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DISPUTE RESOLUTION ALERT

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CONSTITUTIONAL COURT CONFIRMS THAT POLITICAL HEADS OF STATE DEPARTMENTS CAN BE HELD PERSONALLY LIABLE FOR COSTS IN LITIGATION

Fraud, corruption and mismanagement frequently make the news headlines. The difficulties faced by many public and private institutions that have failed to stick to the rules seem unlikely to abate any time soon as the various commissions of inquiry set up to hold individuals and institutions accountable go on.

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One of the consequences of these searches for truth is the increase in litigation, but who is to pay?

When officials act recklessly or dishonestly, their conduct may attract personal costs orders. They cannot hide behind their position to protect them. The law has developed mechanisms to combat errant officials. In company law parlance, we understand this as "piercing the corporate veil", a concept that is finding greater application in the courts' assessment of public officials.

Until now, it has not been common for senior political officials to be held personally liable for their actions while in office. However, in the recent round of social grants litigation in - *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* [2018] ZACC 36 (27 September 2018) - the Constitutional Court ordered former Minister of Social Development, Bathabile Dlamini, to pay a portion of the cost of the litigation in her personal capacity.

In this circumstance the Court held that Ms Dlamini's conduct was "reckless and grossly negligent" which served as a "sufficient reason for a personal costs order". Moreover, it would serve as a deterrent against future conduct and "account for her degree of culpability in misleading the Court".

The Court went on:

It is difficult to determine the proper extent of the personal costs order. The determination is a discretionary one. We have to consider Minister Dlamini's personal responsibility, arising from the parallel process 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. It is a novel matter to hold a cabinet minister personally responsible for the costs of litigation. In the circumstances it will be appropriate to order that she must pay 20% of the taxed costs.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



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A personal costs order "might have a sobering effect on truant office bearers", who think they will not face the consequences of their actions.



The Constitutional Court's order against the political head of a government department is the first of its kind in South Africa's courts and breaks new ground in the tools available to ensure that senior public officials act diligently, honestly and uphold the values of the Constitution.

However, a court censure in this regard is not entirely novel: In *Gauteng Gambling Board and Another v MEG for Economic Development, Gauteng*, the Supreme Court of Appeal made clear that courts would consider holding public officials personally liable for costs where they "acted in flagrant disregard of constitutional norms", in a "high-handed manner", and "played the victim" in litigation. Importantly, the Supreme Court of Appeal was aware that in such situations not granting a personal costs order would ultimately expose taxpayers to foot the bill for the actions of wayward officials.

Accordingly, the Supreme Court of Appeal's view was that a personal costs order "might have a sobering effect on truant office bearers", who think they will not face the consequences of their actions.

This will certainly be the case for former President Zuma as he seeks to overcome his pending appeal (in his personal capacity) in which he is challenging a Pretoria High Court decision ordering him to pay, in his personal capacity, 100% of the costs of his application (while President of the Republic) to judicially review the remedial action in the Public Protector's State Capture Report, released on 2 November 2016.

Lionel Egypt and Yana van Leeve (with the assistance of Zamuxolo Madungandaba)

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

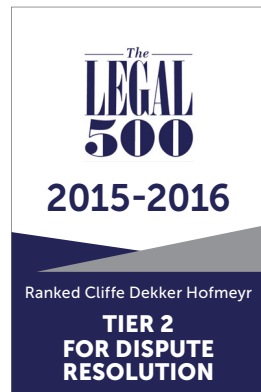



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