



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: 2194/2017

In the matter between:

CASSIM MOHAMMED MOOLA

First Applicant

THE CONCERNED CITIZENS GROUP

Second Applicant

DEVADAS PAUL DAVID

Third Applicant

And

KWA-DUKUZA MUNICIPALITY

First Respondent

DOUBLE RING TRADING 7 (PTY) LTD

Second Respondent

JUDGMENT

CHETTY J:

[1] The applicants launched an urgent application for an interim interdict in the following terms:

- a. That pending the determination of a review application to be launched by the applicants concerning the decision of the first respondent, alternatively, the decision of the first respondent's Tender Adjudication Committee taken on 17 January 2017, to sell the immovable property described as Portion 10 000, Erf 478 and Erf 264 Stanger, in extent 20.9 hectares, 2.298

hectares and 4047 square meters respectively (which have been or are to be consolidated as Erf 12666 Stanger) (“the property”) to the second respondent, the second respondent is interdicted and restrained from:

- a. taking occupation or possession of the property;
- b. commencing or continuing with excavations or any form of construction on the property.
- b. The first respondent is interdicted and restrained from authorising, to the extent that it may be required to do so:
 - i. the occupation or possession of the property by the second respondent; and
 - ii. commencement or continuation of construction work and all excavations on the property by the second respondent.
- c. That, within 15 days of the granting of this order, the applicants are to institute the review application aforesaid, failing which the interdict against the first and second respondents will lapse and be of no force and effect;
- d. That the first and second respondents, jointly and severally, the one paying the other to be absolved, are to pay the applicants costs.
- e. That the provisions of prayers 1(a) and 1(b) above operate as interim relief pending the final determination of this application.’

[2] The application for a temporary interdict was opposed by the first respondent (‘the municipality’) and the developer (‘DRT’), the second respondent. An undertaking was sought and obtained from DRT that whilst the parties undertook to exchange affidavits, it would maintain the status quo and no work or construction related activities would take place on the property pending the finalisation of the urgent application.

[3] It is trite that in order to secure an interim interdict the following must be established (1) A prima facie right on the part of the applicant; (2) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; (3) A balance of convenience in favour of granting the interim relief; and (4) The absence of any other satisfactory remedy available to the applicant. See *Johannesburg Municipal Pension Fund & others v City of Johannesburg & others*

2005 (6) SA 273 (W) para 8. In *Joubert NO & others v Maranda Mining Company (Pty) Ltd & others* [2010] 2 All SA 67 (GNP) para 26 it was held that:

'The applicants are obliged to show that the right which is the subject-matter of the main application which they seek to protect by means of interim relief is clear, or if not clear, is *prima facie* established, though open to some doubt. If the right is only *prima facie* established then it must be shown that there is a well-grounded apprehension of irreparable harm to the applicants if the interim relief is not granted and they ultimately succeed in establishing their right; that the balance of convenience favours the granting of interim relief; and that the applicants have no other satisfactory remedy.'

[4] When the matter came before me, the applicants submitted that in light of the Court being in possession of the affidavits of all the parties, it was more prudent that the Court consider the granting of a final order as opposed to the granting of an interim relief. See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) where the Court said:

'[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

[5] This approach, in my view, accorded with the practicalities of the circumstances in this particular case as work on the development site had come to a halt or stalled, and would remain in that state if an order were granted in favour of the applicants, until the finalisation of the review application which the applicants intend to bring. In contrast to the requirements for interim relief, when seeking a final order the applicants would have to show a clear right on their part; an injury actually committed or reasonably apprehended and that there is no other satisfactory remedy available to the applicant. The requisites for the right to claim for a final interdict were expressed in *Setlogelo v Setlegelo* 1914 AD 221 at 227.

[6] At the outset it is worth remembering, particularly for reasons that will become apparent from what follows, that in motion proceedings the affidavits serve both as the pleadings and the evidence relevant to the issues between the parties, and a

party can only be expected to deal with averments raised by the other side and not with allegations possibly anticipated but which are not made. See *Minister of Law and Order & another v Dempsey* 1988 (3) SA 19 (A) at 37G-J. It is trite that an applicant in motion proceedings must make out his or her case and produce all he desires to use in support of it in his affidavit filed with the notice of motion and is not permitted to supplement it in his replying affidavit and still less to make out a new case in his replying affidavit. See *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA) at 200C-E

[7] The first applicant is a member of the second applicant, a voluntary association whose members are ratepayers within the area of the KwaDukuza Municipality. The third applicant is a respected member of the legal profession residing and practicing in the area of KwaDukuza. He is also a member of the second applicant. The founding affidavits do not say more of the applicants' locus standi; albeit an oblique reference to the fact that as residents on the municipality, they have a right to ensure that municipal property is not unlawfully disposed of to third parties. The Constitution of the second applicant (the Concerned Citizens Group – 'CCG') provides that its aims and objectives include taking up '*in any way, civic issues that relate to the KwaDukuza Municipality, the Illembe District Municipality and any other organ of government. The term, "civic issue" shall be given as wide an interpretation as is reasonably possible*'. CCG further seeks to monitor the decisions, regulations and bylaws of the municipality and to undertake campaigns in support or opposition to such decisions. It is also entitled to sue in its own name.

[8] Initially, the respondents took issue with the locus standi of the applicants, with the first respondent contending that the applicants "are not the custodians of public rights" and that they have not established that they will suffer any harm if the development were to proceed. DRT suggested that the applicants were "business people and landlords, concerned about competition to their commercial interests". I considered the objections to the applicants' standing to be without merit. The opposition was withdrawn by counsel for the respondents at the time of the hearing, and I am of the view that the concession was properly made, particularly as courts should adopt a broad, rather than a narrow approach to standing, especially with

regard to matters where the relief sought is on behalf of others, and where citizens legitimately exercise their right to interrogate the actions of government or organs of state against the standard of lawfulness. The applicants, in my view, were not “own interest” litigants as was the case in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC). At para 34 Cameron J observed that:

‘...To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.’

[9] In 2013 the municipality, which is the owner of the immovable property being the subject matter of this application, published an invitation to tender inviting preferred developers to ‘partner the municipality’ in the development of the project site, known as the golf course area. The municipality was of the view that this would contribute to the regeneration of its central business district. The proposal was for the development to include new civic offices and a mixed use development which could include retail/office developments, residential/entertainment and recreation and/or service industry development, at the cost of the developer. The successful developer would be required to enter into an agreement with the municipality to implement the project in accordance with the tender specifications.

[10] The applicants considered the proposal to be a ‘public private partnership’ in the form of project financing – often referred to as BOT or ‘build, operate and transfer’ – where a private developer receives a concession from the public sector to finance, design, construct, and operate the facility. DRT was selected as a preferred bidder pursuant to a tender process. The applicants allege in their founding papers that the municipality sold the property unconditionally to DRT for R9 million, and not on the basis of the public private partnership which had been conveyed to the residence and ratepayers of KwaDukuza. The applicants go further to contend that the municipality did not follow a tender process and that the property was awarded to DRT on the basis of an unsolicited bid. Accordingly, the applicants contended that

the municipality acted outside of its powers in disposing of the property as it did, and in so doing, violated provisions of the Local Government: Municipal Finance Management Act 56 of 2003 (the 'MFMA'), the Public Finance Management Act No. 1 of 1999, the municipality's own Supply Chain Management policies, as well as its Immovable Property Disposal Policy.

[11] On 18 November 2016 the municipality placed a notice in a local newspaper advising of its intention to hold a public meeting on 17 January 2017 to consider the disposal of the development site to DRT. On 13 January 2017 the applicants attorney wrote to the municipality expressing concern at the disposal of public property other than by a process of an open tender, in accordance with legislation. The letter is particularly relevant as it records the basis of the applicants' opposition to the disposal of the property to DRT. The letter contends that the municipality's decision *"in principle, to entertain an unsolicited bid for the purchase of the properties ... Is ... wrongful and unlawful and falls outside the parameters of the prescribed legislation"*. It continues that the sale of the properties *"by process of unsolicited bid rather than open public tender would be wrong for unlawful and unconstitutional"*.

[12] In addition, the applicants attorney, in terms of s 32(1)(a) of the Constitution, requested access to information held by the municipality pertaining to the adjudication of the tender, which the third applicant requested on 9 May 2016 and reiterated the issue of the disposal of the property by means of an unsolicited bid. The municipality was given until 16 January 2017 to furnish the applicants with the information requested in the letter and in a previous access to information request filed in terms of the Promotion of Access to Information Act 2 of 2000 ('PAJA') by the third applicant. In the event of the municipality not complying with the request to supply information, the applicants' attorney gave notice to the respondents that an application would be brought to court to compel access to the required documents and to *"set aside the tender adjudication committee meeting, should such meeting proceed on 17 January 2017."*

[13] As matters turned out, the meeting took place on 17 January 2017, at which the first applicant and members of the second applicant were present. For reasons

that are not entirely irrelevant to this judgment, the first applicant and other members of the second applicant were removed from the meeting. It bears noting however that in the notice of motion to which the founding affidavit is attached, there is no prayer for relief pertaining to the request for information in terms of PAJA or to set aside the decision of the tender adjudication, taken on 17 January 2017.

[14] The applicants launched their urgent application in this Court on 28 February 2017 seeking the relief set out earlier. They contend that the municipality's decision to entertain DRT's 'purchase bid' was unlawful and fell outside its 'parameters', was unfair and an unlawful administrative action and offended against the principle of legality. The applicants expressly state that they intend to review the decision of the municipality to sell the property 'unconditionally' to DRT.

[15] The municipality accepts that it is common cause that it initiated a tender process for the re-development of the golf course area, and that the entire costs of the development would be at the cost of the developer, DRT. In particular, it pointed out that the specifications provided for the alienation of the development site to the preferred developer and that the site would be developed according to agreement for the provision of new civic offices, a residential component as well as retail, recreational and service industry uses. The municipality points out crucially in its heads of argument that the applicants do not take issue with the legitimacy of the tender process or that the tender was not properly awarded to DRT. The applicants' point of departure, as interpreted by the municipality, is that the tender was put out on the basis of a private public partnership, as defined in s 121 of the MFMA, where a private party acquires municipal property for its own commercial purposes and assumes the financial risks associated therewith. The municipality's position is that the applicants have misconstrued the entire process in that the tender specifications did not envisage a public private partnership, but rather it sought to dispose of municipal land on the basis that the successful tender would develop, at its own costs, new civic offices for the municipality. The municipality further submits that it disposed of the property in a fair, equitable and transparent process, consistent with the provisions of s 14(5) of the MFMA, and that the amount of R9 million paid by DRT was consistent with the market related value, which is confirmed by a valuer.

[16] A reading of the applicants founding affidavit would suggest that its case is essentially based on the contention that the municipality embarked on a tender process, in which DRT was eventually chosen as the preferred bidder. Despite the development being aligned to certain key deliverables, the municipality simply disposed of the property at a value below market related prices, and absolved the developer of its obligations to design and develop the site in accordance with the tender specifications. Despite the applicants making repeated reference to an 'unsolicited bid' on the part of DRT, I find much difficulty in appreciating how such a bid would form part of the overall development scheme where it is not denied that there was a public invitation to tender, which a number of bidders responded to. I fail to see on what basis it can be said that DRT acquired the property through an unsolicited bid, as this argument is mutually destructive of the acknowledgment by the applicants that the municipality did initiate a public tender process. Whether the final agreement reached between the municipality and DRT regarding the specifications as to what would be developed on site is consistent with the tender specifications, is entirely a different case from that which emerges from the founding affidavit.

[17] In light of the above, the municipality contends that the challenge mounted by the applicants is misconceived, and that they have failed to establish a prima facie right, let alone a clear right where they seek a final interdict on the papers. Similarly, the municipality contends that no likelihood of irreparable harm has been shown, nor does the balance of convenience tilt in their favour as the disposal of the site to DRT has not been shown to be below market value and accordingly there can be no prejudice suffered to the applicants or to the general body of ratepayers within the municipality.

[18] DRT similarly interpreted the applicants' founding affidavits to contend that it had been awarded a tender for a public private partnership, which transformed itself into an unsolicited bid. It is this unsolicited bid, so interpreted, which the applicants contend is legally impermissible and which must be reviewed and set aside. DRT, correctly in my view, contends that the decision to sell the property to it was taken in October 2015 in terms of a resolution passed by the municipality at a special council meeting. As such, DRT submits that any attempt to review and set aside the

decision to sell the property should have been launched within 180 days of the resolution being taken. As such, it does not follow that the applicants had to wait until 17 January 2017 to launch their application. According to the applicants, it was only on 17 January 2017 that a decision was taken unconditionally to sell the properties in question to DRT.

[19] Recognising that they would face difficulties in overcoming the delay in bringing their review application, the applicants in their replying affidavit change course and instead contend that the respondents have adopted an overly technical interpretation of the founding papers. The applicants contend that rather than fixating on the terms ‘public private partnership’ and ‘unsolicited bid’, the substance of their argument is that the sale agreement is deficient and falls to be reviewed and set aside. However, DRT submits that the concession made in the replying affidavit by the applicants that they *“may have been aware of the intention of the first respondent to sell the properties”* to DRT, is foundational to their failure, despite the assertion that they were never aware that such intention had been implemented.

[20] DRT, like the municipality, contends that the applicants have not made out a case that any of the decisions which they seek to challenge are reviewable. The sale of the properties, as discussed earlier, was adopted by resolution in October 2015. The time for reviewing that decision is well past 180 days, and there is no application for condonation before me. Moreover, the reliance on the aspects of a ‘public private partnership’ and of the sale taking the form of an odious ‘unsolicited bid’ appears to have been transcended by the terms of the sale agreement between the municipality and DRT. Indeed, when the matter came before me I enquired from Mr King, who appeared for the applicants, to clarify precisely what the applicants’ case was, as it appeared to morph from one permutation to another. In his submission, it was only on 17 January 2017 that the applicants became aware that the municipality had in fact disposed of the property to DRT without “strings attached”, and without the obligation to ensure that the “non-negotiables” in terms of the tender specifications had to be complied with. These non-negotiables included the building of a new civic centre for the municipality at the cost to the developer (DRT).

[21] When pressed further for clarity on the applicants' case, counsel referred me to the provisions of the sale agreement concluded between DRT and the municipality concluded in February 2016 in support of the argument that the municipality had failed in its obligation to hold DRT to the non-negotiable aspects of the tender specifications. In this regard I was referred to clause 4 of the sale agreement which provides that the property is sold on the express understanding that it shall be used for a mixed-use development, with the object of ensuring job creation during and after the period of construction. The pertinent provisions relevant to the applicant's argument are the following:

'4.4 the purchaser shall, at its own costs, attend to the construction of a main civic office for the seller, which said office shall not exceed 15,000 (15,000 thousand) square metres and shall be built on the proposed portion 2 of the property as indicated in the diagram annexed hereto marked D according to the specifications agreed between the parties.

4.5 the parties shall make all efforts to reach an agreement within 360 days after the signature date, or such extended period as may be granted by the seller to the purchaser in writing, the parties conclude a written agreement in respect of the main civic office regarding the following :-

4.5.1 the specifications with which the main Civic Centre must comply;

4.5.2 the rental and or purchase price and/or build operate transfer, as the case may be, in respect of the main civic centre.

4.6 in the event that the parties failed to reach an agreement on the issues raised in clause 4.5 above, the purchaser must, at its own costs, procure that the proposed portion 2 of the property as subdivided and depicted in annexure D be transferred back to the seller within a reasonable period....'

[22] Counsel for the applicants submitted that the agreement merely records what will be done by the parties, but contains no details as to the specifics of the development, such as what the mixed-use component of the project would entail. More importantly, it was submitted that the agreement was defective as it omits to cater for the civic centre, and merely states that if the parties cannot agree, all that

DRT is required to do is to transfer that portion of the property intended to be used for the centre, back to the municipality. As stated earlier, in terms of the tender specifications, the development of a main civic office was reflected as a non-negotiable aspect of the tender proposal. On this basis, counsel submitted that the applicants maintain that the municipality's decision to entertain a purchase of the property by DRT without agreement being reached on the provisions of the new civic offices, results in the sale of the properties on an unconditional basis, and at variance to the basis on which it was originally put up for sale.

[23] In my view, the case which counsel attempted to advance before me was fundamentally different from that which is set out in the founding affidavit. As the respondents have contended, the founding papers and to a lesser extent the applicants replying affidavits are replete with reference to DRT engaging in a public private partnership, and later that it purchased the property in question as an unsolicited bid. In an attempt to counter the criticism of the applicants changing their case, counsel submitted that the applicants' case all along has been that the sale agreement did not accord with the tender specifications set out by the municipality. I am not persuaded by this argument nor of counsel's contention that the respondents have chosen to selectively concentrate on certain terminology to favour their argument.

[24] It was further submitted that the applicants have satisfied the test for a final interdict, and that they are entitled to play a supervisory role over the municipality's functions, in particular where the municipality steps outside of its mandated role to act in the best interests of its ratepayers. I should point out, as an aside, that the municipality also has an obligation to those who are not ratepayers, especially those living in informal settlements, who may not contribute financially to the municipality's coffers. I am however in general agreement with the sentiment expressed by the applicants' counsel that citizens cannot be expected to sit back and allow organs of state or local government to flout the law particularly in respect of the disposition of public land. However the courts intervention must be premised on a factual basis, made out in the founding affidavits of the parties seeking the assistance of the court.

[25] The respondents contend that the applicants change of their case, departing from their arguments of a private public partnership and an unsolicited bid, to focusing on the terms of the sale agreement between the municipality and DRT, cannot be permitted and constitutes trial by ambush. In *Molusi & others v Voges NO & others* 2016 (3) SA 370 (CC), it was emphasised that a fundamental rule of civil proceedings is that the parties must be apprised of the case which they are to meet and a party must formulate its case so as to define the disputes for the other parties and for the court. The Court in *Molusi* held:

'[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker [Naidoo and Another v Sunker and Others]* [2011] ZASCA 216]:

"If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on."

[28] The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (*mero motu*) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert [Minister of Safety and Security v Slabbert]* [2010] 2 All SA 474 (SCA)] the Supreme Court of Appeal held:

"A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'" (Footnotes omitted)

[26] I am in agreement with Mr *Stokes* and Mr *Goddard*, who appeared for the first and second respondents respectively, that the interdict which has been sought by the applicants is based on a decision of the municipality, alternatively the Tender Adjudication Committee, taken on 17 January 2017 to sell the property in question to

DRT. The resolution is silent as regards the issues of a public-private partnership or an unsolicited bid. It is also evident from the papers before me that no review has been sought in terms of the sale agreement. As set out above, the applicants appear to take no issue with the tender process and the award of the tender to DRT. Moreover, if one has regard to the provisions of clause 4.5 of the sale agreement, it is still open to the municipality and DRT to reach agreement on the issue of the civic centre and other aspects of the tender specifications. It cannot therefore be contended that the position has been reached where all that has been achieved by the disposal of the property is the development of yet another shopping mall.

[27] The problem which confronts the applicants is that they approached the court contending that the municipality invited tenders to develop certain properties and initiated a tender process. The process took place (one must assume) in accordance with the standards of openness and transparency as no challenge has been mounted on that front. The process resulted in DRT being the successful bidder. For reasons which the applicants do not set out, the municipality abandoned the tender and disposed of the property by means of an unsolicited bid. It seems to me that these arguments are mutually destructive of each other. What possible benefit could result by abandoning the tender process, part of which is the conclusion of the sale agreement between the parties where further details can be added to the scope of work to be undertaken. DRT was already the successful bidder. What more advantage could it have secured? Even if I am wrong on that score, the case which the applicants attempted to make out at the hearing was substantially different from that which was foreshadowed in its affidavits. It is worth noting that even if the applicants contend not to have had prior sight of the sale agreement, after the municipality attached the agreement to its answering affidavit, the applicants still did not deal with the terms of the agreement in their replying affidavit. For those reasons alone, I am in agreement with the respondents' counsel that the application for a final interdict must fail. A further factor militating against the applicants is that they have known of the sale agreement since February 2016 and have only chosen to come to court a year later.

[28] As I have stated above, the applicants have not succeeded in establishing the requirements for a final interdict and the balance of convenience would rather favour

DRT which stands to lose substantial amounts with each passing week where construction has come to a halt.

[29] Counsel for the respondents submitted that the applicant should be dismissed with costs, including that of senior counsel. Mr *King* for the applicants conceded that if the applicants were unsuccessful, costs should follow the result. In light of the constitution of the CCG, which I referred to earlier, I enquired from Mr *King* whether this was not a matter to which the issue of costs should be guided by the Constitutional Court's decision in *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC). I raised the applicability of *Biowatch* as there was no evidence on my reading of the papers that any of the applicants had launched this application for self-interest. As the Constitution of the CCG clearly states, their intention is to hold the municipality and elected officials accountable for their actions. This is a vital ingredient if any democracy is to develop in accordance with the rule of law. Mr *King* submitted that *Biowatch* would not find application in this matter which he described as a "commercial matter" and because the relief sought would have no implications for those in the rest of the country. My interpretation of the principles distilled from *Biowatch* is at variance to those of counsel for the applicants. In *Biowatch*, the court held that the general rule is *not* to award costs against unsuccessful litigants when they are litigating against state parties and the matter is of genuine constitutional import. Although the applicants did not clearly set out in their papers what constitutional right they sought to assert, they did contend that they had a right to hold the municipality accountable to act in a fair and lawful manner where it sought to dispose of public land, in which the ratepayers have a vested interest.

[30] In *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (2) SA 621 (CC) the long standing practice was affirmed that costs are in the discretion of the court and, in general, the unsuccessful party must pay. The Court at para 3 held:

'The [High] Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs.

Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.’ (Footnotes omitted)

[31] In my view the application was misguided and veered from the position of DRT being the beneficiary of an unsolicited bid for public property to the last position of the applicants attack on the provisions of the sale agreement. As the respondents contended, the latter ground was not foreshadowed in the papers and was certainly not the basis on which their answering affidavits had been drafted. Moreover, the applicants knew of the sale of the property to DRT since February 2016 but only chose to bring an application, on an urgent basis, almost a year later. DRT contends that CCG was formed for the particular purpose of objecting to the development of the shopping mall and have sought every opportunity to delay the construction. My assessment of the applicants’ case is that they were not, as Cameron J in *Giant Concerts* pointed out at para 55, parties who were “merely toying with process, or seeking to thwart a propitious public development because it had been made available to someone else”. Their concerns were bona fide, albeit misguided. Whatever DRT may suggest as a motive attributable to the CCG, the third applicant has brought the application in the spirit of holding the local authority accountable for its actions. None of the respondents have attributed any ulterior motive to him.

[32] In *Lawyers for Human Rights v Minister in the Presidency & others* 2017 (1) SA 645 (CC) the Constitutional Court reflected further on the circumstances where costs could be awarded against an unsuccessful party advancing a constitutional or public interest argument. It held:

‘[17] In both *Biowatch* and *Helen Suzman Foundation* [*Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC)] this court emphasised that judicial officers should caution themselves against discouraging those trying to vindicate their constitutional rights by the risk of adverse costs orders if they lose on the merits. Particularly, those seeking to ventilate important constitutional principles should not be discouraged by the risk of having to

pay the costs of their state adversaries merely because the court holds adversely to them.

[18] This, of course, does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, *Biowatch* said, if the constitutional grounds of attack are frivolous or vexatious, or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the “character of the litigation and [the litigant's] conduct in pursuit of it”, even where the litigant seeks to assert constitutional rights.’ (Footnotes omitted)

[33] At the same time, the *Biowatch* principles should not be abused to avoid the consequences generally attendant upon litigation. I do not believe that an award of costs against the applicants would have a chilling effect on them, or other similarly situated civic associations from legitimately challenging governmental action or inaction. Such associations must heed the warning issued by the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency* supra para 26 where it was stated that “a worthy cause or worthy motive cannot immunise a litigant from a judicially considered, discretionarily imposed adverse costs order”.

[34] In the result, I make the following order:

‘The application is dismissed with costs, including costs of senior counsel, to be paid by the applicants jointly and severally, the one paying the other to be absolved.’



M R CHETTY

Appearances

For the Applicant:	J C King SC
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Date of hearing:	20 March 2017
Date of Judgment:	21 April 2017