

RE: CONSTITUTIONAL COURT OF SOUTH AFRICA MATTER NO: CCT48/17

(In Proceedings in terms of section 38 of the Superior Courts Act 10 of 2013)

In the matter of:

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	EIGHT RESPONDENT

Report in terms of Section 38 of the Superior Courts Act, 10 of 2013:

Referee: B M Ngoepe J

1. In its Order dated 2 August 2017, the Constitutional Court appointed me as referee in this matter in terms of section 38 of the Superior Courts Act 10 of 2013 ("the Act") to inquire into, and report to it on, certain issues set out in the Order. The matter had to be referred to an inquiry as there were several disputes of fact. This is my Report. The 2 August 2017 Order was a culmination of a number of judgments by the Court about the issue of the payment of grants by the South African Social Security Agency ("SASSA"). SASSA falls under the Department of Social Welfare and Development ("the

Department”), a portfolio which at all material times hereto, was headed by Minister Bathabile Olive Dlamini; it is a matter of public knowledge that the Minister has recently been moved to another Ministry. This matter has served before this Honourable Court in various stages over a period of time. The Court is therefore more familiar with it than I can ever hope to be. I will therefore, solely for the purpose of giving context to my Report, take the matter only from the Court’s Order of 17 March 2017.

1.1 March 17, 2017: Amongst other Orders, there is an Order to the Minister to show cause why she should not be joined in the proceedings in her personal capacity, and also why she should not be made to pay the applicant’s costs out of her own pocket¹.

1.2 June 15, 2017: An Order is made, joining Ms Bathabile Olive Dlamini (“the Minister”) in her personal capacity. However, an order for her to pay costs out of her own pocket is not made. This was because several disputes of fact arose between the Minister’s affidavit, and the affidavits filed by a Mr Thokozani William Magwaza and Mr Zane Dangor. Their affidavits contradicted several material averments contained in the Minister’s affidavit. In the circumstances, the 15 June 2017 Order refers the matter to an Inquiry in terms of section 38 of the Act. In the Order, the parties are instructed to agree on a referee.

1.3 August 2, 2017: As the parties could not agree on a referee, an Order is made appointing me as one. Specific issues are identified, in the form of questions, which I am to inquire into and report on.

2. The issues into which I am to inquire and report on, are set out in paragraph 2 of the Order as follows:

¹ Black Sash Trust v Minister of Social Development and Others (Freedom Under Law intervening) 2017 (3) SA 335 (CC)

- "a) Whether the first respondent (Minister) 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;*
 - iv) The reason why the Minister did not disclose to this Court that these individuals were appointed at her instance and that they had to report directly to her".*

3. The Court also usefully gives some guidance on how the oral evidence should be collected; for example, as to who should testify first, as also regarding the examination and cross-examination of the witnesses. A few novel issues confronted the Inquiry. Mr Magwaza and Mr Dangor, both of whom were not parties to the matter, requested not only legal representation, but also the right to cross-examine the Minister and her witnesses. Regarding the first issue, there was no opposition by any party; after all, there was no evidence leader for the Inquiry. As at all material times Mr Magwaza (who has since resigned) was the Chief Executive Officer (CEO) of SASSA, the latter agreed to pay his legal fees. The Department agreed to pay Mr Dangor's legal fees because at

all material times he was the Department's Director-General (he too has since resigned). While the Minister's counsel was not opposed to the two witnesses being lead in chief by their respective legal representatives, he was against allowing them the right to cross-examine the Minister and her witnesses. I overruled him. I gave a few reasons *ex tempore* for my ruling, and said I would add more.² Here are my full reasons: Firstly, as I have already said, there was no evidence leader. I would have possibly found myself in an untenable situation whether, in the event the need arose, I should myself cross-examine the Minister and her witnesses in relation to the evidence of the two witnesses, with their hapless legal representatives reduced to mere spectators (once they had finished leading the witnesses in chief). This would have been manifestly unfair to these witnesses. True, they were not parties to the matter; but they had a substantial interest in it because, in her affidavit to show cause why she should not be joined in person, and be mulcted in costs out of her own pocket, the Minister was putting the blame on them; particularly Mr Magwaza. Some of the allegations made by the Minister against them had the potential not only to damage their reputation, but also to limit their careers; these were very senior civil servants. Add to that the fact that the matter had aroused a huge public interest and anxiety. It should also be remembered that both Mr Magwaza and Dangor filed their affidavits out of a sense of public duty to assist the Court to find where the truth lied. After admitting their affidavits, the Court determined that there were several disputes of fact. In truth, therefore, the real disputes of fact were between the Minister on the one hand, and Mr Magwaza and Mr Dangor on the other. That being the case, allowing them the right to cross-examine witnesses was not only fair, but also necessary to enable the Inquiry to execute its mandate properly and fairly. I also could

² Section 38 Inquiry Record, 23 January 2018, pp 153 - 156

not see any prejudice to the Minister or any other party for that matter. Finally, for the same considerations set out above, I allowed the two witnesses's legal representatives to file heads of argument and make oral submissions on their behalf. Mr Solomon did so on behalf of Mr Magwaza, while Mr Maleka did so on behalf of Mr Dangor.

4. Ambit of the Inquiry:

4.1 I agree with counsel for the Minister, Mr Semenya, on his description of what the purpose of this Inquiry is not about. It is not, for example, its business to determine whether or not the Minister must pay the costs of the application out of her own pocket; that remains the preserve of the Court itself. My task is only to hear, and have recorded, the evidence towards answering the above question and, to the best of my ability, answer the Court's questions. Mr Semenya is also correct to say certain issues canvassed were not the subject of the Inquiry, at least not directly; for example, whether or not the Minister acted in bad faith in the grant payment saga; whether she deliberately stalled the process of insourcing the payments of grants by SASSA; whether she favoured a particular company to do the payments etc. But it cannot be correct, as Mr Semenya submits, that the nature of the relationships between the Minister and her special advisors, the director general and the SASSA CEO or the legal consequences from these relationships, are irrelevant to these proceedings. The incorrectness of this submission will be apparent as each question is being considered. Suffice it for now to say that, for one thing, the nature of the relationship between the CEO would not sit comfortably with an arrangement by the Minister that the work streams reported to her directly as opposed to the CEO; see in this regard for example section 6(2) of the South African Social Security Agency Act 9 of 2004 ("the Act"), which says the SASSA

CEO is accountable to the Minister and must report to the Minister on the activities of SASSA.

4.2. Mr Semenya referred to the matter of *A P Wright vs W R Wright and Another*³. As mentioned in that case⁴, there is a dearth of reported cases on proceedings of this nature. He argues, with reference to that case, that as a referee, I only sit to determine the facts and do not exercise, as he puts it, judicial or quasi-judicial functions. He then goes on to identify and label certain functions as being of a judicial or quasi-judicial nature and, after so labelling them, declares them as being out of my competence as the referee. If I heard him correctly, amongst the things I cannot do, is to make credibility findings or to make conclusions or factual findings. This approach is wrong; for one thing, the labelling of a particular function may itself be wrong. In my view, the point of reference as to what a referee may or may not do, are the terms of the mandate. The scope of each inquiry is therefore determined by its own terms of reference. If a proper and full execution thereof requires of the referee to hear oral evidence, the referee will do so; if credibility findings have to be made, the referee will do so; so too when it comes to factual findings or conclusions if they have to be made. In the present instance, the mandate to the Inquiry is not only to inquire into, but also to “report on” the questions posed by the Court. I am of the view that, in order for me to execute my mandate properly and fully, I must do all the above. It is also not lost on me that the Court chose a judge, hopefully experienced enough, to deal with all those things; but of course only with reference to and within the ambit of the questions posed. Witnesses were examined and cross-examined, with senior counsel representing

³ 2015 (1) SA 262 (SCA)

⁴ Para 6

them. Finally, I am emboldened by the comfortable knowledge that, in the unlikely but possible event I am wrong, the Court would correct me. I would rather do more than what is required of me, than fall short of fully executing my mandate because that could leave the Court in an invidious position: refer the matter to me again? Surely, that scenario I must avoid.

4.3. One issue which took time and energy was the debate about the existence or non-existence of what was referred to as "*parallel structures*". Mr Maleka in particular came out strongly on this point. The issue here was that by creating work streams which reported to her directly instead of doing so to SASSA, the Minister created a mechanism which ran parallel to SASSA's own plans; as a result, SASSA's plans were frustrated. This was the evidence of SASSA's CEO and other witnesses. For her part, the Minister denied the existence of any parallel structures. In my view, however, this issue is more related to the question of apportionment of blame for the crisis, than to the actual question posed by the Court: did the work streams report directly to the Minister? I am able to deal and report on that question without resolving the debate about the existence or non-existence of "*parallel structures*".

5. A brief note on the work streams:

At the centre of this Inquiry is the appointment of the work streams and the role they played; a brief note on them is thereof necessary. In her letter of 9 July 2015 to Ms Virginia Petersen, then CEO of SASSA, the Minister gave instructions for the appointment of work streams, and also identified specific individuals to lead these streams. The work streams were tasked to capacitate SASSA to take over the payment of social grants itself. The deadline for SASSA to be able to do so was 31 March 2017. The individuals and their respective teams were to be Mr Andile Nyonya,

the team leader; Mr Tim Sukazi (legal stream); Ms Tankiso Parkies (social benefits stream); Mr Lizune Shezi (economic development stream) and Mr Patrick Monyeki (information communication technology stream). The Minister said in her evidence that all these people had been members of the Ministerial Advisory Committee, which had recommended the establishment of the work streams. In the end though, only three work streams were established: legal, headed by Mr Sukazi, social benefits, headed by Ms Parkies and information communication technology given to Rangewave Consulting of which Mr Moneyki was the director; the others were not available. These facts are common cause. I return to the letter of 9 July 2015 and its significance in greater detail when dealing with question 2(a).

6. Comments on witnesses and their evidence:

Before turning to the questions posed by the Court, there are certain comments I should make about the witnesses and their evidence, having had the benefit of listening to, and observing them. I do so in the order in which they testified: Ms Bathabile Olive Dlamini, Mr Thokozani William Magwaza, and Mr Zane Dangor. As far as the substance of the evidence of each witness is concerned, that will be dealt with when I deal with each question posed.

6.1 Bathabile Olive Dlamini ("Minister").

The Minister's home language is isiZulu. As she was entitled, she chose to make use of an interpreter from English (questions) into isiZulu and from isiZulu (her answers) into English. There was, however, no doubt that the Minister had a good command of the English language. This came out time and again when she answered questions even before they were interpreted into isiZulu; she would also

occasionally answer directly in English. This inconsistency sometimes left the interpreter baffled, not knowing whether, or when, to interpret.⁵ The inconsistency did not, however, hamper the proceedings in any material way, although it may be making the record a clumsy read here and there. The Minister's answers to some of the vital questions were, to put it mildly, less than satisfactory; I give only a few examples:

- 6.1.1 she would unjustifiably answer "I don't know/remember" to important questions.⁶
- 6.1.2 she would simply not answer some of the questions.⁷ Instead of answering the question she told counsel to proceed to the next one.⁸
- 6.1.3 she gave long answers which did not speak to the question asked.⁹
- 6.1.4 at one stage, despite the fact that I never doubted his competence, I asked the interpreter to confirm to me that he had interpreted the question from counsel correctly into isiZulu. This was because I simply could not understand why the Minister was not properly answering such a simple question.¹⁰ Of course, even before seeking confirmation from the interpreter, I had had no doubt in my mind that the Minister had understood the original question in English anyway, given her command of the language.

⁵ Section 38 Inquiry Record, 22 January 2018, pp103 - 104

⁶ Section 38 Inquiry Record, 23 January 2018, p93 and p95

⁷ Section 38 Inquiry Record, 23 January 2018, pp18, 19, 22, 61, 61, 68-69, 100

⁸ Section 38 Inquiry Record, 25 January 2018, p23

⁹ Section 38 Inquiry Record, 22 January 2018, p 116

¹⁰ Section 38 Inquiry Record, 23 January 2018, p70

6.1.5 a witness may not be criticized for asking for clarification; but the Minister did so too often in respect of what were clear questions.¹¹

6.1.6 she was evasive to some questions.¹²

6.1.7 she would answer questions with questions.¹³

6.2 Mr Thokozani William Magwaza

The criticism I have against Mr Magwaza is not that he was not a credible witness, or that he was evasive or not telling the truth. He was just overcharged, almost unstoppable. He would be too elaborative where he could have been concise, and tended to go too much into context¹⁴. On occasions he had to be brought back to the question, and asked to limit himself thereto.¹⁵ The reason was not because he was not truthful or honest or was evasive. Rather, he appeared to be someone who had long been yearning for, and finally got, an opportunity to ventilate as much as possible bottled-up complaints about the Minister and the work of the work streams. As to what these complaints were, will appear later when answering questions 2(b)(ii) and 2(b)(iv). Lest it be thought I imply bias or ill motive on Mr Magwaza's part towards the Minister, I hasten to say that is not the case; nor do the remarks I make above detract from the substance of his evidence.

6.3 Mr Zane Dangor

Mr Dangor testified well, and I am not able to level any criticism against him as a witness. He articulated his dissatisfactions and disagreements with the Minister quite well, which were consistent with the reasons for his resignation. Some of

¹¹ Section 38 Inquiry Record, 23 January 2018, p99

¹² Section 38 Inquiry Record, 22 January 2018, pp 104 – 111 and 25 January 2018, p19

¹³ Section 38 Inquiry Record, 23 January 2018, p98,

¹⁴ Section 38 Inquiry Record, 25 January 2018, pp 24 – 26; 63 - 69

¹⁵ Section 38 Inquiry Record, 25 February 2018, p79 and 2 February 2018, p23; 29, 30

those reasons are important to this Inquiry inasmuch as they relate to his concerns to the Minister about the reporting lines of the work streams in accordance with governance protocol.

6.4 Ms Elaine Zodwa Mvulane and Mr Warwick Metcalfe

Unsigned statements by Ms Mvulane and Mr Metcalfe were filed with the Inquiry on behalf of the Minister. They were later signed under oath on 26 January 2018 and 1 February 2018 respectively. During her oral evidence, the Minister referred to them and relied on them extensively. Mr Semenya said, at the time, that the two might be called to testify as the Minister's witnesses. They were not called, even though the Order specifically allowed for that. I cannot say that they would have necessarily contradicted the Minister or, if so, to what extent. Once Mr Semenya eventually indicated that he would not call them, Adv Yacoob for the Intervening Party raised a query about the status of their statements. I said then that I would decide how to deal with them and what weight, if any, to attach to them. This is how I have decided to deal with them: Nobody has objected against their admission into the record. Where the contents of their affidavits are at variance with the evidence of Mr Magwaza and Mr Dangor, I choose the versions of the latter two. Mr Magwaza and Mr Dangor were prepared to, and did, subject themselves to vigorous cross-examination so that the veracity of their versions could be tested; not so Ms Mvulane and Mr Metcalfe and, what is more, with no explanation proffered.

7. Brief overview of the evidence tendered.

7.1 The evidence shed a lot of light on the importance of the appointment of “*work streams*” and their role in the whole saga. Not surprisingly, therefore, there was a huge dispute about their reporting lines and their role. I therefore briefly refer to some relevant material parts of the evidence. According to Mr Magwaza, the “*work streams*” reported directly to the Minister, albeit through Ms Mvulane, who was their project manager. According to him, this created a problem because in terms of governance protocol, the work streams were supposed to report to the CEO of SASSA. The second problem with the work streams, according to him and others, was that they created a parallel structure to that of SASSA. The evidence shows that Mr Magwaza raised this concern a few times, to no avail. Mr Dangor, who was the Minister’s special advisor at some point before becoming the Director General of the Department, supports Mr Magwaza’s above contention about the work streams.

7.2 According to Mr Magwaza, the practice of the work streams to report directly to the Minister resulted in SASSA being side-lined, jeopardizing whatever plans (called “*packages*”) SASSA was putting in place towards meeting the deadline. For her part, the Minister disputes, though not quite consistently, the fact that work streams reported to her directly, or that they created a parallel structure – more about this later; but suffice it to say at this stage that the weight of evidence overwhelmingly supports Mr Magwaza’s and Dangor’s above contentions. It is against the above background that the answers to the questions should now be considered.

8. Question 2(a): Whether the first respondent (Minister) 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.

During argument, it became common cause that the answer to the question is in the affirmative. The answer to the question lies largely in the Minister's letter of 9 July 2015¹⁶ to the then Chief Executive Officer of SASSA, Ms Petersen. One can divide the question into two legs. Firstly: whether the Minister “*sought the appointment of individuals to lead work streams*”; that is, whether she gave such instructions. In this regard the relevant part of the letter, reads “*I have decided to retain the services of the following individuals ...*” and the names of the people are then mentioned in the letter; instructions are given to appoint them “*with immediate effect*”. The second leg of the question is the part: “*... who would report directly to her*”. Notionally, this leg of the question, linked as it is to question 2(b)(iii), is nevertheless distinguishable from the latter. It is a directive as to whom the work streams should report once appointed, while 2(b)(iii) wants to know whether, as a matter of fact, the work streams, in line with the directive, did report directly to the Minister. From its reading, it is clear from the letter of 9 July 2015 that the Minister's intention was that the “*work streams*” would report to her directly. The relevant part of the letter, after identifying people to be appointed, says “*this panel will account directly to me during the implementation process*”. There is no need to dwell on this question because, as said already, it is common cause that the answer is in the affirmative to both legs of the question.

9. Question 2(b)(i): If these individuals were appointed, when were they appointed?

There is no dispute about the answer to this question. After receiving the Minister's letter of 9 July 2015 directing her to appoint work streams and their leaders, Ms Virginia

¹⁶ Black Sash Bundle, p66-67

Petersen, then Chief Executive Officer of SASSA, set the process in motion. On 11 May 2016 she wrote letters of award to the leaders of work streams as identified by the Minister herself: Tim Sukazi¹⁷: Legislative and Policy Requirements work stream; Tankiso Parkies¹⁸: Change and Stakeholder Management, and Rangewave Consulting (Pty) Ltd, Mr Monyeki¹⁹: Information and Business Systems. Consultancy Agreements were entered into on 4 July 2016 between SASSA and the head of each work stream.²⁰

10. Question 2(b)(ii): Whether they reported directly to the Minister

The second part of question 2(a), which I answered in the affirmative, was whether the Minister had sought the work streams to report to her directly. Now, the present question, as I understand it, wants to establish whether the work streams did actually report directly to the Minister as directed by her in her letter of 9 July 2015. Given the context of the case, reporting "*directly*" to the Minister means reporting to her (even if it be through Ms Mvulane), as opposed to reporting to SASSA or its CEO. This would be in line with the letter and spirit of the Minister's directive as *per* the letter of 9 July 2015 referred to above: report to me directly as opposed to reporting to SASSA. In answering the question, I took into account the relevant evidence by the Minister, Mr Magwaza and Mr Dangor, subject to my observations made earlier about them as witnesses. I also considered documentary evidence.

10.1 Minister: In paragraph 40 of her written statement to the Inquiry dated 29 November 2017, the truth of which she confirmed under oath, the Minister says the work streams did not report to her directly; but in paragraph 42 says that it was necessary for her to be kept abreast of the developments and that, to that

¹⁷ Volume 1: First and Eighth Respondent's List of Documents, p67

¹⁸ Volume 1: First and Eighth Respondent's List of Documents, p71

¹⁹ Volume 1: First and Eighth Respondent's List of Documents, p74

²⁰ Volume 1: First and Eighth Respondent's List of Documents, pp79, 99, 114

end, was frequently updated by Ms Mvulane. At best, this is pretty ambivalent; at worst contradictory. Mr Semenya also argued that the work streams held meetings with the Steering Committee, a body in which three other members of the SASSA Executive Committee (Exco) sat, including Ms Mvulane (but notably not the CEO). Even if that were to be true, it would not detract from the fact that work streams reported directly to the Minister, through Ms Mvulane, their project manager. The Minister did say in her evidence that Ms Mvulane gave regular telephonic and informal reports to her. Mr Semenya also sought to argue that the contracts of engagement concluded between SASSA and the work streams pointed to the former reporting to the latter as opposed to the Minister. Again, even if that were so, what happened in practice was different. In her statement dated 29 November 2017 to this Inquiry, Ms Mvulane says in, i.a paragraph 26, that she would give verbal progress reports to the Minister, at the Minister's office or her home. The Minister would also initiate such meetings.

In her evidence before the Inquiry, the Minister confirmed that she frequently liaised with Ms Mvulane to get progress report. Under cross-examination the Minister clearly confirmed being informed by Ms Mvulane on the work of the work streams.²¹

- 10.2 Mr Magwaza: Mr Magwaza's evidence has always been that the work streams reported directly to the Minister, through Ms Mvulane, and not to the CEO of SASSA as they should have. He says he did raise this concern with the Minister in a letter he wrote to her on 4 April 2017; the concern, he says, is also reflected in two sets of the minutes (one set produced by the Minister and one

²¹ Section 38 Inquiry Record: 23 January 2018, p 112 – 114 and 25 January 2018, p15

set by SASSA) of a meeting held on 24 October 2016. The letter and the two sets of the minutes are referenced and discussed in more details in paragraph 14.2 below. No denial came forth from Ms Mvulane or the Minister that the work streams were reporting to the latter.

- 10.3 Mr Dangor: Mr Dangor's evidence supports Mr Magwaza. He also says in his affidavit to the Court, dated 10 April 2017, that Ms Mvulane and work stream leaders reported directly to the Minister, bypassing SASSA's Exco, in violation of governance protocol.²²

11. Documentary evidence

- 11.1 Mr Shezi's affidavit: I was referred to the affidavit made by one Siphon Kenneth Shezi in another matter: *High Court Gauteng Division, Pretoria: Siphon Kenneth Shezi (Applicant) vs Department of Social Development, (First Respondent) and The Minister of Social Development (Second Respondent)*. In paragraph 20 of his affidavit, dated 19 October 2017, Mr Shezi says that the work streams breached government protocol in that they reported directly to the Minister and not to SASSA's CEO. A copy of this affidavit was filed of record into this Inquiry by the applicant.²³
- 11.2 In his heads of argument, counsel for the applicant, Mr Budlender, referred to what he described as eleven pieces of documentary evidence, all of them showing that the work streams were the Minister's, and therefore reported to her. Amongst them is the now well-known letter of 9 July 2015 in which, amongst others, the Minister said "*this panel (work streams) will account directly*

²² Black Sash Bundle, pages 719 – 720 para 8 – 9

²³ Black Sash Bundle, pages 901

to me during the implementation process". It is improbable that this instruction from a Minister was not complied with. The minutes of the meeting of SASSA Exco, held on 25 July 2016²⁴, three weeks after the appointment of work streams, make no mention of them at all; this despite the Minister's concession in her evidence²⁵ that if the streams were to report to SASSA Exco, their appointment would have been important and therefore mentioned in the minutes. Again, in her letter of 23 October 2016 to the applicant, Ms Mvulane described the work streams as "*the Ministerial work streams*", an indication as to whom they reported.²⁶ This aspect was taken up with the Minister during cross examination.²⁷ The next document is a copy of the minutes produced by the Minister of the presentation made by the work streams to SASSA Exco meeting on 24 October 2016. The minutes reflect Mr Magwaza's concern that the work streams should be reporting to his Exco, and not to the Minister.²⁸ SASSA's own minutes²⁹ of the same meeting reflected, as demonstrated by a solid line, that work streams reported directly to the Minister, and only to SASSA Exco through a Steering Committee. Very important also is the letter written by Mr Magwaza to the Minister on 4 April 2017.³⁰ In it, after reminding the Minister of his responsibilities as the CEO, he makes the point that work streams and Ms Mvulane should be reporting to him and taking instructions from him. It is clear from the letter that Mr Magwaza felt so strongly about this issue, that he went so far as to threaten declaring a dispute with the Minister over it. The issue was

²⁴ SASSA Bundle p 178 - 187

²⁵ Section 38 Inquiry Record, 23 January 2018, pp 34 - 36

²⁶ Black Sash Bundle, p 843

²⁷ Section 38 Inquiry Record, pp 39 -40

²⁸ Volume 1:First and Eighth Respondent's List of Documents Bundle, p 302

²⁹ SASSA Bundle 2, p 211

³⁰ Black Sash Bundle, pp 982 - 983

therefore real. The Minister admitted receiving the letter. However, when questioned about it she refused to answer questions despite my intervention.³¹ I am also of the view that, even on probabilities, the work streams reported directly to the Minister, through Ms Mvulane:

11.2.1 The letter of 9 July 2015 specifically so directed; it is highly unlikely such an express instruction by the Minister would be disobeyed, particularly because

11.2.2 no action was taken by the Minister against Ms Mvulane for keeping her in the dark.

11.2.3 Given the importance of the matter, and the publicity it attracted, the Minister would have simply allowed herself to remain uninformed. She must have known what was happening.

12. For all the above reasons my answer to the question is in the affirmative.

Question 2(b)(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

13. The question contemplates written reports. No one such report was produced by any party. This does not, however, detract from the answer to the previous question, namely, that work streams reported directly to the Minister at least through Ms Mvulane. Mr Semenya compiled a list of documents which he says were the work stream reports submitted to SASSA. Unfortunately, these documents were not submitted and thus canvassed, during oral evidence. In any case, the Court is not asking for work stream

³¹ Section 38 Inquiry Record, 23 January 2018, pp 66- 69

reports to SASSA, but for work streams reports "to the first respondent" (own emphasis); as I say, none of the parties produced any.

14 Question 2(b)(iv): The reason why the Minister did not disclose to this Court that these individuals were appointed at her instance and that they had to report directly to her

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 joined as a party in her personal capacity and 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 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, inevitable, 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 have justifiably leave out the issue of the appointment of the 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 reported to her directly. Add to that the fact that Ms Mvulane reported to her regularly about their 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 sheer 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 so to the Court. I disagree. I have been asked “*to enquire and report on*” (see paragraph 1 of the Order) 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 to 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."*

Dated this 4th day of April 2018



B M Ngoepe, J, Referee.

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