



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: A48/2023

In the matter between:

AFRIFORUM NPC

Appellant

and

NGWATHE LOCAL MUNICIPALITY

First Respondent

**ACTING MUNICIPAL MANAGER,
NGWATHE LOCAL MUNICIPALITY**

Second Respondent

FEZILE DABI DISTRICT MUNICIPALITY

Third Respondent

MINISTER OF WATER AND SANITATION

Fourth Respondent

CORAM: MBHELE, AJP *et* REINDERS, ADJP *et* CHESIWE, J

HEARD ON: 13 OCTOBER 2023

DELIVERED ON: 28 MARCH 2024

JUDGMENT BY: CHESIWE, J

- [1] The appellant is a non-profit company and describes itself in the papers before us as a civil-rights organisation with its main purpose to promote and advocate for democracy and constitutional rights with an emphasis on civil and socio-economic rights. It approached a single judge of this Division on 30 September 2022 for relief on an urgent basis wherein it attempted to assert certain constitutional relief against the first and second respondents and more in particular the Ngwathe Local Municipality (the first respondent).
- [2] The essence of the relief so sought, boiled down thereto that Respondents be ordered to comply with its constitutional duty in supplying residents of the Ngwathe Municipality¹ (including also those of the third respondent - Fezile Dabi Municipality²) with clean and safe drinking water, as well as the right of access to sufficient water.³
- [3] The court hearing the matter removed the application from the roll finding that there was no urgency in the matter and ordered the appellant to pay the wasted costs.
- [4] The Appellant lodged an application for leave to appeal the said order. The same judge on 10 March 2023 granted leave to appeal to the full bench of the Free State High Court only in respect of the cost order. The appeal was granted in terms of section 17(1)(a)(i), dealing with reasonable prospects of success, as well as section 17(1)(a)(ii) of the Superior Courts Act 19 of 2013 (the Superior Courts Act). In passing judgment on the application for leave to appeal, the learned judge, with reference to **Biowatch Trust v Registrar Genetic Resources and Others**⁴ (Biowatch) and **Lawyers for Human Rights v Minister in the Presidency**⁵ noted that the court grants leave as it “cannot be ignorant of the sentiments” expressed in Biowatch which ‘is to the effect that “a litigant who litigates *bona fide* to protect constitutional rights, ought not to be

¹ Towns resorting under Ngwathe include Parys, Vredefort, Heilbron, Koppies and Edenville.

² It includes, amongst others, Kroonstad, Sasolburg, Cornelia and Deneysville.

³ See section 24 (a) and 27 (1) of the Constitution of the Republic of South Africa 1996 – the Constitution.

⁴ 2009 (6) SA 232 (CC).

⁵ 2017 (1) SA 645 (CC).

ordered to pay costs even in the event of not being successful" (hereafter the Biowatch-principle).

[5] The Appellant's main contention in this appeal is that the court *a quo* had erred in respect of granting a cost order against it, as the Appellant approached the court on a matter that involves a fundamental human rights issue (a lack of clean water) and had failed to apply the Biowatch-principle. The Appellant thus seeks the following relief:

1. "That the appeal be upheld with costs including the costs of two counsel and such costs to include the costs of the application for leave to appeal which includes costs of two counsel employed by the Appellant/Applicant.
2. That the order of the Court *a quo* be varied to the effect that each party is to pay their own wasted cost following the removal of the matter from the roll."

The Respondents on the other hand, requested us to dismiss the appeal with costs.

[6] Before us it was not contended that the application itself did not seek to protect the constitutional rights of the residents of the mentioned municipalities. The orders sought in the notice of motion seek declaratory relief that first and second respondents' conduct in failing to provide safe and adequate potable water to its residents is unlawful, inconsistent with the Constitution and invalid. It further sought a declarator that third and fourth respondent's conduct in failing to oversee, monitor, support and strengthen first and second respondent's responsibility to provide safe and adequate potable water is inconsistent with the Constitution. Various ancillary orders are also sought, however it suffices to say that the relief sought is based on, amongst others, s27(1)(b) of the Constitution which guarantees access to clean and safe water.

[7] In removing the application from the roll, the court *a quo* found that, although mindful of the fact that the then applicant acted on behalf of the community of Parys, it was not entitled to approach court on an urgent basis wherefore the mentioned cost order followed.

[8] In *Biowatch supra* the Constitutional Court found that the trial court misdirected itself where it made an adverse cost order against the appellant in the absence of evidence that appellant did not act in good faith and/or that the litigation was frivolous, vexatious or that it had conducted itself in some manner warranting censure or disapproval of court. At paragraph [23] of the judgment it was held:

“...it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the constitution – if there should be a genuine, non-frivolous challenge to the constitutionality of a law or state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the cost consequences of failure.”⁶

[9] In **Masinga & Others v Chief of the SA National Defence Force and others**⁷ the Supreme Court set aside a cost order by the full bench and it was held that as the appellants sought to enforce fundamental rights under the Constitution, the court erred by not applying the *Biowatch* principle.

[10] The Constitutional Court in **Affordable Medicines Trust and Others v Minister of Health and Another**,⁸ held as follows:

“The award of costs is a matter which is within the discretion of the Court considering the issue of costs... . One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to

⁶ See also: **South African Breweries v Minister of COGTA** [2021] 4 All SA 189 (WCC) at paras [13]- [17]

⁷ (2022) 43 ILJ 805 (SCA) at para [51].

⁸ (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005).

pay cost. The rationale for this rule is that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights.”

Moreover, the Court overturned the order on costs made by the High Court and ordered that each party should bear its own costs.

- [11] Counsel for the first and second respondents argued that the orders of the court a quo are correct and unassailable. It was submitted that the procedure set out in Uniform Court Rule 6(12) is not simply there for the taking and that the Appellant did not set forth facts and reasons rendering the matter urgent. We were referred to Lawyers for Human Rights supra in arguing that the applicant's reliance on urgency was manifestly inappropriate.
- [12] In Lawyers for Human Rights supra the Constitutional Court reiterated the Biowatch principle. The court stated that the threat of hefty cost orders may “chill constitutional assertiveness” and may discourage parties from challenging constitutionally questionable practices.”⁹ The court reiterated that the principle does not mean “risk free constitutional litigation” and that costs might be ordered against an entity if the constitutional grounds of attack are frivolous or vexatious or where the litigant has acted with improper motives or there are other circumstances that makes it in the interest of justice to so order costs.¹⁰ However, the Constitutional Court concluded that the high court correctly found that the way the proceedings had been managed and the extreme belatedness by targeting an operation that was long gone and done, as the basis for deviating from the Biowatch principle.
- [13] The respondents did not and could not argue that the appellants did not attempt to raise a constitutional issue in favour of the residents of the Ngwathe Municipality. They did not and could not convince us that the appellant was mala fide, frivolous or vexatious in bringing the application before the trial court.

⁹ At para [16].

¹⁰ At para [18].

To the contrary, the matter was instituted on an urgent basis for the mere fact that the issue of non-supply of clean water was on-going.

- [14] It is trite that an appeal court ought not to interfere with the judicial discretion of the Court *a quo*. In *Ex Parte Neethling and Others*,¹¹ the court said:

"Can it be said in the present case that the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons."

- [15] Accepting that this discretion is not to be interfered with, however, the Court *a quo* in my view did not pay sufficient account to the issue that the matter was before it on an urgent basis, nor did the Court *a quo* consider the **Biowatch** principle and apply it to the facts. As the matter involves a constitutional right, bearing in mind that clean water is a basic need for all, it ought in my respectful view have been done so.

- [16] It would be an injustice if litigants have to fear to approach courts with matters relating to constitutional litigation, that if unsuccessful, they will be saddled with costs orders, specifically if the government is the respondent in such matters. Litigants should not be discouraged from seeking to vindicate their constitutional rights against government institutions.¹²

- [17] I therefore come to the conclusion that the issue that was raised was to be considered in respect of the cost order from the point of view set out in *Biowatch*, namely where the appellant was unsuccessful each party should bear its own costs. It was on this very basis that the trial court granted leave

¹¹ 1951 (4) SA 331 (A) at 335E (See also *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para [26].

¹² See *Biowatch* at para [12]- public interest litigation could be jeopardised by severe financial penalty costs orders imposed on organisations bringing the suit.

and the order for the reasons aforesaid, should be rectified to conform with this constitutional principle.

[18] In respect of the appropriate cost order to be made in this appeal, I am mindful thereof that one of the purposes of a costs award to a successful party is to indemnify it for the expenses to which it had been put through having been unjustly compelled to either initiate or to defend litigation.¹³ A cost order is not intended to be compensation for a risk to which one has been exposed but a refund of expenses actually incurred.

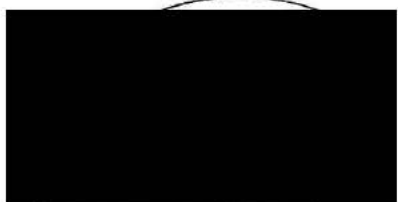
[19] Based on the above, I am inclined to grant an order that each party should pay their own costs. Even though the Appellant is the successful party, the Respondent cannot be faulted for having opposed the application.

[20] The following orders are issued:

20.1 The appeal succeeds and paragraph [2] of the Court Order granted on 30 September 2022 is set aside and replaced with the following:

“2. Each party to pay their own costs.”

20.2 Each party to pay their own costs in the appeal.



CHESIWE, J

¹³ See Payen Components South Africa Ltd v Bovic Gaskets CC and others (448/93) [1995] ZASCA 57;1995 (4) SA 441 (AD); (AD);[1995] 2 All SA 600 (A) (25 May 1995).

I concur


PP MBHELE, AJP

I concur


REINDERS, ADJP

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