

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 514/2011

In the matter between:-

MATJHABENG LOCAL MUNICIPALITY

Applicant

and

THE MUNICIPAL DEMARCATION BOARD

First Respondent

THE ELECTORAL COMMISSION

Second Respondent

**THE MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

Third Respondent

**THE MEC FOR COOPERATIVE
GOVERNANCE, TRADITIONAL AFFAIRS AND
HUMAN SETTLEMENT, FREE STATE PROVINCE**

Fourth Respondent

HEARD ON: 24 NOVEMBER 2011

DELIVERED ON: 1 DECEMBER 2011

JUDGMENT

H.M. MUSI, JP

[1] This matter came before me for determination of only the issue of costs. It is, however, necessary that before I set out and deal with the issues raised, I give a brief outline of the factual background.

[2] The applicant brought this application on the basis of urgency seeking primarily the orders as set out in prayers 3, 4 and 5 of the notice of motion, which are as follows:

- “3. That the First Respondent’s decisions to delimit the Applicant’s wards as published on 16 April 2010 and 31 August 2010 in the Free State Provincial Gazette number 11 and 74, respectively are hereby reviewed and set aside.
4. That the First Respondent’s delimitation of Applicant’s wards in 2006 and the wards compilation following the Local Government Elections in 2006 as published by the Electoral Commission be retained and maintained for the 2011 local government elections,
alternatively,
5. That voter registration in Applicant’s wards and voting districts affected by the First Respondent’s delimitation decisions is hereby suspended pending the finalisation of this application.”

[3] The matter first came before Moloi, J on 5 February 2011, but it was postponed without being heard to 11 February 2011 in order to afford the first and second respondents the opportunity to file their answering affidavits and timeframes

were laid down within which these, as well as the applicant's replying affidavit and the heads of argument, were to be filed. In due course the answering affidavits and replying affidavit were filed, although not necessarily punctually. On the eve of the date of hearing the applicant removed the matter from the roll by notice dated 10 February 2011, without prior consultation with the first and second respondents. It is apparent that this was necessitated by the respondents' objection to the non-joinder of the third and fourth respondents and the applicant seemingly removed the matter in order that it should first join these parties as they clearly had a direct and substantial interest in the matter. By notice dated 10 February 2011 the third and fourth respondents were joined. Thereafter the applicant reinstated the matter on the roll for hearing on 28 March 2011. However, by notice dated 25 March 2011, the applicant again removed the matter from the roll and reinstated it on the roll for hearing on 13 April 2011. The matter was again removed from the roll at the instance of the applicant and was subsequently enrolled for hearing on 14 November 2011. The applicant subsequently addressed a letter to the respondents and the registrar of this court announcing that

the hearing on 14 November 2011 would focus only on the issue of costs. The letter was brought to my attention and I then directed that the matter be removed from the roll as it was no longer to be heard by two judges as a Rule 53 review and further directed that it be put on the ordinary roll for opposed applications. The matter was accordingly enrolled for hearing on 24 November 2011.

- [4] At the outset of argument before me, Mr. Moerane, for the applicant, made it known that the applicant is withdrawing its application and confirmed that I should adjudicate only the issue of costs. Now under a discussion of Rule 41(1)(c) relating to the issue of costs upon withdrawal of an action, Erasmus: **Superior Court Practice** at B1-305 says the following:

“The general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. The court, however, retains a discretion to deprive the successful party of his costs.”

There can be no doubt that this is settled law. See the

authorities cited in footnote 4 and 5 of **Erasmus**.

[5] The applicant is in the same position as an unsuccessful litigant and the rule that ordinarily costs should follow the cause, would apply. However, the applicant's case is that this court should exercise its discretion in favour of depriving the respondents of their costs. Two grounds have been advanced for this submission. The first is that this is a constitutional matter and the Constitutional Court has laid down a rule to the effect that in such matters the unsuccessful litigant should normally not be mulcted with costs. The second is that the parties herein are organs of state and that section 41(3) of the Constitution applies. This section enjoins organs of state to co-operate and to make reasonable efforts to settle disputes among themselves before approaching the court for redress. The applicant contends that it took all reasonable steps to try to resolve the dispute with the first respondent, but that the latter failed to co-operate, thus forcing it to approach this court with the instant application. It was submitted that on that basis I should make no costs order.

[6] In argument Mr. Moerane raised a further point to the effect

that the parties herein all get their funds from the same source, National Treasury, and contended that whatever costs are awarded will ultimately have to be paid from the same source. Counsel submitted that it was undesirable that costs be awarded against any of the parties. In my view, this submission loses sight of the fact that once funds are allocated to state organs, each takes full responsibility for how the funds are utilised. If, for instance, the applicant were to be ordered to pay the costs of these proceedings, the payment will be debited against its allocation and this may amount to wasteful expenditure that would create a shortfall on its budget. The award would naturally negatively impact on its ability to carry out its statutory mandate of providing services to the public and it would also dent its governance profile. On the other hand, an award of costs may be a fitting sanction to be imposed on an organ of state broiled in litigation and which had failed to heed the provisions of section 41 of the Constitution. Such an award would also serve as a warning to other organs of state not to rush to court before exhausting ways of resolving the disputes with their counterparts.

[7] I now turn to deal with the constitutional principle. Mr.

Burger, for the first respondent, contended that the proceedings herein did not raise constitutional issues. He argued that the impugned decision did not have a bearing on the rights of the voters affected by the delimitation. All that the delimitation meant was that a voter who used to vote at a particular voting station, may now have to go and vote at a different polling station. The voters' right to vote would not be affected at all, so the argument went. Mr. Burger said that the delimitation was a purely procedural matter. Mr. Knoetze, for the second respondent, supported this line of reasoning.

- [8] I agree with counsel for the applicant that the delimitation of wards for purposes of municipal elections goes to the root of the democratic process of election by the residents of a municipal area of their public representatives. Equally there can be no doubt that a dispute between organs of state relating to the exercise of their statutory powers is a constitutional issue. I am also of the view that where an organ of state genuinely believes that the conduct of another organ of state has the potential to impinge on, or threatens, the constitutional rights of the citizens under its governance,

it would be entitled to challenge the conduct complained of and if necessary approach the court for redress.

[9] In my view, the applicant took every reasonable step to try to resolve the dispute between it and the first respondent before approaching the court. It is undisputed that after the first respondent had published the second delimitation on 16 April 2010, the applicant lodged an objection timeously on 30 April 2010. Thereafter numerous correspondences were addressed on behalf of the applicant enquiring about the first respondent's response to the objections. The first respondent simply did not respond and various requests for the reasons for the delimitation fell on deaf ears.

[10] The first respondent ultimately gave its reasons for the delimitation by letter dated 17 January 2011. In the meantime the second respondent had declared that voter registration would start on 4 – 5 February 2011. Quite clearly the matter became urgent and the applicant then proposed that a meeting be held to discuss the issue, but the first respondent again failed to respond, as it did in respect of an earlier request for a meeting. I therefore hold that in

these circumstances the applicant was justified in approaching the court on the basis of urgency to seek redress.

- [11] Counsel for the applicant referred me to authority dealing with application of the principle that an unsuccessful private litigant engaged in proceedings against an organ of state to vindicate his constitutional rights should not be settled with costs. Compare MOTSEPE v COMMISSIONER FOR INLAND REVENUE 1997 (2) SA 898 (CC) para [30]; AFFORDABLE MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH AND OTHERS 2006 (3) SA 247 (CC) para [138]; BIOWATCH TRUST v REGISTRAR, GENETIC RESOURCES, AND OTHERS 2009 (6) SA 232 (CC) at 246 A – 247 E. The cases reveal that the principle is not unqualified. The qualification was expressed as follows by Sachs, J in BIOWATCH at 247 A – B:

“If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.”

[12] Counsel for the second respondent contended that the qualification should apply in this case because, as he put it, the application was inappropriate. I disagree. In the first place, counsel did not say that the application is manifestly inappropriate, but only that it is inappropriate. Secondly, he did not contend that it was frivolous or vexatious. As counsel for the applicant pointed out, the applicant has alleged in its founding affidavit substantive non-compliance with *inter alia* the delimitation criteria set out in item 4 of schedule 1 to the Local Government: Municipal Structures Act, Act 117 of 1998. These include the need to avoid as far as possible the fragmentation of communities, the safety and security of voters and election material as well as identifiable ward boundaries. These are not frivolous or spurious matters.

[13] Now it is apparent that the principle is meant to apply primarily in instances where private individuals litigate against organs of state. I, however, agree with the submission made by counsel for the applicant that the principle should cover instances where a state organ vindicates the rights of the citizens under its charge as *in*

casu provided, of course, that the issues raised are genuine and substantive. See in this regard the remarks made by Sachs, J in **BIOWATCH** in paragraph [16]. The learned judge said the following:

“The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional democracy.”

[14] I conclude that the principle that an unsuccessful litigant in constitutional matters should not be ordered to pay the costs is applicable in this case.

[15] Now counsel for the applicant has brought to my attention the judgment in **INDEPENDENT ELECTORAL COMMISSION v LANGEBERG MUNICIPALITY** 2001 (9) BCLR 883 (CC). It was there decided that the Independent Electoral Commission is not an organ of state within the national sphere of government and that section 41(3) of the Constitution does not apply to it. In other words, there was no obligation on the second respondent to engage in any efforts to try to resolve the matter outside court. Likewise the

provisions of the Intergovernmental Relations Framework Act, 13 of 2005, ("the Act"), do not apply to it.

[16] The first respondent is not a chapter 9 institution and does not operate outside of government. Therefore the provisions of section 41 of the Constitution as well as the Act apply to it. Now Mr. Knoetze pointed out that the applicant failed to declare a formal intergovernmental dispute with the first respondent in terms of section 41 of the Act, which would have triggered the procedure laid down in sections 42, 43 and 44 of the Act. He contended that the applicant was therefore debarred by virtue of the provisions of section 45 of the Act to institute the instant proceedings.

[17] It seems to me that the provisions of section 41 of the Act are not peremptory for the section says that the organ of state **may** declare a dispute. In my view, the circumstances of this case are such that there was not time to engage in the processes set out in sections 42, 43 and 44 and declaring a dispute would not have helped. This is because the applicant was furnished with reasons for the delimitation only subsequent to 17 January 2011, after its earlier enquiries

had fallen on deaf ears, and registration of voters was due to start on 4 – 6 February 2011. What is crucial in my view is the injunction to make every reasonable effort to resolve a dispute before approaching a court. In this regard, the applicant tried to resolve the dispute even at that late stage and proposed a meeting for the purpose, but the first respondent was again not moved.

- [18] Now it should be noted that although the second respondent does not fall within the national sphere of government, it nonetheless remains an organ of state and the principle relating to awards of costs in constitutional matters equally applies to it. In addition, I have to take into account that the dispute herein was really between the applicant and the first respondent and significantly no order was sought against the second respondent. In these circumstances I think this is an appropriate case where a costs order should not be made. Compare **ELECTORAL COMMISSION OF THE REPUBLIC OF SOUTH AFRICA v INKATHA FREEDOM PARTY** 2011 (9) BCLR 943 (CC); **PREMIER, LIMPOPO PROVINCE v SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE AND OTHERS** 2011 (11) BCLR 1181 (CC);

UTHUKELA DISTRICT MUNICIPALITY AND OTHERS v
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND
OTHERS 2003 (1) SA 678 (CC).

[19] Finally, I am of the view that the issues of urgency and alleged non-compliance with section 35 of Act 62 of 1955 are matters that should have been canvassed before the matter was withdrawn and are now water under the bridge.

[20] In the result the following order is made:

Save for the costs already awarded in this matter, each party shall pay their own costs of suit.

H.M. MUSI, JP

On behalf of applicant:	Adv. M.T.K Moerane SC Instructed by: Moroka Attorneys BLOEMFONTEIN
On behalf of first respondent:	Adv. A.H. Burger SC Instructed by: Neuhoff Attorneys BLOEMFONTEIN
On behalf of second respondent:	Adv. Barnard Knoetze SC Instructed by: Symington & De Kok BLOEMFONTEIN

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