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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 15768/2023

In the matter between:

THE ROODEBERG RESIDENTS ASSOCIATION NPC **Applicant**

and

DRAKENSTEIN MUNICIPALITY **First Respondent**

**DAVID HEILIG & ABRAMSE PROFESSIONAL
LAND SURVEYORS** **Second Respondent**

CECILIASTRAAT ONTWIKKELING (PTY) LTD **Third Respondent**

JUDGMENT DELIVERED: THURSDAY, 19 SEPTEMBER 2024

NZIWENI, J

Introduction and Background

[1] This is a ruling on a request by the first and third respondents for a cost order against the applicant or his attorney or the deponent to the applicant's founding affidavit (Mr Sass) [one of the three directors of the applicant]. The relief sought is pursuant to the withdrawal of the applicant's urgent application without conducting a hearing on merits, on 03 October 2023.

[2] The applicant opposes an award of costs against it. According to the applicant, this Court should depart from the normal rule that a party that withdraws litigation should bear the costs as it undertook this litigation in the interest of the public.

[3] The applicant is cited as 'The Roodeberg Residents Association', the First respondent is the Drakenstein Municipality, and the third respondent is CeciliaStraat Ontwikkelling (Pty) (Ltd) [the developer].

[4] The significant chronology of events which led up to the present dispute begins on 06 May 2021. The recitation of the chronology of events is essential to understand some of the parties' contentions. During the hearing, I specifically directed that the parties should prepare a chronology of events critical to this application. The parties prepared a joint timeline. I am indebted to the parties for the most helpful chronology of relevant events. The chronology of the pertinent events as prepared by the parties are as follows.

The chronology of events

[5] As a background, the facts relevant to the present application may briefly be summarised as follows.

[6] The third respondent submitted an application ("the application") for subdivision and a site development plan to the first respondent. On 25 May 2021, 84 residents of 1[...] of Paarl, lodged a petition against the proposed development. Three directors of the applicant were amongst the signatories of the petition. On 03

June 2021, Mr and Mrs [H]... [residents of Ward 1[...]] lodged an objection to the proposed development.

[7] On 08 July 2021, the first respondent's Environmental Department approved the third respondent's application for subdivision and site development, subject to certain conditions. On 15 July 2021, the first respondent's Civil Engineering Department also issued an approval of the third respondent's application, imposing certain conditions as part of the approval.

[8] On 13 April 2022, the first respondent ultimately approved the third respondent's subdivision and development applications with the imposition of the conditions that were imposed by its departments.

[9] Pursuant to the approval of the applications, 19 community members including the three directors of the applicant, appealed against the approval.

[10] On 14 October 2022, the first respondent dismissed the appeal.

[11] On 25 July 2023, the preparation of the site commenced.

[12] On 31 July 2023, attorneys wrote a letter of demand to the first respondent on behalf of 'concerned citizens residing in Ward 1[...]. In the letter of demand 'the citizens' demanded that the first respondent should retract all permissions associated with the third respondent's application and should provide all the information related to the compliance with the terms and conditions. The letter of demand was not answered.

[13] On 08 August 2023, a final letter of demand on behalf of the 'concerned citizens residing in Ward 1[...]' was sent to the first respondent.

[14] On 23 August 2023, the applicant was incorporated as a company with three directors one of which is the applicant's deponent to the founding affidavit [Mr Sass].

[15] On 05 September 2023, a letter was transmitted to the first respondent recording its failure to reply to the letters of demand and warned of the intention to institute this application.

Litigation

[16] On 12 September 2023, the applicant filed an urgent application seeking a mandamus to be issued to direct the third respondent to:

- deliver updated studies as referred to in the memorandum issued by the third respondent in approval of an application by the third respondent;
- enforce the conditions stipulated in a by-law on the Municipal Land Use Planning.

[17] Additionally, the applicant in his notice of motion sought that a *rule nisi* be issued interdicting and restraining all the respondents from continuing with the development at Erf 8[...] Paarl, pending compliance with all the conditions and by-laws of the first respondent. The application was scheduled to be heard on 03 October 2023.

[18] It is important to note that the applicant's notice of motion pertinently stated that the respondents were to deliver their answering affidavit by 22 September 2023 at 16h00. At the same time, it is also significant to note that, in terms of the notice of motion the respondents were to deliver their heads of arguments on 02 October 2023 at 12h00.

[19] The first and third respondents timeously delivered their answering affidavits. In addition, the third respondent filed a notice pursuant to the provisions of Rule 7 (1) of the Uniform Rules of Court disputing the authority of the applicant's attorney to act on the applicant's behalf.

[20] The applicant delivered its replying affidavit. On 02 October 2024, the first and third respondents also delivered their heads of arguments.

[21] By email dated 02 October 2023 at 15h00 the applicant's counsel advised the judge on duty that the applicant would be withdrawing the application. The applicant's counsel wrote: “

1. . .

2. . . .

3. The applicant does not intend to argue the merits of the application, and my instructions are that it will be withdrawing the application.

4. However, the opposing respondents . . . , may wish to address your Judge on the issue of costs. They are still in the process of obtaining instructions.

5. Will you be so kind as to bring this email to your Judge's attention, as it may impact the reading of the papers.

6. An updated email as to the conduct of the matter will follow as soon as I have received confirmation from the opposing respondents.”

[22] On 03 October 2023, the parties, by agreement obtained an order withdrawing the application and postponing the issue of costs for hearing on the semi-urgent roll.

[23] It is thus common cause that this Court does not need to determine the merits of this matter.

[24] Before summarising the respective submissions directed to the present application, I need to address the issues between the parties.

The issue

[25] The very nub of this matter revolves around whether the applicant is liable to pay the costs of the application pursuant to the withdrawal of the main application. Simply put, the overarching question is whether this Court, in the exercise of its discretion as to costs, should order that the ordinary rule related to the award of costs when a party withdraws litigation, is inappropriate on the facts of this case.

[26] The first and the third respondent added the following issues to be addressed:

- The first respondent is seeking that a cost order should also be awarded against a deponent to the founding affidavit [Mr Sass].
- It is, of course, the third respondent's argument that the cost order should be *de bonis propriis* against the applicant's attorney and Mr Sass.

Submissions by the applicant

[27] According to Mr Engela on behalf of the applicant, this Court needs to look at the chronology of events and the context in order to determine whether the applicant acted reasonably by withdrawing the application and whether the application was frivolous or vexatious. Accordingly, Mr Engela submitted that the issue of costs in the instant case requires consideration of the history leading up to the litigation, regarding the applicant's dealings with the first respondent.

[28] Mr Engela emphasised that different principles apply in litigation involving the State and a municipality, particularly litigation that is of constitutional nature with the community. Interestingly, Mr Engela developed these submissions in the course of his argument. He submitted that the general principle in similar litigation between two private parties is that the party who withdraws is the unsuccessful litigant; he or she should tender costs unless there is good reason not to do so.

[29] It is the submission of the applicant that this Court should not be rigid and follow the traditional rule as far as costs related to a withdrawn claim.

[30] It is averred on behalf of the applicant that this Court is dealing with a specific type of litigation. The thrust of Mr Engela's argument is that in such situations when a court is dealing with public interest litigation, a different set of rules apply as far as costs are concerned.

[31] Mr Engela illustrated his argument by stating that the applicant in this application represented the interests of Ward 1[...], a small community. The public interests require that the Municipality must be in compliance with its self-imposed requirements.

[32] It is the applicant's contention that the application is not for personal or private interest. Mr Engela asserted that based on the main objective of the applicant as a non-profit company as reflected at CIPC; the applicant is a community economic empowerment foundation. Mr Engela asks this Court to find that the applicant was undertaking litigation in the public interest in good faith.

[33] The applicant states that this application was triggered by the approval of the application. Mr Engela averred that demand was made upon the first respondent to retract all permissions; but there was simply no response.

[34] Accordingly, it was argued strenuously by counsel on behalf of the applicant that an applicant who withdrew and had the foresight to withdraw an application rather than persisting with it and losing it, should be in a better position than the applicant who has lost a case. In essence, it is the applicant's submission that costs should not be awarded because, amongst others, the litigation was in the public interest. And the applicant acted reasonably in launching the application. To that end, Mr Engela invokes the authority of *Environmental Alliance v MEC For Economic Development* 2020 (4) SA 453. It was further argued that the first respondent did not respond to the concerns raised by the applicant before the launching of the application.

[35] The essence of Mr Engela's argument is that the applicants asked the first respondent on behalf of the members of the community that a light industrial development and a five-storey development be stopped. It is asserted on the applicant's behalf that the application was not acting frivolously or vexatiously when it launched the application.

[36] It was further submitted on the applicant's behalf that a party who has withdrawn a case cannot be in a worse position than a party who has lost a case.

First respondent's submissions

[37] To briefly summarise the arguments on behalf of the first respondent, it was submitted by Mr De Jager, first respondent's counsel; that the applicant in this matter is on the same footing as an unsuccessful litigant.

[38] According to Mr De Jager, before the applicant was formed, incompetent demands were made to the first respondent on behalf of unidentified citizens and the municipality did not answer 'the incompetent' demands. It is submitted that the prayer that was sought by the applicant that the municipality should deliver updated studies is incompetent as it is not for the municipality to produce studies. So, the argument continues that after the applicant was formed the same demand was made but not on behalf of the applicant.

[39] It is further submitted on the first respondent's behalf that this application was brought a week after a third demand was made. Mr De Jager developed these submissions in the course of his argument. He stated that the applicant should not have sought an urgent hearing of this matter and on that ground, the application would have been struck off the urgent court's roll.

[40] Mr De Jager reinforced this submission by submitting that the applicant had available to it, at the time it launched the application, an alternative remedy to demand an undertaking from the developer to stop building or to pursue a damages claim. And because the applicant did not avail itself of the alternative remedies, the application would never have gotten off the ground.

[41] Moreover, it is further submitted that there is no standing for the applicant to take up this case. Mr De Jager asserts that there is nothing to substantiate the claim that the applicant has as its main objective, the community's [Ward 15's] economic empowerment and foundation. The gravamen of the standing issue is that the applicant was only formed in August 2023, after the directors had already objected to the development. Additionally, Mr De Jager suggests that the fact that the applicant's directors objected to the development and appealed the first respondent's decision in their personal capacity before the formation of the applicant evinces that the three directors are pursuing their personal agenda through the applicant.

[42] According to Mr De Jager his conclusion is fortified by the consideration that after their appeal was dismissed by the first respondent, the applicant's directors did not launch a review in terms of PAJA. And when they realised that they ran out of time to launch a review, they formed the applicant to bring a stop to the building. It is submitted that it appears that the applicant was formed solely to pursue this litigation. Mr De Jager submitted that the application is done by three individuals who are personally interested in what is going on.

[43] Mr De Jager further submitted that the applicant is nothing but a sham that is used as a device by the three directors to hide behind it. It is submitted on behalf of the first respondent that the applicant is an entity used by its three directors to assert their right to stop the development. It is further submitted that there is no evidence to show that the application was brought in the public interest and that there is no genuine public interest element in this matter.

[44] The first respondent submits that the deponent to the founding affidavit, Mr Sass, had no authority to bring this application. Thus, the application was not authorised. According to Mr De Jager, this is so because Mr Sass in his affidavit does not say he is authorised to bring this application and the resolution does not refer to this application.

[45] In relation to who is supposed to pay the costs, the first respondent submits that it is crystal clear that the applicant must bear the costs of this application.

[46] Accordingly, Mr De Jager submitted that there is nothing in the papers that indicated that the municipality failed to enforce any conditions. Mr De Jager developed these submissions during his argument. He submitted that there is nothing to demonstrate why the municipality should be directed to enforce conditions. With the above submission in mind, Mr De Jager argues that the application was a non-starter because, amongst others, all the orders sought against the municipality are incompetent. Mr De Jager illustrated his argument by suggesting that if the orders that were sought by the applicant were not incompetent the application would not have been withdrawn.

[47] Mr De Jager further stressed that the applicant dragged the municipality into an expensive arena of a court and when the municipality complied it was told on the day of the hearing that the matter is being withdrawn. He further submitted that it is the ratepayers who would bear the wasted costs associated with this litigation.

[48] It is Mr De Jager's submission that no authority has been presented to show that this Court should depart from the traditional rule that when the applicant withdraws litigation it should pay the costs.

Submissions by the third respondent

[49] Ms Christians stated that she aligns herself with the submissions made by Mr De Jager. According to her, there is nothing public about the relief that was sought in October 2023. She submits that everything about this application is related to personal interests. Ms Christians submits that the applicant's three directors own a property close to the site of the development.

Analysis

The public interest that the applicant sought to vindicate

[50] It is now firmly established that any policy, or government action or inaction can be a subject matter of public interest litigation.

[51] Here it seems as if we are dealing with 'public interests' that require that the municipality must be in compliance with its self-imposed requirements or conditions.

Public interest litigant or litigation

[52] In considering the competing submissions, I believe that the starting point must be to analyse the phrases 'public interest litigant' and 'public interest'.

[53] Public interest litigation is well known in South Africa and in most instances than not has dedicated organisations pursuing it. Some of the organisations are specialising and work in this specific area of the law.

[54] It seems, to me, that the question before this Court does not involve the issue of standing but the issue of costs in 'general public interest' litigation. Public interest litigation does not always concern Constitutional issues. In Black's Law Dictionary (7th edition) 1229, the term 'public interest' litigation has been described as follows

"Public interest litigation is a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected."

The phrase 'public interest'

[55] There is a myriad of cases that state that the word public interests itself is not capable of clear and comprehensive definition. Thus, in the interpretation of the phrase, context as well as the scope of it are also very important. See *Transnet Ltd t/a Metrorail and Others v Rail Commuters Action Group and Others* 2003 (6) SA 349 at paragraph 15 A.

[56] In *Ex Parte President of the Conference of Methodist Church* 1993 (2) SA 697 at 703C, the following was said regarding the phrase 'public interest'

“The phrase ‘public interest’ does not permit a clear and comprehensive definition. As was observed by Herbstein J in *Argus Printing and Publishing Co Ltd v Darby’s Artware (Pty) Ltd and Others* 1952 (2) SA 1 (C) one must adopt, in giving effect to the phrase, a ‘broad commonsense view of the position as a whole . . . (and it must be considered whether) . . . the public would be better served if the applicant were to be allowed to proceed with its scheme than by the continuation of the existing state of affairs.”

[57] In *Argus Printing and Publishing Co Ltd v Darby’s Artware (Pty) Ltd and Others* (*supra*) at 8H, the following is stated:

“What is meant by the “general interest of the public?” Not only is the phrase as a whole incapable of exact definition but each of its separate elements lacks clarity. Who, for example, is to be included in “the public?” in *Jennings v. Stephens*, 1936 (1) A. E. R. 409, Lord Wright said:

“‘The public’ is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach or who would be interested in any particular matter, professional, political, social, artistic or local. . . Thus, it is clear that by ‘public’ is meant . . . ‘a portion of the public’. That particular portion of the public which is meant may sometimes be very small indeed...”

One faces the same difficulty in determining the “general interest” of that nebulous “public.”. The interests are a “general” one; not a particular interest such as the possibility of larger dividends to shareholders but one which is widespread though not necessarily common to the whole group of “the public”.

How is this “general interest of the public” to be determined? It is sufficient for the Court to utilize its own conception of what might be the “general interest of the public” or is it necessary to determine it as a matter of fact on evidence by members of the public? If it is the former, the determination may be largely a matter of guess-work and dependent upon a number of incalculable factors including *inter alia*, the personality of a Judge. The Court might find that it was laying down what it thinks the public interest should be and not what it really is.”

[58] Since time immemorial, as a general rule, a party that withdraws litigation should tender costs unless the court orders otherwise. The court can depart from the general rule for instance when the litigation serves the public interest. However, during litigation the conduct of the party claiming to litigate in public interest is crucial in the determination of costs. The starting point, of course, is that in such cases [public interest litigation], it is incumbent upon the applicant [in public interest litigation] to establish that the circumstances are such that the interests of the public necessitate the [immediate] launching of the application. And if the litigation is not followed, to do so would result in a manifest injustice to the public.

[59] In this matter it is not clear why the applicant failed to pursue the application that was brought on a truncated timeline and then abandoned it on the eleventh hour. This is perhaps one of the applicant’s most perplexing conduct. Voluntarily launching the application and then simply withdrawing it on the eve of the hearing.

[60] Surely, as one would expect if the applicant was pursuing the litigation in the public interest, it should have seen it through.

[61] Litigation expenses play an integral part in accessing litigation. For a variety of obvious reasons, not everyone who institutes litigation believing or asserting that he or she is doing so in the interest of the public can be absolved of the liability for the payment of litigation costs. In this matter, the motive of the applicant to bring this litigation is questioned by the first and the third respondents. As I have already indicated, the first and third respondents question that the applicant launched this application as a genuine public interest litigant who seeks to assert public interest.

[62] At the outset, I wish to state that the fact that the applicant is registered as a community economic empowerment foundation does not automatically qualify it to be a public interest litigant. Equally, the fact that the applicant is in possession of petitions directed at an issue involving the litigation, does not translate to mean that the mere existence of a petition warrants a person to litigate in order to vindicate public interest.

[63] As will already be apparent, I readily accept that a party does not come within the definition of a 'public interest litigant' based solely on characterisation as a 'public interest litigant'. A fact-specific approach should be employed to determine whether a litigant is a public interest litigant. Thus, the determination of whether a litigant is a public interest litigant is determined on a case-by-case basis and each case is to be determined with due regard to its factual circumstances.

[64] Public interest litigation is generally viewed as a most powerful and very effective accountability tool that seeks to hold the government [government including municipalities] and its agencies to account for its decisions and any action that is considered to be inappropriate. The courts have acknowledged this powerful mechanism given to the citizens by which they can truly hold the government, and public sector officials to account. This is especially true when an unsuccessful public interest litigant is excused from costs liability.

[65] The general principles that public interest litigation costs are incident to the cause are now well established. Thus, in cases involving issues of genuine public interest, an unsuccessful party is not mulcted with opponent's fees. See *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232(CC); 2009 (10) BCLR 1014 (CC)

[66] The motive behind this principle is that the award of costs in this type of litigation would deter ordinary members of the public from litigating important questions involving matters of public concern for fear of incurring legal costs. It is my view that there is an obvious distinction between a public interest litigant or group

promoting constitutional litigation and tone who pursues a general issue as in the present case.

[67] In *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (8 October 2009), O' Regan J, stated the following:

“The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy. When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.

Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to “progressively realise” social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution. . .

It is true that litigation of this sort is expensive and requires great expertise. South Africa is fortunate to have a range of non-governmental organisations

working in the legal arena seeking improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to costs in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order. The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued.

This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process.” (Footnotes omitted)

[68] It is settled that the award of costs is a matter which is within the discretion of the court considering the issue of costs. However, there may be instances where it would not be appropriate to award such costs.

[69] In *Biowatch (supra)* the following was stated at par 16:

“In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice”.

[70] Of course, in *Biowatch* this was stated in the context of Constitutional litigation. Thus, not every aspect of it is applicable to the present case.

[71] I consider important that when a party asserts that it brings a case with a motive to vindicate 'general public' interests, it is critical for the court to be mindful amongst others of the following:

- a) What is it that the public interest litigant seeks to address or serve? Stated otherwise, what is the main reason and primary objective for the litigation?
- b) Would the concern to pursue litigation vindicate or effectuate public policy?
- c) Whether the public interest litigation would result in the enforcement of an important right affecting the public interest?
- d) Would the public interest litigation bring a substantial obvious benefit to the public at large? Put otherwise, whether the litigation is directed primarily to the achievement of some public purpose.
- e) Does the case involve matters of public importance?
- f) Would the issue only implicate a particular public interest litigant or would it be for the benefit and be important to the public at large?
- g) Does the public interest litigant have a pecuniary or proprietary interest in the result of the litigation?
- h) Would the public interest litigation result only in vindication of the rights of a few individuals?
- i) Would the litigation benefit the public in the sense that the public would be better off by having the litigation pursued by than being without it.
- j) Would the public interest issue outweigh or transcend any private interest that may be involved?

k) Does the matter involve litigation that only a private party can be expected to pursue

l) Has the public interest litigation been taken in good faith or bad faith?

[72] Indeed, it is important to emphasise that, while it is important to litigate in order to vindicate public interest, such litigation should definitely benefit the interests of numerous people. Thus, the public generally would be better served by the relief sought.

[73] I have already indicated (in paragraph 23 above) that the present case, the court was not called to adjudicate the merits of the application as the applicant abandoned pursuing the litigation. Thus, the issues between the parties were not ventilated. Notwithstanding that this Court is still able to distill from the papers whether the actions taken by the applicant were necessary in the interests of the public. In any event, in the case of *Wildlife & Environmental Society v MEC For the Economic Affairs* 2005 (6) SA on page 129B-E, Pickering J, endorsed the view that an applicant which has withdrawn its application, can make reference to the averments contained in the affidavit filed in the main application, in substantiation of its contention that in bringing the application it acted reasonably. That is why in this case, the history preceding the formation of the applicant, and the launching of this application cannot be ignored.

[74] The evidence in this case indicates that the applicant's three directors were involved from the initial stages in taking this matter to court.

[75] The timing of the formation of the applicant cannot be ignored. The applicant was formed on the eve of the institution of this litigation. In the circumstances of this case, I would, however, like specifically to endorse all the respondents' contentions that the applicant's formation was not for legitimate reasons but plainly for pretextual ones.

[76] When the facts of this matter are considered, it becomes abundantly clear that there was nothing that prevented the applicant's directors from bringing the litigation.

This is so because they were also involved from the onset in the engagement with the third respondent. It is also common cause in this matter that the three directors are property owners in the area where the development in question is situated. Hence, it is not even surprising that the founding affidavit was deposed to by Mr Sass [applicant's director].

[77] Clearly, property owners have a private interest in the construction of development in their neighbourhood that is in close proximity to their properties. It is however significant to note that the private interest of the property owners is not always in alignment with the interests of the public at large. The corollary of this is that when property owners institute litigation they are not always acting in the interest of the public. This is so because they may have proprietary incentive to commence the litigation. Thus, as far as costs are concerned, they may have private interests that would balance the deterrent effect of litigation costs against them.

[78] Turning now to the applicant, in the circumstances of the case, the question that aptly arises is; can it be said that the applicant qualifies as a public interest litigant? In this case, it is difficult to say that the applicant is lacking a proprietary incentive in the outcome of this matter. Particularly if regard is had to the background that preceded the formation of the applicant and the timing of the formation of the applicant that almost coincided with the institution of this matter.

[79] Moreover, the applicant's directors are property owners in the Ward in question. Thus, this litigation by the applicant is directly tied to homeowners. The connection of the property owners to the applicant is too close. To my mind, the most significant feature of respondent's submission was that the applicant is a 'sham'. Given the plain connection between the applicant and its directors who are homeowners in Ward 1[...], the respondents cannot be faulted for saying that the applicant is a device used by the directors to hide behind and formed solely to pursue this litigation.

[80] From the evidence placed before this Court, it is clear, therefore in my mind that the applicant was formed to advance the interest of its directors. Furthermore and significantly, it is evident from the papers that a significant part of the applicant's

motivation to bring this application is connected directly to its directors and this case. It is highly unlikely that the applicant would have been formed if this litigation was not going to be launched. Since it is only the applicant's directors who also happen to be the three homeowners who were actively involved in challenging the third respondent before this litigation commenced, it is highly unlikely that the applicant would have been formed in the absence of the three directors. I find it difficult to find in the circumstances of this case that the applicant is acting genuinely in the 'public interest [in the interest of Ward 1[...] residence].

[81] The main difficulty in this case springs from the fact that the very same applicant who purportedly brought the application to champion the interests of the public, withdraws the application. There is an oddity around the fact that the applicant withdrew the application. The withdrawal of the application is extremely illuminating.

[82] Firstly, it bolsters and lends gravitas to the assertion that incompetent demands were made to the applicant and that the application was never launched to vindicate public interest. Secondly, it speaks to the *bona fides* of the applicant in bringing the application. Moreover, there is now a line of cases lending authority for the position that any person bringing proceedings to vindicate his or her perception of the public interest should do so in good faith and the challenge should be genuine and not frivolous. See Environmental Alliance case(supra).

The withdrawal of the application

[83] Parties should think very carefully before they take a case to court. For that matter, I do not think it would be wise to create an impression that any party bringing a proceeding to vindicate their perception of the public interest should be shielded from an award of costs in all cases. Though such an intention should be considered, it should not be considered to the exclusion of all other relevant and weighty factors.

[84] As to this point, I find it most telling that the applicant chose not to proceed with the matter. Perhaps most telling and significant to me is the fact that it was withdrawn, albeit it was ripe to be heard.

[85] So far as I am aware, there was no justification proffered for the withdrawal of the application. There is nothing in the papers that provides a compelling reason why the matter was not pursued. Of course, this begs the question as to how could it then be found that the applicant acted reasonably in withdrawing or launching the application.

[86] Viewed in the light of the above considerations, it is quite ironic if not hypocritical that a litigant that came to court claiming that it seeks to vindicate a public interest issue, yet on the eve of the hearing, the very litigant abandoned such litigation that was even brought on an urgent basis.

[87] An additional irony is that the litigant that purports to be a public interest litigant as far as the issues are concerned in this matter, does not even give a reason for the withdrawal of the action. It is noteworthy that the application was withdrawn whilst one of the issues that were raised against the application was the standing of the applicant to bring the application.

[88] The abrupt withdrawal of the application, in my mind, shows that it was not launched in good faith. Absent any evidence to the contrary, it is impossible to conclude that this was public interest litigation. In my mind, this takes the present case outside the scope of public interest litigation.

[89] Such litigation should not be financed by the taxpayers. To hold otherwise would be to extend the scope of public interest litigation extremely wide. The fact that the applicant is a non-profit company is neither here nor there.

[90] It is undeniable that the first and third respondents have incurred costs due to the institution and the last-moment withdrawal of the application by the applicant. Thus, the respondents are entitled to be reimbursed for the unnecessary expenses. I agree with the applicant that if there is something to establish that the withdrawal is reasonable. Such has not been established on the facts of this case or through oral submissions.

[91] The withdrawal of an opposed application [that was brought on an urgent basis] on the eve of a hearing, in my mind, constitutes behaviour that is extremely unreasonable.

[92] There can be little doubt that it is in the public interest that a public interest litigant undertaking litigation on behalf of the public, should see such litigation to its finality. Otherwise, it would be difficult to find that an abandoned litigation was undertaken in the public interest.

[93] A careful consideration of the evidence and the applicant's submission fails to disclose any public interest involved in this litigation. In the circumstances, it is somewhat difficult to find that the issues that are raised in the applicant's application are prima facie meritorious and they transcend individual interests. It is difficult to think of a case where an applicant should have thought much more clearly about whether this was really a case where an application should have been pursued in the fashion it was.

[94] It is undeniable that the matter was brought to this Court at no doubt considerable further expense to the ratepayers.

[95] In consideration of all the circumstances before me, I conclude that in such circumstances a party cannot escape cost consequences on a ticket of public interest litigation. On the facts of this case, I consider that the first and third respondents have put forward good reasons why the applicant should not be excused from paying costs.

[96] The crucial question, then, is from who the respondents are entitled to recover the costs.

Besides the applicant, who else should carry the cost burden?

[97] The respondents argued that the court should also order that the costs be paid *de bonis propriis* by the deponent to the founding affidavit, Mr Sass. Mr Sass was not a party in these proceedings. As such, I am not convinced that such an

order is appropriate without him having been joined in these proceedings. I believe that the present case is readily distinguishable from the authority relied on by the respondents of *Interim Ward S19 Council v The Premier: Western Cape Province and Others* 2003 JDR 0413 (C). It is distinguishable in two important ways. Firstly, here, unlike in *Interim Ward S 19* case, there is no unfortunate, long and checkered history that involves non-payment of taxed legal costs. The history of costs in *Interim Ward S 19* was somewhat complex. Secondly, there is no evidence that the respondents would be unable to recover the costs from the applicant.

[98] For these reasons I agree with Mr Engela that no case has been made out for an order *de bonis propriis*.

[99] Consequently, I make the following order:

The applicant is to pay the costs of the application.

NZIWENI J
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	Adv RB Engela
Instructed by	Len Dekker Attorneys Inc.
Ref	Mr C Van Der Walt
Counsel for First Respondent:	Adv N. De Jager
Instructed by	Van Zyl Kruger Attorneys
Ref	Mr A Van Greunen
Counsel for Third Respondent:	Adv A G Christians
Instructed by	Du Plessis Hofmyer Malan Inc
Ref	JP Du Plessis