003] ZACC 25 described as conduct that was “motivated by malice or amount[ed] to improper conduct”.

Accountability and responsiveness are founding values of our democracy. All organs of state must provide effective and accountable government. 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. Cabinet members are responsible for the powers and functions of the executive assigned to them by the President, and they must act in accordance with the Constitution. All constitutional obligations must be performed diligently and without delay.

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 may give rise to a costs order.

With regards to the affidavits submitted, the Court acknowledged that the allegations made by Mr Magwaza and Mr Dangor were untested in evidence. Though the Minister’s own undisputed affidavit might allow a conclusion that she had acted in bad faith, her conduct surrounding the “work streams” needs to be first clarified, so that the matter is not addressed in a piecemeal fashion.

The Court ordered the Minister to be joined as a party to the proceedings. Pursuant to section 38 of the Superior Courts Act 10 of 2013, the Court further ordered the parties to report within 14 days on whether they could agree on an appointment of a referee to produce a report on the Minister’s role in the institution of the “work streams” identified in the affidavits. Failing an agreement, the Court will issue directions on the further process to follow.