

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.:26999/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
Date: 18 October 2024	
E van der Schyff	

In the matter between:

Die Hoërskool Menlo Park School Governing Body
and

Applicant

The City Manager: City of Tshwane
Metropolitan Municipality

First Respondent

The City of Tshwane Metropolitan Municipality

Second Respondent

The Chairperson: Municipal Planning Tribunal

Third Respondent

The Chairperson: The Appeal Authority of the
City of Tshwane Metropolitan Municipality

Fourth Respondent

Optimprops 90 (Pty) Ltd

Fifth Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] This application concerns a review application instituted by the applicant, the School Governing Body of Die Hoërskool Menlopark (the SGB), on 18 May 2022. The SGB applies for the review and setting aside of decisions taken on 10 July 2019 by the third respondent (the MPT) and on 1 October 2021 by the fourth respondent (the MAT), respectively. Both decisions concern the rezoning of property located opposite the school premises.
- [2] Before the review application is considered, two preliminary issues need to be determined. The first is the fifth respondent's submission that the SGB does not have the necessary *locus standi* in these review proceedings. The second is the SGB's contention that the decisions concerned are not administrative decisions and that the review is a legality review and not a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Preliminary issues

Locus standi

- [3] The SGB stated in its founding affidavit that it-
- 'has been mandated *inter alia* to conduct the day-to-day operations of the Hoërskool Menlopark and to take the necessary steps to ensure that the rights and safety of the pupils of the school are at all reasonable times protected and to take all necessary steps and to institute the necessary proceedings to give effect to its mandate.'
- [4] It is evident, particularly from the SGB's supplementary affidavit, that the SGB is of the view that the decisions concerned, if implemented, will exacerbate traffic congestion in the street where the school's pupils are dropped off in the morning and that the traffic congestion poses a threat to the learners' safety.

- [5] The fifth respondent (Optimprops) contends that the SGB failed to demonstrate in its founding papers how it, as a governing body, stands to be materially and adversely affected by the impugned decisions to approve the rezoning application.
- [6] The Constitutional Court explained in *Giant Concerts CC v Ronaldo Investments (Pty) Ltd & Others*¹ that in determining whether a litigant established own-interest standing under the Constitution, a court must be cognisant thereof that:

‘Standing is not a technical or strictly defined concept. And there is no magical formula for conferring it. It is a tool a Court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an Applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And there a measure of pragmatism is needed.’

- [7] The SGB made the following averments in the founding affidavit that are relevant to this issue:

‘The Applicant has been mandated *inter alia* to conduct the day-to-day operations of the Hoërskool Menlopark and to take the necessary steps to ensure that the rights and safety of the pupils of the school are at all reasonable times protected and to take all necessary steps and to institute the necessary proceedings to give effect to this mandate.

...

In the morning such peak traffic will coincide with the pupils arriving for school, but the increased flow of traffic along Rosemary Street will further endanger school pupils at all times of the day.

...

¹ 2013 (3) BCLR 251 (CC) at para [41].

[T]he traffic issues are real and present an immediate and continuing danger to the pupils of the School.'

- [8] I disagree with Optimprops' contention that the SGB did not establish a substantial interest in the rezoning of the properties and the possible impact it may have on the safety of learners attending Die Hoërskool Menlopark. A school governing body's primary task is 'governance'.² The term governance is not defined in the South African Schools Act 84 of 1996 (the Schools Act) but is wide enough to include the control of external factors that affect a school and the safety of the pupils. Ascribing this content to the term 'governance' aligns with the statutory imperative that a public school's governing body must promote the school's best interests.³ I, therefore, find that the applicant has the necessary *locus standi* in this review application.

PAJA or legality review

- [9] The SGB contends in its heads of argument that a decision on a development application is not a decision *in personam* but a decision *in rem*. It also submits that an adopted and approved land use scheme has the force of law, and an amendment to the scheme is, therefore, an amendment to the law regulating land use and development rights within a municipal area. As a result, the SGB submits that the decision of the MPT consequent a development application is not an administrative decision but an executive or legislative decision, and this review is to be considered as a review under the principle of legality and not as a review under PAJA.
- [10] This approach is surprising, seeing that the SGB stated in its founding affidavit that the decisions that are the subject matter of the present applications –

'are subject to judicial review in that they have failed to meet the required standards, as set out in Section 6 of the Promotion of Administrative Justice Act No. 3 of 2000 ...'

² S 16(1) of the South African Schools Act 84 of 1996 (the Schools Act).

³ S 20(1)(a) of the Schools Act.

[11] The SGB's view in the founding affidavit stated above, was repeated in the affidavit accompanying the first amended notice of motion. The SGB also indicated, in the notice of motion filed and the second amended notice of motion as in the founding affidavit, that it shall seek an extension of the 180 days referred to in section 7 of PAJA for a period of 30 days.

[12] In *Weinert v Municipality of the City of Cape Town*⁴ Van Zyl AJ accepted that a rezoning application is 'undoubtedly' an administrative process.⁵ In earlier decisions, *Van Huyssteen v Minister of Environmental Affairs*,⁶ and *South Peninsula Municipality v Malherbe*,⁷ the court dealt with rezoning decisions as administrative decisions. In *Aboobaker NO v Serengeti Rise Body Corporate*⁸ Steyn J stated that:
 'there is no doubt in my mind that the respondents' conduct regarding the rezoning amounts to administrative action...'

[13] I support this view.⁹ Land use planning schemes are legislative in character, but it has been established, among others through the case law referred to above, that rezoning applications that result in amendments to spatial schemes are administrative decisions. A rezoning decision is a decision of an administrative nature. It is taken by an organ of state exercising public power and performing a public function derived from legislation. The power to rezone property is sourced in

⁴ [2023] 1 All SA 536 (WCC) (1 August 2022) at para [15].

⁵ See also *Zimmerman v Ndlambe Municipality and Others* [2017] 4 ALL SA 584 (ECG) (22 June 2017).

⁶ 1996 (1) SA 283 (C).

⁷ 1999 (2) SA 966 (C).

⁸ 2015 (6) SA 200 (KZD) at para [26].

⁹ In the second edition of the monograph 'Planning Law', Professor Jeannie van Wyk states, with reference to a substantial body of case law, that examples of administrative action include, among others, the removal of a restrictive condition, the determination of an appeal and the rezoning of property - *Planning Law*, Juta, 2nd ed 167. See also *Confident Concept (Pty) Ltd v Member of Mayoral Committee for Development City of Jhb and Others* (617/2018) [2022] ZAGPJHC 1204 (13 December 2022).

legislation. Rezoning is an act of policy execution rather than policy making,¹⁰ and it is not a matter of high political judgment that would oust PAJA's applicability.

- [14] This review, is a review in terms of PAJA. The timeframe in which review applications may be instituted provided for in PAJA subsequently applies. This gives rise to the *point in limine* raised by the respondents, namely that the SGB delayed in launching this review. The undisputed delay necessitated the condonation and extension of the 180-day period sought by the SGB.

Delay in launching the review

- [15] It is common cause that the SGB became aware of the conclusion and outcome of the internal remedy on 12 November 2021. The review proceedings were instituted on 18 May 2022. The SGB submits that the 180 days to have instituted any proceedings in terms of section 7(1) of PAJA lapsed on 11 May 2022. The respondents contend that the delay was unreasonable and that the review application should not be entertained.
- [16] It is necessary to reiterate that PAJA requires an applicant to institute review proceedings 'without unreasonable delay', and no later than 180 days after the date that any proceedings instituted in terms of internal remedies, where such are provided for, have been concluded. Brand JA clarified the effect of section 7(1) of PAJA in *Opposition to Urban Tolling Alliance v South African National Road Agency Limited*.¹¹ Brand JA explained that the:

'delay exceeding 180 days is determined *per se* unreasonable, but a delay of less than 180 days may also be unreasonable and require condonation'.

- [17] *In casu*, the SGB exceeded the 180-day outer limit before launching the review application. It is trite that condonation for failure to comply with the time period

¹⁰ See *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para [24].

¹¹ [2014] 3 All SA 639 (SCA) at para [26].

prescribed by PAJA is not simply there for the asking, a proper explanation must be provided. This court has a discretion whether or not to grant condonation. This discretion must be exercised judicially. Due regard must be had to the nature of the relief sought, the extent and cause of the delay and its effect on the administration of justice, the reasonableness of the explanation for the delay, whether or not the delay has caused prejudice to the other parties, the importance of the issue for determination for the parties and the applicant's prospects of success.¹²

- [18] It is unfortunate for the SGB, that the explanation for the delay is dealt with in broad strokes in the founding affidavit. The SGB relates that the MAT's decision was emailed to their attorneys of record. The SGB does not inform the court when the attorneys of record communicated the decision to it. The SGB does not state how soon after it received communication of the decision, the meeting was called, where the decision was communicated to its members, or when this meeting occurred. The SGB failed to provide any details regarding the dates on which further consultations with its legal representatives and advisors happened or when it was decided to oppose the granting of land use rights to the developer. What is stated is that a letter was written during December 2021 to Optimprops' attorneys of record requesting a meeting to discuss the matter to determine whether the parties could find one another without resorting to litigation. It can thus be inferred that all the stated activities occurred between 12 November 2021 and some date in December 2021.
- [19] The SGB was informed that the developer (Optimprops) and its legal representatives were only available in January. The developer contacted the SGM in January 2022, and a meeting was subsequently set up for 3 March 2022. Several meetings were held between March 2022 and May 2022. The issues could, however, not be resolved, and the SGB decided to proceed with the review application. SGB's recount is again drawn in broad strokes. The court is not informed of the dates on which meetings were conducted, the matters that were discussed, or when the SGB realised that the matter could not be resolved without having to revert to litigation.

¹² *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) at para [46].

- [20] Optimprops argues that the delay was undue and that the meetings did not justify any delay. The SGB did not address this in reply.
- [21] I pause to state that the SGB seemingly failed to consider the municipality role-players' interest in considering whether to proceed with review proceedings. It is not stated whether the meetings were attended to by the municipality respondents. The SGB states that Optimprops was not prejudiced by the delay in instituting the review after the lapse of 180 days. The Farlam JA, however, explained in *Gqwetha v Transkei Development Corporation and Others*,¹³ that it is important for the functioning of public bodies that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The court also emphasised the public interest element in the finality of administrative decisions.
- [22] In order to find whether a delay in instituting review proceedings is unreasonable or undue, a court must conduct a factual inquiry upon which a value judgment is made in light of all the relevant circumstances. I accept that the SGB is a public body that collects funds from the state and parents and does not unnecessarily want to spend money on expensive litigation if it could be avoided. Due to the scanty information provided, albeit that the discussions were held on a without-prejudice basis, I am not able to find that the SGB provided a satisfactory explanation for the delay in instituting the review. The SGB did not provide sufficient factual information for this court, assessing the information objectively, to conclude that the delay was reasonable.
- [23] This is, however, not the end of the condonation application. The Constitutional Court explained in *Khumalo v Member of the Executive Council for Education: KwaZulu-Natal*,¹⁴ that when it is found that a delay is unreasonable or undue, the court must decide whether to exercise its discretion to overlook the delay and nevertheless entertain the application.

¹³ 2006 (2) 603 (SCA) at paras [22]-[24].

¹⁴ 2014 (5) 579 (CC) at para [49].

Prospects of success

[24] It is now necessary to turn to the SGB's prospects of success in the review application. At the onset of the discussion it is necessary to have regard for the fact that the decision to rezone is correctly described in the municipal respondents' heads of argument as a:

'multi-faceted polycentric decision requiring an equilibrium to be struck between a range of competing interests and considerations which is to be taken by a person or institution with specific expertise in that area.'¹⁵

[25] In considering a review application, the court is not sitting as a court of appeal. The court considering a review application is not concerned with the correctness of the decision made by a functionary but whether the functionary performed the function he was entrusted with.¹⁶ It is not open to a court to second-guess the functionary's evaluation in exercising the discretion the functionary has been entrusted with.

[26] The Supreme Court of Appeal in *Clairison's CC*, continued to explain:¹⁷

'It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go into the making of the decision, is that of the decision-maker. As it was stated by Baxter: "The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'

¹⁵ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

¹⁶ *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at para [18].

¹⁷ *Supra*, at para [20].

[27] The SGB's main point of contention is that the municipality respondents failed to consider the impact that increase in the traffic will have on the safety of the pupils of Die Hoërskool Menlopark when the pupils are dropped at school at the same time in the morning that the occupants of the proposed development will depart for work. The SGB avers that the municipality respondents failed to consider the impact of the proposed BRT routes on the traffic on Rosemary Street and the surrounding environment and contends that the traffic assessments done by Optimprops were insufficient. The SGB takes the municipality respondents to task for not conducting their own independent traffic assessment when it became apparent that the results of the traffic assessment reports provided by the SGB and Optimprops were not aligned.

[28] Although it is a matter of common sense that heavy vehicle traffic poses an inherent risk to pedestrians, the pupils concerned are secondary school learners, and the users of Rosemary Street expect young pedestrians to be around and to cross the road. These factors contextualise the risk.

[29] The SGB fails to explicitly define the manner in which the approval granted by the MAT would 'have a significant impact on the rights of the pupils .. for generations to come.' In reply to the municipality-respondents' answering affidavit, the SGB states:

'The deponent is completely impervious to the impact the development will have on the rights of the pupils to health, education, a clean environment, and protection from harm'.

The SGB, however, does not provide a basis, other than the general assumption referred to above, for the court to understand how the approval will negatively impact the learners' right to 'health, education, a clean environment, and protection from harm'.

[30] The SGB contends in the second founding affidavit filed that the decision-makers fell foul of the following provisions of PAJA:

- i. Section 6(2)(b) in that a mandatory and material procedure or conditions prescribed by an empowering provision was not complied with;

- ii. Section 6(2)(c) that the action was procedurally unfair;
- iii. Section 6(2)(e)(iii) that irrelevant considerations were taken into account or relevant considerations were not considered;
- iv. Section 6(2)(e)(vi) that the decision was arbitrary or capriciously taken;
- v. Section 6(2)(f)(i) that the action itself contravenes a law or is not authorised by the empowering provisions;
- vi. Section 6(2)(f)(ii) that the action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the Administrator, or the reasons given for it by the Administrator.

[31] It might have benefitted the SGB if the facts relied upon when the grounds of review were set out were linked to the different grounds of review. It is now for the court to work through the affidavits filed 'in founding' to determine whether the facts support the grounds of review. In *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy*,¹⁸ the court explained:

'There is no acceptable reason for founding papers in a review application to fall short of identifying the facts and grounds of the review clearly and with appropriate reference to the relevant sections of PAJA that are relied upon. The papers should also draw the necessary link between the material facts and the identified grounds of review.'

[32] I pause to note that the SGB did not seek the court's permission to file the affidavit that accompanied the first amended notice of motion. Optimprops, however, filed an answering affidavit. Optimprops informs the court in this affidavit of the Spatial Development Framework and the Regional Spatial Development Framework adopted by the municipality when the rezoning application was submitted, aspects also dealt with by the municipality respondents in their answering affidavit. The 2013 City of Tshwane Regional Spatial Development Framework (2013 RSDF) calls for a drastic change in the built environment and, among other, introduced higher density and intensity land uses. The area under consideration is considered to form part of

¹⁸ 2014 (6) SA 403 (GP) at para [29].

a 'Concentration Zone' within which high density development is promoted. Densities of more than 200 units per hectare are promoted for properties less than 500 meters from proposed BRT stations. The subject properties fall within this category.

- [33] While the rezoning application was pending, and before the tribunal hearing, the municipality adopted the 2018 RSDF. This RSDF likewise emphasises the densification of areas within a 500-metre walking distance from a proposed BRT station.
- [34] Optimprops indicated that the school has established parking bays within the road reserve. Although invited to do so, the SGB did not provide the necessary permission and authorisation for these parking bays as part of the papers before this court. Optimprops contended that the obligation rests on the school to provide a safe drop-off and collection point on the school property.
- [35] The municipality respondents, among others, submit that the SGB glossed over the conditions for the approval provided by the MPT. These conditions, they aver, were imposed by the MPT because it has considered that traffic would increase in Rosemary Street and mitigating factors need to be employed. The following conditions were given:
 - i. Rosemary Street and Sussex Avenue intersection to be converted to a traffic circle;
 - ii. The traffic signal at the Atterbury Road and Rosemary Street intersection to be optimised by including turning phases and vehicle detection by camera;
 - iii. Optimprops will be responsible to obtain any additional land to increase the existing road reserve width that may be required for the provision of a new road or transportation infrastructure applicable to this development;
 - iv. Occupation of the development will only take place when all the required road upgrades have been constructed;
 - v. It was noted that the traffic impact assessment only evaluated the traffic operations and does not evaluate the exact access positions nor the geometric designs. Approval of these aspects may be discussed separately.

The approval of the traffic impact study does not imply that the alignment of any of the proposed roads is approved.

- [36] The SGB avers that none of the conditions imposed by the MPT will ameliorate the 'deleterious effect' of the development on Rosemary Street. The SGB purports to rely on an affidavit filed by Mr. Jaco Kruger, an issue dealt with below.

- [37] I don't intend to deal in detail with the processes followed by the MAT and the MPT. It suffices for purposes of the condonation application to state that I am of the view, that the SGB did not substantiate the grounds of review. I fail to identify any mandatory and material procedure or condition prescribed by an empowering provision that was not followed. The same should be said for the contention that the decision to grant the rezoning application itself contravenes a law or is not authorised by the empowering provisions.

- [38] I don't agree with the SGB's contention that the process followed in coming to the impugned decisions was procedurally unfair. The City did not, as alleged by the SGB, pay lip service to the public participation process. The public participation process rendered 29 objections. These were considered. Since it is not required to provide a traffic impact assessment report when a rezoning application is launched, the fact that the report was not available during the public participation process is not a material shortcoming.

- [39] The SGB was allowed to respond to the traffic impact assessment report provided by Optimprops and submit its own traffic impact assessment. Optimprops supplemented their first traffic impact assessment with a further assessment. I am alive to the objections raised regarding the dates on which the assessments were done. It is evident from the papers, however, that the municipality is aware of the extent of the current traffic issues that present itself in Rosemary Street.

- [40] The SGB was allowed to make written and oral submissions to the decision-making bodies. The relevant internal departments of the municipality commented on the application and the objections thereto. The report filed by the Road and Transport Department and the memorandum of the MPT indicate that the decision-makers are

aware of and considered the traffic issue. The SGB takes issue with the in-committee discussion where it was not present; however, from the report filed by the municipality respondents, it is evident that the same issues raised and discussed in the public meetings were considered. I do not find this sufficient reason to indicate that the SGB's prospects of success are sufficient to grant condonation for the late filing of the review application.

- [41] The SGB failed to identify any irrelevant considerations that were considered when the decisions were made. The municipal respondents deny that the traffic issue was not considered when the impugned decisions were taken. The record of proceedings and the affidavits filed by the respondents read in context with, amongst others, the 2013 and 2018 RSDF substantiates a finding that the traffic assessments were considered. The decision-makers were aware of the existing traffic issues and addressed the traffic concerns by incorporating specific requirements relating to traffic flow when they approved the rezoning application.

- [42] The 2013 and 2018 RSDF provide the backdrop against which the MAT and MPT's decisions need to be evaluated. It goes without saying that a drastic change in the built environment' foreseen and provided for in the respective RSDFs by, among others, introducing higher density and intensity land uses, will dramatically impact the *status quo*.

- [43] The SGB contends that the traffic assessment provided by Optimprops did not deal sufficiently or at all with the impact that the BRT will have on the existing traffic. As a result, the argument is that the MAT and, subsequently, the MPT also did not consider the impact of the BRT. The BRT, however, stands central in this application, as the location of the proposed BRT station is the sole reason for the area to be developed as a high-density area. Optimprops correctly explained that the BRT project aims to reduce the traffic load by providing public transport that would minimise single private-vehicle traffic.

- [44] The information before the court supports a finding that the MPT and MAT decisions were not made arbitrarily or capriciously. The rezoning application and the objections were considered. Tribunal meetings were even adjourned to allow time

for the consideration of documentation provided at a very late stage and to obtain the relevant internal department's input.

- [45] I fail to find any substantiation for the SGB's contention that the decision is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the decision-maker, and the reasons provided by the decision-maker. The decision might seem irrational to the SGB, whose only focus is the current chaos in Rosemary Street when learners are dropped off and collected. For the objective onlooker, it is evident that the decision-maker regarded the traffic issue as one of several factors that had to be considered when the rezoning application was considered.

- [46] The SGB avers that the decision-makers failed to determine the impact of the proposed development on the school's learners. The mere fact that the SGB, the representative of the learners' interest, had knowledge of the proposed development and objected to the development while acting in the learners' best interest indicates that the impact of the development on the learners was not ignored. As a result, I am of the view that the SGB does not have any prospect of success with the review application. The condonation and extension applications stand to be dismissed.

- [47] Likewise, the SGB did not convince the court that it is in the interest of justice to condone the late filing of the review application.

Miscellaneous

- [48] The respondents took issue with the SGB's attempt to introduce new evidence in its supplementary affidavit, and rightly so. The evidence the SGB attempts to introduce also revolves around the traffic issue. This evidence was not before the decision makers when the rezoning applications were considered. The affidavit of Mr. Kruger was prepared 4 years after the decision of the MAT and two years after the decision of the MPT. Mr. Kruger's report highlights the general concern regarding the learner's safety and he proposes that a proactive road safety audit be conducted which will assess the potential risks associated with the introduction of additional traffic volumes to the already congested Rosemary Street as well as the impact of

the implementation of new road infrastructure. Mr. Kruger's report, among others, highlights the responsibility of all stakeholders in considering the learners' safety.

- [49] The SGB takes issue with the respondents' contention that the traffic problem is caused by the school, but Mr. Krugesr states:

'The congestion can primarily be attributed to drop-off and pick-up activities at the entrance of the school, informal on-street parking and conflict of pedestrian's movements along Rosemary Street, resulting in queues extending to Atterbury Road and Lynnwood Road as well as along Sussex Avenue.'

- [50] The SGB is primarily responsible for ensuring the learner's safety and the void within the papers filed by the SGB is an exposition of how the SGB currently mitigates the risk.
- [51] Mr. Kruger's report does not support the contention that the impugned decisions are irrational.

Costs

- [52] The two general principles that govern costs orders are that the court of first instance hearing a matter has a judicial discretion to award costs and that costs follow the event in that the successful party is usually awarded costs.¹⁹ *In casu*, the SGB contends that the review application constitutes constitutional litigation. The SGB correctly submits that litigants seeking to test constitutional principles should not be discouraged by the risk of adverse costs orders unless their grounds are frivolous, vexatious, or driven by improper motives.²⁰ The SGB submits that in cases involving public interest litigation, the court may refrain from awarding costs to avoid

¹⁹ See the insightful article by T Humby *Reflections on the biowatch dispute – reviewing the fundamental rules on cost in the light of the needs of constitutional and/or public interest litigation* PELJ 12:1 Jan 2009.

²⁰ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

discouraging litigants from pursuing constitutional claims, even if they are unsuccessful.

- [53] Counsel for the municipality respondents drew the court's attention to *Moodley v Kenmont School and Others*,²¹ where the Constitutional Court held that public schools are not immune from an adverse costs order.
- [54] Optimprops seeks a punitive costs order against the SGB. Optimprops submits that the obstructive nature of the application is transparent.
- [55] The principle has now firmly been established as expressed by Ackermann J in *Motsepe v Commissioner for Inland Affairs*²² that one should be cautious in awarding costs against litigants who seek to enforce their constitutional rights against the state. Ackermann J continued –

‘This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interests of the administration of justice nor fair to those forced to oppose such attacks.’

- [56] A precedent like *Motsepe* emphasises that the discretion regarding costs still rests squarely with the presiding officer. In *Biowatch*, the Constitutional Court clarified that public interest litigants acting in good faith will not have to fear that costs will be awarded against them, but repeated the warning that the principle is not unqualified. If an application is frivolous, vexatious, or inappropriate, the worthiness of its cause will not render it immune against an adverse cost order. The court emphasised that merely labelling the litigation as constitutional would not be enough to invoke the

²¹ 2020 (1) SA 410 (CC) at paras [41] and [42].

²² 1997 (2) SA 898 (CC) at para [30].

principle. The issues in the matter must genuinely and substantively be of a constitutional nature.²³

- [57] The SGB acted in the interest of the learners' of Die Hoërskool Menlo Park. None of the respondent parties averred that the SGB attempted to promote a hidden agenda, or that any of the SGB members are promoting their own interest. In considering the appropriate costs order, I had regard to the relief sought by the SGB. The relief was directed at reviewing and setting aside the MPT and MAT's decisions. Optimprops was cited as a party because it has a direct and substantial interest in the matter. No relief was sought against Optimprops. It was for the decision-makers to explain how they proceeded to make the impugned decisions and to answer to the allegations, among others, that the process followed was procedurally unfair, that the decision was not irrational and unlawful. Optimprops decided to protect its interest by filing substantive answering papers. They cannot be faulted for this, but since I am of the view that the *Biowatch* principle finds application regarding an appropriate costs order, the fact that no relief was sought against them is taken into consideration.
- [58] In these circumstances, I am of the view that the application of the principle underpinning the *Biowatch* judgment will be given effect to by ordering each party to carry their own costs.

ORDER

In the result, the following order is granted:

1. The review application is dismissed.
2. Each party is to carry their own costs.


 E van der Schyff
 Judge of the High Court

²³ *Biowatch*, *supra*, at paras [24] and [25].

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:	Adv. A Vorster
With:	Adv. N. Nortje
Instructed by:	Boshoff Incorporated
For the first to fourth respondents:	Adv. T.M. Makola
Instructed by:	Kutumeal Sithole Incorporated
For the fifth respondent:	Adv. J.A. Venter
Instructed by:	Ivan Pauw & Partner Attorneys
Date of the hearing:	13 August 2024
Date of judgment:	19 October 2024