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DISPUTE RESOLUTION ALERT

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Judicial overreach: Limitations to the imposition of personal cost orders against state officials

Personal cost orders against public officials act as a significant mechanism in combating corruption, malfeasance and ineptitude in government. Hitting the pockets of truant office bearers may have a sobering effect and mitigate against untoward behaviour by the powers that be.

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Judicial overreach: Limitations to the imposition of personal cost orders against state officials

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This alert follows two previous articles addressing personal cost orders, titled [Courts order errant state officials to pay legal costs out of their own pockets](#), published 27 July 2016 and [Payment of legal costs: State officials to feel the pinch](#) published 18 April 2018.

In the recent judgment in *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* [2020] ZACC 10, the Constitutional Court was called upon to determine, amongst other things, the appropriateness of the personal cost orders against the Public Protector.

This case emanates from a decision handed down on 29 July 2019, in which the North Gauteng High Court, Pretoria granted an interim interdict suspending the operation of the remedial action contained in two reports issued by the Public Protector pending the final determination of the review of both reports. The first report was issued on 24 May 2019 and dealt with allegations of maladministration and impropriety concerning the approval of Mr Pillay's retirement from the South African Revenue Service (SARS). The second report was issued on 5 July 2019 and dealt

with, amongst other things, the alleged establishment of an intelligence unit by SARS in violation of the South African intelligence prescripts.

The High Court awarded costs against the Office of the Public Protector, the Economic Freedom Fighters (EFF) and the Public Protector in her personal capacity. Aggrieved by this decision, the EFF and the Public Protector appealed to the Constitutional Court against the whole judgment and order of the court *a quo*, albeit separately.

The EFF argued that the High Court erred in making a costs order against it as the court should have held that it was protected by the *Biowatch* principle. Briefly, the purpose of the *Biowatch* principle is to protect unsuccessful litigants from the obligation of paying costs to the State in genuine constitutional litigation. The court conceded to the EFF's submissions, holding that the EFF should have received the benefit of the *Biowatch* principle and, as a result of this finding, the court set aside the costs order.

In tackling the cost order imposed against the Public Protector in her personal capacity, the Constitutional Court found that the High Court did not furnish any reasons to justify a personal costs order against the Public Protector. In fact, according to the Constitutional Court, the High Court disavowed any reliance on the adverse allegations made in the founding papers, which could have possibly warranted a personal costs order. The Constitutional Court reemphasized

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The Constitutional Court concluded that personal cost orders cannot be imposed in the abstract and without support from the facts at hand. To do so, a court would be derelict in its duties.

that personal cost orders against public officials were primarily aimed at vindicating the Constitution by ensuring that officials who flout the Constitution are held accountable. It further stated that personal cost orders against public officials are punitive in nature and must be imposed when a court is satisfied that the conduct of the incumbent in concern, in the execution of their duties, or their conduct during the course of the litigation, warrants the ordering of a personal cost orders.

Thus, the Constitutional Court concluded that personal cost orders cannot be imposed in the abstract and without support from the facts at hand. To do so, a court would be derelict in its duties. Furthermore, not only should such an order be supported by the facts, the court ought to furnish reasons for imposing the personal cost order failing, which the court would still be derelict in its duties.

The court reaffirmed the long-established common law test of bad faith or gross negligence regarding personal costs

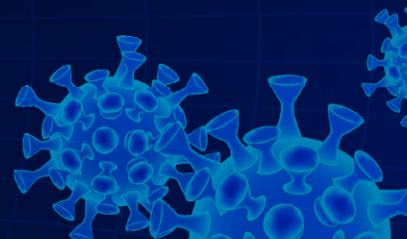
orders established in *Black Sash Trust v Minister of Social Development* (Freedom Under Law intervening) [2017] ZACC 20. In applying this common law test, the court set aside the personal costs order against the Public Protector as the facts did not support its imposition because the High Court shied away from any reliance on the adverse averments made in the founding papers. This avoidance was evident in the fact that the High Court imposed the personal costs order without giving reasons for its appropriateness.

While this judgment serves as a reminder to public officials that they may be ordered to pay costs out of their own pockets, such orders may only be granted in terms of the common law test of bad faith or gross negligence. Before imposing a personal cost order, our courts must be satisfied that the conduct of a particular incumbent, in the execution of their duties, or their conduct during the course of the litigation, warrants such imposition.

Mongezi Mphahla and Mayson Petla

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