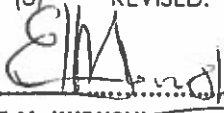


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 12689/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
E.M. KUBUSHI	13/8/2019 DATE

In the matter between:

SALVINAH TENIA MANTSINA

APPLICANT

and

THE DIRECTOR-GENERAL: DEPARTMENT OF LABOUR

FIRST RESPONDENT

THE GOVERNMENT EMPLOYEES' PENSION FUND

SECOND RESPONDENT

JUDGMENT

KUBUSHI J

[1] This application was set down on the opposed motion roll for the determination of costs occasioned by the withdrawal of the application instituted by the applicant in the urgent court.

[2] The applicant was injured on duty during the time when she was employed by the Department of Health and Welfare as a nurse. The injury was occasioned by a motor vehicle collision when the ambulance in which she was tending to patients in transit was involved in a collision. She, as a result suffered serious injuries which resulted in her being declared permanently disabled and, therefore, medically unfit to continue with her nursing duties.

[3] The applicant subsequently applied for compensation at the Workmen's Compensation Fund in terms of section 27 of the Workmen's Compensation Act 30 of 1941 ("WCA") (now the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA")). Section 100 (2) of COIDA provides for transitional issues between WCA and COIDA as such all actions done under a provision of COIDA are deemed to have been done under WCA.

[4] An award for compensation was granted to the applicant by the Compensation Commissioner on the basis of a 37% permanent disablement. In terms of section 39 (1) (d) of WCA the applicant was awarded a monthly pension payable during her lifetime. The plaintiff's grievance is that since the award was made on 5 September 2008 she has not been able to access the funds nor has she received any payment in terms thereof.

[5] Initially the applicant wanted to contest the findings of the Compensation Commissioner on the basis of 37% permanent disablement which she was not

satisfied with, but because of her financial position and need for medical care she decided to go along with the Compensation Commissioner's findings.

[6] However, despite numerous attempts by the applicant to claim the pension, even assisted by her daughter at times, she was unsuccessful. When all attempts to access the funds yielded no benefit, the applicant opted for the legal route. The applicant approached an attorney who wrote letters to the first and second respondents, respectively. Such letters went unanswered and this prompted the launch of the current proceedings.

[7] The first letter sent on 7 February 2019 set out the factual background of this matter and a request for urgent payment of the award to the applicant. On 12 February 2019, and having received no feedback on the letter of 7 February 2019 from either the first or second respondent, the applicant's attorney sent a further letter requesting urgent feedback and in this letter informing that if a response is not received by no later than 15 February 2019, the applicant would be left with no option than to approach the urgent court for relief.

[8] Despite these two requests, the first and second respondents failed, respectively, to communicate with the applicant's attorneys. The applicant then, on 25 February 2019, instituted an urgent application for payment of all the monies held by the second respondent under the compensation award. The urgent application was served on the first respondent on 25 February 2019. The first respondent on receipt of the application filed its notice of intention to oppose the application. After receipt of the notice of intention to oppose, the applicant's attorney sent another letter to the first respondent requesting that they enter into settlement negotiations in order to avoid costs of litigation.

[9] The first respondent, instead of responding to the applicant's letters, filed its answering affidavit which was three days out of time. A response to the letters was, however, received from the second respondent on 8 March 2019 informing the applicant that the money sought by the applicant was in fact being administered by the Government Pensions Administration's Agency, which is an entity separate from the first respondent. Based on the response from the second respondent, the applicant saw it fit to withdraw the application. On 12 March 2019, when the parties appeared in court, the applicant removed the application from the roll and the issue of costs regarding the first respondent was reserved. The parties are now before court for the determination of the reserved costs.

[10] The crux is whether the first respondent is entitled to costs under the circumstances of this case.

[11] The argument by the applicant is that the respondent is not entitled to the costs of suit because: firstly, her case contains a constitutional dimension in that she was requesting money she was entitled to from the state. In this regard, the applicant relied on the decision in *Biowatch Trust v Registrar, Genetic Resources and Others*¹ wherein the Constitutional Court held that the constitutional dimension of a case needs also to be taken into account in the consideration of an award for costs. Secondly, the conduct of the respondents (particularly as government institutions) in failing to timeously reply to her correspondence, led to her instituting action. She had

¹ 2009 (6) SA 232 (CC).

to withdraw the action only after the second respondent responded to her query and informing her about the correct institution to approach.

[12] The applicant, thus, suggests that because of the constitutional dimension of the case she should not be burdened with a cost order and that each party must be ordered to pay own costs.

[13] The first respondent concedes that the applicant's case has a constitutional dimension but contends that in this instance the difference is that the award the applicant is looking for has already been granted. The applicant instituted action against the wrong institution since there is no relationship between the first and second respondents. As regards the conduct of the first respondent in failing to respond to the applicant's correspondence, it is the first respondent's argument that the applicant did not give it enough time within which to respond. According to the first respondent, correspondence in the Department of Labour, because of its size, takes a long time to be processed. The applicant was supposed to have given the first respondent adequate time within which to respond to the correspondence instead of rushing to court.

[14] The general rule is that the party withdrawing an action is liable, as an unsuccessful litigant, to pay the costs of the proceedings. The court, however, retains the discretion to deprive the successful party of her/his costs. In the exercise of its discretion the court should have due regard to the question whether, objectively viewed, the applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because of facts emerging for the first time, or because the relief was no longer necessary or obtainable. In an

appropriate case the court should also have due regard to the constitutional nature of the litigation and the public interest.²

[15] It has become trite that in litigation between the government and a private party seeking to assert a constitutional right, ordinarily, if the government loses it should pay the costs of the other side, and if the government wins, each party should bear its own costs.

[16] It has been held that it is the State that bears the primary responsibility for ensuring that both the law and the state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, and then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and the State conduct are constitutional is placed at the correct door.³

[17] I am of the view that this is an appropriate case where the principle in *Biowatch* should apply. It is not in dispute that the present case has a constitutional dimension and that in such cases the applicant as a non-state litigant should be shielded from the cost consequences of having lost the case. I do not think that the first respondent's contention that this case should not fall under the *Biowatch* principle only because the award had already been granted, has substance. From the evidence of the applicant it is clear that she had no knowledge of the correct organisation to approach hence the letters written to the first and second respondent.

² Erasmus: Superior Court Practice 2ed Vol 2 pD1-D551 – 552.

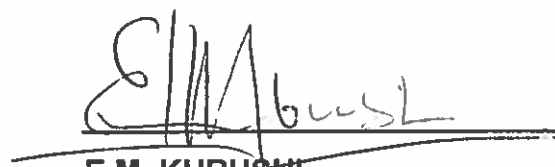
³ *Biowatch*, above, at page 246 para 23.

If the response to those letters came in time the applicant would have approached the correct organisation.

[18] Besides, the first respondent's argument in opposition to the application of the *Biowatch* principle in this instance, does not, in my view, do away with the fact that the applicant's case had a constitutional dimension. *Biowatch*, in my opinion, was meant precisely for cases like this where the non-state litigant would lose her case, for whatever reason. The principle finds application as long as the matter at issue had a constitutional dimension.

[19] I hold, therefore, that this case falls squarely within the parameters of the *Biowatch* principle and that the applicant, as the losing party, must be shielded from cost consequences of losing the case. The appropriate cost order in the circumstances is that each party should bear its own costs.

[20] I, as result, make an order that each party pay own costs.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant:

Adv. T. J. Jooste

Instructed by:

Albert Hibbert Attorneys

Counsel for First Respondent:

Adv. C. B. Kubeka – Manyelo

Instructed by:

State Attorneys' Office, Pretoria

Date heard:

14 May 2019

Date of judgment:

13 August 2019