



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
2 September 2025	 SIGNATURE
DATE	

Case No: 058307/2022

In the matter of
**THE SOCIETY OF THE PROTECTION OF OUR
 CONSTITUTION**

Applicant

And

PRESIDENT CYRIL RAMAPHOSA

First Respondent

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
 PRETORIA**

Second Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
 PROSECUTIONS**

Third Respondent

JUDGMENT

MINNAAR AJ.

[1] The first respondent's application consists of Part A and Part B. Part A compels the applicant to comply with the first respondent's notices in

terms of Rule 7, Rule 14, and Rule 35(12). In terms of Part B, the first respondent seeks an order directing the applicant to pay the first respondent's costs of opposing the main application brought by the applicant, which was withdrawn on 13 July 2023.

[2] Although there was some confusion about what exactly was placed before the court, it became evident that only the aspect of costs (Part B) required adjudication. The first respondent did not file an updated practice note. Counsel for the applicant, however, placed reliance on a document dated 5 December 2024, styled 'Joint Practice Note', wherein it was evident that the nature of the motion related to costs. This was also evident from the heads of argument filed by the first respondent. The applicant's practice note, dated 29 May 2025, stated that the nature of the proceedings was an application for an award for costs pursued by the first respondent against the applicant.

[3] The first respondent attempted to introduce a further affidavit, dealing with the aspect of costs, into the record. This further affidavit was not accepted as part of the record.

[4] It is competent for a court in applications for costs to take into account the affidavits filed in the main application.¹

¹ *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) on 12⁹

[5] The main application was issued in December 2022. In essence, the applicant sought an order compelling the second and/or third respondent to secure the attendance of the first respondent to the Pretoria Magistrates Court by way of summons as contemplated in section 38 of the Criminal Procedure Act, Act 51 of 1977, on charges relating to the now well-known Phala-Phala saga.

[6] On 20 June 2023, the first respondent filed an answering affidavit to the main application. The second and third respondents also filed an answering affidavit to the main application.

[7] The first respondent's basis for opposition was that the main application was not competent. Relevant to this cost application is paragraph 76 of the first respondent's answering affidavit in the main application, which stated:

"... If the applicant fails to withdraw its application, or persists in pursuing it after the filing of this answering affidavit, it will be submitted to the Court that the applicant should not enjoy the Biowatch protection. Accordingly, the Court will be asked to order the applicant and/or its legal representatives to pay the costs in this application."

[8] The *Biowatch* principle originates from *Biowatch Trust v Registrar, Genetic Resources, and Others* (2009) 6 SA 232 (CC) (2009 (10) BCLR 1014; [2009] ZACC 14). It states that parties that seek to vindicate

constitutional rights against the state are not liable to pay the state's legal costs if they are unsuccessful.

[9] The invitation in paragraph 76 of the first respondent's answering affidavit to the main application was unequivocal: withdraw the main application or lose the protection of *Biowatch*.

[10] The applicant did not immediately withdraw the main application. Between 28 June 2023 and 6 July 2023, the applicant sent three letters to the first respondent's attorney and filed notices in terms of Rule 7 and Rule 30A.

[11] On 10 July 2023, the applicant's attorney addressed a letter to the first respondent's attorney. In this letter, paragraph 76 of the first respondent's answering affidavit was quoted verbatim. In the letter, it was then recorded: *Consequence to careful scrutiny of the afore quoted paragraph 76 our client instructs not to continue with this application any further."*

[12] On the same day, the first respondent's attorney responded and requested that the applicant deliver a notice of withdrawal, in accordance with Rule 41(1) of the Uniform Rules of Court, by no later than 17h00 on 11 July 2023.

[13] On 11 July 2023, instead of delivering the requested notice of withdrawal, the applicant's attorney addressed a letter in terms of which the authority of the first respondent's attorney was disputed. The applicant's attorney further stated that its client, in writing, heeded the caution and conveyed in writing its intention not to continue with the proceedings.

[14] On 13 July 2023, the attorney for the first respondent replied. Of relevance are the following paragraphs:

"6. The purpose of this correspondence is to formally respond to Ms Omar's email of 10 July 2023 and your office's subsequent letter.

7. The first respondent's answering affidavit was filed on 22 June 2023. In this affidavit, as you have acknowledged, we clearly articulated our client's position with regard to a waiver of the Bio Watch principle. Instead of notifying us of your client's withdrawal shortly after receipt of the answering affidavit, your client, aided by you, clearly persisted with this litigation. This is borne out by the fact that between 26 June 2023 and 7 July 2023 you sent us a number of letters relating directly to the ongoing litigation and served on us a discovery affidavit and multiple notices in terms of the Uniform Rules of Court.

8. The above is not indicative of your client heeding caution in response to paragraph 76 of the first respondent's answering affidavit, but in fact demonstrates quite the opposite.

9. In the circumstances and consistent with the position already conveyed, our client will not agree to each party carrying their costs,

should your client decide to formally withdraw its application by issuance of a notice of withdrawal in terms of Rule 41.”

[15] Following this letter, and on the same day, the applicant’s attorney then delivered the notice of withdrawal. In the notice of withdrawal, the applicant did not tender the costs of the main application. Under the circumstances, the provisions of Rule 41(1)(c) applies.

[16] On 26 October 2023, the first respondent delivered the costs application. No notice of intention to oppose nor answering affidavit was forthcoming. It was only on 1 August 2024, and without seeking condonation, that the applicant delivered a signed answering affidavit. This is almost eight months late. According to the applicant, and this was also the essence of the submissions made by the applicant’s counsel, the applicant accepted the tender made in paragraph 76 of the answering affidavit in the main application, and, as far back as 10 July 2023, the first respondent’s attorney accepted to settle the dispute in accordance with paragraph 76. It is further contended by the applicant that the application for costs is dishonest and vexatious and must be dismissed with costs on the scale as between attorney and client, on scale C.

[17] The applicant further relies on a Rule 30(2)(b) notice of an irregular step. This notice is dated 2 November 2019. It is a mystery how this notice can find any application herein, as it predates any of the events leading up to this application.

[18] Besides being woefully out of time, the answering affidavit also fails to answer any of the specific averments contained in the founding affidavit. It is trite that if the respondent's affidavit in answer to the applicant's founding affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the court will, for the purposes of the application, accept the applicant's allegations as correct.²

[19] I am not convinced that the parties settled the dispute as alleged by the applicant. What is evident is that the main application was not withdrawn immediately as requested. Instead, the applicant elected to file further notices and to engage in further correspondence (not to settle the aspect of costs amicably but to quibble on the authority of the first respondent's attorney). Rule 41(1) requires a formal notice of withdrawal and not merely an intention to withdraw by way of correspondence. The notice of withdrawal was only delivered on 13 July 2023, and it was only then that the withdrawal became effective.

[20] Unless the court, in exercising its judicial discretion upon consideration of all the facts, is persuaded that it would be unfair to impose costs on the unsuccessful party, the general rule of application is that, in cases where litigation has been withdrawn, a successful litigant is entitled to their costs.³ The discretion in granting costs is trite.⁴

² *Moosa v Knox* 1949 (3) SA 327 (N) at 221

³ Footnote 1 above: *Wildlife* on page 131

⁴ *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others* 1996 (2) SA 621 (CC) at paragraph 3

[21] Even if consideration is given to the *Biowatch* principle, this court remains unconvinced that the applicant should not be ordered to pay costs. Throughout the main application and the costs application, the applicant was legally represented. In paragraph 76 of the answering affidavit, a generous invitation was extended to the applicant in June 2023. The applicant did not accept this invitation. In the absence of an agreement to costs, the applicant failed to tender any costs in the notice of withdrawal. The costs application was defended way out of time and by way of a very cryptic answering affidavit relying on an irrelevant Rule 30(2) notice. No shred of justification is provided for why the main application was indeed brought and then withdrawn. The applicant failed to take this court into its confidence by lifting the veil of secrecy surrounding the applicant's identity. It follows that there are no grounds to deprive the first respondent of its costs in the main application. Equally so, there is no basis why the first respondent should be out of pocket on pursuing this costs application.

[22] I note the first respondent's concern that no purpose would be served by awarding the first respondent a costs order against a non-existent entity. In his attack on the applicant's identity, the first respondent relies on notices in terms of Rule 7, Rule 14, and Rule 35(12), annexed to the founding affidavit. There is, however, no proof attached to the first respondent's founding affidavit that any of these notices were served. It is not for the court to delve through the court file to establish a case on behalf of a litigant. As such, the court cannot

entertain the first respondent's concern that a costs order against the applicant will not be satisfied. Equally so, if there is no proof of compliance with the relied-upon notices, the court cannot entertain the request that Zehir Omar Attorneys be liable for any costs.

[23] Due consideration was given to grant punitive costs against the applicant. The first respondent's failure to present a properly prepared application must, however, be frowned upon. The first respondent has further, despite the Judge President's Directive, also failed to correctly identify and upload documents separately. As a result, no punitive costs will be granted.

[24] The determination of which scale of costs is applicable under the party and party scale regime is dictated by the provisions of Rule 67A of the Uniform Rules of Court. Rule 67A(3) provides that a court "shall", when making a party and party costs order, "indicate the scale in terms of rule 69, under which costs have been granted". Those scales have been inserted into rule 69(7) under the amendment that created rule 67A.⁵

[25] Scale A is the lowest scale and will be applied by default if no scale is specified. Scale B falls in the middle of the spectrum, and scale C is the highest scale when party and party costs are ordered. The effect

⁵ *Mashava v Enaex Africa (Pty) Ltd* (2022/1840) [2024] ZAGPJHC 387 (22 April 2024) at par 7 to 9

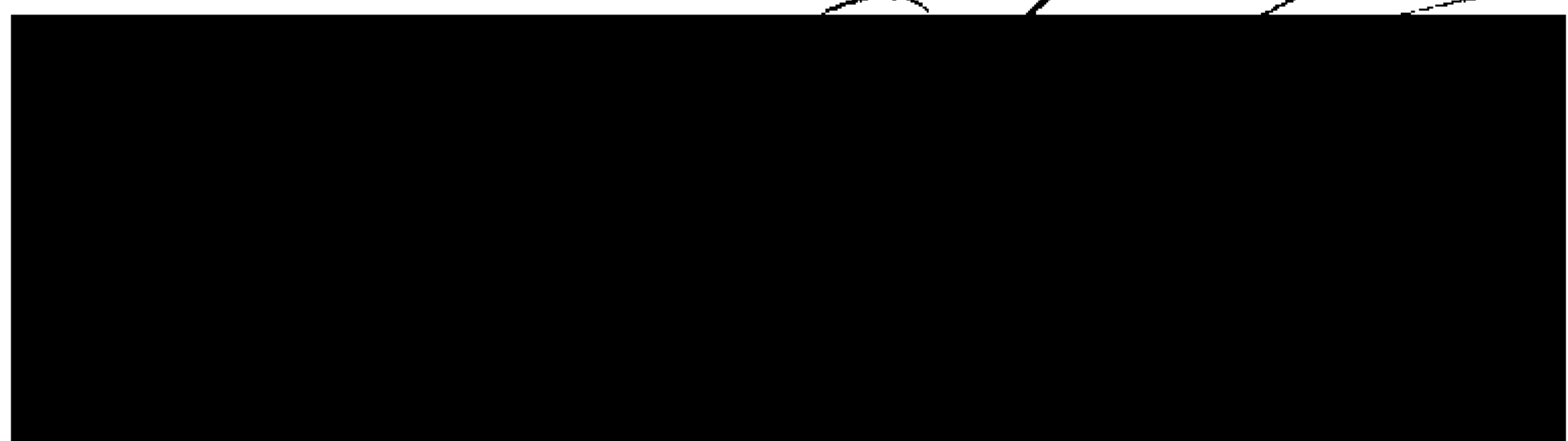
of different cost scales is to determine the rate at which costs can be taxed.

[26] On the nature of the application and the criticism against the manner in which the application was presented, I am of the view that costs on scale A would be reasonable.

[27] Consequently, I make the following order:

[1] The applicant is directed to pay the first respondent's costs of the main application, such costs to be taxed on Scale A.

[2] The applicant is to pay the costs of this application, such costs to be taxed on Scale A.



Minnaar AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard on	: 2 June 2025
For the first respondent	: Adv P Sokhela
Instructed by	: Harris Nupen Molebatsi Attorneys
For the applicant	: Adv. Y Omar
Instructed by	: Zehir Omar Attorneys
Date of Judgment	: 2 September 2025