



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: 3243/2024

In the matter between:

MAKGOTSO E MBUYISA

Applicant

and

**HOD: FREE STATE DEPARTMENT OF
SOCIAL DEVELOPMENT**

First Respondent

TUMELO J PHAHLO

Second Respondent

THE PREMIER OF THE FREE STATE PROVINCE

Third Respondent

**MEC: FREE STATE DEPARTMENT OF
SOCIAL DEVELOPMENT**

Fourth Respondent

DG: FREE STATE PROVINCIAL GOVERNMENT

Fifth Respondent

Neutral citation:

Coram: Mbhele DJP *et* Opperman J

Delivered: 13 March 2025

Summary: *Biowatch*-rule – intent of rule confirmed – rule only applies to genuine constitutional issues.

ORDER

1. Application for leave to appeal is dismissed with costs.
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JUDGMENT

Mbhele DJP (Opperman J concurring)

Introduction:

[1] On 5 August 2024, we struck an application for review off the roll with costs on the basis that the matter was not properly before the court due to non-compliance with the Uniform Rules of Courts (the rules). This is an application for leave to appeal against our judgment and order only in relation to costs. The leave to appeal is decided on papers.

[2] The grounds on which leave to appeal is sought are listed extensively in the application and to avoid prolixity I shall not repeat same herein. The grounds are mainly a rehash of what was argued before us in relation to costs and dealt with in the judgment.

[3] Central to the applicant's complaint is that we erred in granting a costs order against her and that she ought to have been afforded the protection of the *Biowatch*-rule. In *Biowatch Trust v Registrar Genetic Resources and Others*¹ (*Biowatch*), the Constitutional Court addressed the issue of costs in constitutional litigation, particularly in cases involving public interest and the enforcement of constitutional rights. The principle provides that if a matter is of constitutional importance and involves public interest litigation, the unsuccessful party should not be burdened with costs, even if they lose the case. The *Biowatch* principle was articulated as follows:

'If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is

¹ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way the responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door.²

[4] The operation of the *Biowatch* principle is restricted to genuine constitutional challenges. It is not available to a litigant who is guilty of unacceptable behaviour in relation to how litigation is conducted. Such litigant may be ordered to pay costs.³ Over and above the rule being limited to constitutional challenges, it also excludes vexatious and frivolous litigation.

[5] The applicant approached this court, *inter alia*, seeking relief to review and set aside a decision by the first respondent to place her on precautionary suspension. The first respondent subsequently lifted the applicant's suspension. The applicant persisted with her application on the basis that the decision to suspend her is an administrative decision which stands until reviewed and set aside by a competent court. However, this argument is misplaced.

[6] In *Chirwa v Transnet Ltd and Others*⁴ (*Chirwa*) and *Gcaba v Minister of Safety and Security*⁵ (*Gcaba*) the Constitutional Court said that matters relating to employment, even in public service, do not constitute administrative actions. Van der Westhuizen J. remarked as follows in the majority judgment in *Gcaba*:

'[64] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.'

² Ibid para 23.

³ *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC).

⁴ *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC).

⁵ *Gcaba v Minister of Safety and Security* [2009] ZACC 26; (2010) 31 ILJ 296 (CC).

[7] Having considered the dicta of Skweyiya J and Langa CJ in *Chirwa*, Steenkamp, J held as follows in *National Commissioner of Police and Another v Harri NO and Another*.⁶

'The Constitutional Court has thus put it beyond dispute in *Chirwa* and *Gcaba* that the dismissal of a public service employee does not constitute administrative action. Why, then, should the state as employer be able to review a decision by its own functionary in this case? The distinction appears to me to lie in the fact that, in this case, the state is acting *qua* employer; and the functionary is fulfilling his or her duties in terms of legislation.'⁷

[8] The Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and Others*⁸ defined administrative action as follows:

'In section 33 the adjective 'administrative' and not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.'⁹

[9] It is clear from the above dicta that the core relationship between the employer and employee is distinct from a purely administrative action. The employer-employee relationship, similar to the one that existed between the applicant and the respondents, is a contractual arrangement based on mutual agreement, mainly focused on exchange of labour for compensation. Administrative actions are, on the other hand, aimed at implementing public policies, regulations or laws.

[10] In consideration of applicable legal principles, I hold a view that the applicant's precautionary suspension was not an administrative action which required a competent court to set it aside. There was nothing that precluded the employer from withdrawing the suspension. Further, it was clear from the letter written to the applicant by the first respondent that the precautionary suspension was imposed in the process of investigating the alleged misconduct. The applicant persisted with her challenge anyway, even though it was clear that the outcome she sought would have had no

⁶ *National Commissioner of Police and Another v Harri NO and Another* [2010] ZALCCT 30.

⁷ *Ibid* para 20.

⁸ *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2009 ZACC 11; 2000 (1) SA (1).

⁹ *Ibid* para 141.

practical effect as the suspension was already withdrawn at the time of the hearing.

[11] The other issue is that the challenge mounted by the applicant against the respondents raises no genuine constitutional issue. As already mentioned, *Biowatch* was not aimed at protecting litigants who bring frivolous and vexatious issues to court. The protection offered by *Biowatch* is available to litigants who are raising genuine constitutional issues.

[12] Having concluded that none of the grounds of appeal enjoys reasonable prospects of success, whether taken singly or cumulatively, the application for leave to appeal must fail.

Order:

[13] I, therefore, make the following order.

The application for leave to appeal is dismissed with costs.



MBHELE DJP

I concur.



OPPERMAN J

Appearances:

For the Appellant:

Adv MJ Merabe
with K Nhlapo-Merabe

Instructed by:

Salakuva Attorneys
Bloemfontein

For the Respondent:

Adv LR Bomela

Instructed by:

State Attorney
Bloemfontein