IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: EL 940/2025

In the matter between

SNR ELECTRICAL CC	**APPLICANT**
and	
KING SABATA DALINDYEBO MUNICIPALITY	**FIRST RESPONDENT**
SIYA AND AYA ENGINEERING (PTY) LTD	**SECOND RESPONDENT**
TIDOO ENGINEERING SERVICES	**THIRD RESPONDENT**
ISANGQA SOMHLABA GROUP (PTY) LTD	**FOURTH RESPONDENT**
VMMV PROJECTS AND TRADING (PTY) LTD	**FIFTH RESPONDENT**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

ROBERSON J:-

[1] This is an application for leave to appeal against a costs order. The applicant was a bidder for a tender published by the first respondent. On 5 May 2025 the first respondent published a notice of intention to award the tender to the second to fifth respondents. On 12 May 2025 the applicant notified the first respondent that it lodged an objection to the decision and asked for reasons for its rejection. On 15 May 2025 the first respondent notified the applicant that it had decided to proceed in terms of SCM Regulation 50 to address the objection. It did not provide reasons for the exclusion of the applicant. On the same day the first respondent informed the second to fifth respondents that it had received an objection, was addressing the matter and would provide updates.

[2] The applicant launched an application on 22 May 2025 seeking to interdict the respondents from concluding any contracts pursuant to the tender or the implementation of contracts which had been concluded, pending an application to review the decision. Other relief claimed was the provision of the record of decision and reasons for the decision.

[3] On 23 May 2025 the first respondent sent an email to the applicant and according to the first respondent also to the second to fifth respondents, proposing an extension to the validity period of the tender, saying that "this extension is necessary to ensure fairness and transparency in accordance with the MFMA regulations". The applicant questioned the validity of the proposal and put the first respondent on terms to deliver its answering affidavit.

[4] The first respondent provided its reasons by letter dated 2 June 2025 and informed the applicant that it awaited the applicant's supplemented objection on receipt of which the objection would be considered and ruled upon in terms of the relevant procurement prescripts. It also invited the applicant to withdraw the application, which it said was in the circumstances an abuse of process.

[5] Prior to the delivery of answering affidavits the second, third and fourth respondents informed the applicant that the application was premature because no award had been made. The first respondent's answering affidavit was delivered on 6 June 2025, in which it was stated, inter alia:

> "The balance of convenience is clearly in favour of the Municipality, pending a final decision on the Applicant's objection. The Municipality will not take further steps on the tender. It cannot. It is compelled to deal with the objection by the regulations and its policy."

[6] The matter was heard on 10 June 2025. Following argument and the submission of draft orders, I made an order striking the matter from the roll and incorporating the first respondent's undertaking not to make an award until the objection procedure had been finalised. I reserved my decision on costs. I ultimately ordered the applicant and the first respondent to pay their own costs up to and including 6 June 2025, the date of delivery of the

answering affidavit in which the first respondent undertook not to take further steps in the tender. I ordered the applicant to pay the first respondent's costs after that date. I ordered the applicant to pay all the costs of the second to fifth respondents.

[7] I am of the view that there is no reasonable prospect that another court would find that I did not exercise my discretion judicially in making this costs order. With regard to the applicant and the first respondent, I took into account their respective conduct up to the time of the answering affidavit and struck a balance between such conduct. I took into account further the clear undertaking in the first respondent's answering affidavit not to proceed with the tender pending the objection procedure. With regard to the second to fifth respondents I took into account that they were obliged to come to court to oppose the application, even though they had warned the applicant that the application was premature, and they played no part in the interaction between the applicant and the first respondent.

[8] The so-called Biowatch principle was not raised when the matter was heard on 10 June 2025. However it is a ground of appeal. In *South African Riding for the Disabled Association v Regional Land Claims Commission, Western Cape and Others* [2025] ZACC 25 (13 November 2025) the following was stated at paragraph [36] (footnotes omitted):

> "The Biowatch principle provides that costs should not be ordered against a party where a party seeks to enforce fundamental constitutional rights against the state. The important reason underpinning this principle is that "one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state . . . lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category". Thus, in constitutional litigation against the state, even an unsuccessful private litigant is spared costs, unless the application is frivolous or vexatious. The application of the Biowatch principle is not unqualified. If the application is frivolous or vexatious, or in any other way manifestly inappropriate, it will be treated as an ordinary civil case."

[9] It is so that in the application the applicant was seeking to enforce its right to just administrative action. Nonetheless I consider the manner in which the application was ultimately conducted was at least "manifestly inappropriate". The applicant initiated the objection procedure. The first respondent acknowledged that it was obliged to conduct the objection procedure and undertook not to proceed further pending this prescribed procedure. In the face of this acknowledgement the applicant persisted with the application, even though no award had been made. The applicant even sought to ask for different relief, namely that the court could interdict the processing of the tender at that stage. When it was pointed out that the first respondent had given its undertaking not to proceed pending the objection procedure it was submitted on behalf of the applicant that this undertaking was insufficient protection and, as I understood the argument, the applicant wanted an undertaking that no further steps should be taken pending the review. In my view the applicant could not demand an undertaking other than the one which had been given. The first respondent was entitled not to give such an undertaking which involved the merits of interim relief pending the review. The outcome of the objection procedure was unknown at that stage. In all these circumstances I am of the view that the applicant did not enjoy the protection of the Biowatch principle.

[10] The first respondent opposed the application for leave to appeal and the second to fifth respondents abided the decision of the court. Insofar as two counsel appeared for the first respondent, the matter did not warrant the costs of two counsel and such costs were not sought. Argument was not complex and costs on scale A will suffice.

[11] The following order will issue:

[11.1] The application for leave to appeal is dismissed.

[11.2] The applicant is to pay the first respondent's costs on scale A.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances

Applicant: Adv X S Nyangiwe, instructed by Dhushu & Majebe Attorneys Inc, East London, email admin@dmlaw.co.za.

First respondent: Adv T G Madonsela SC with Adv M Nombewu, instructed by Mvuzo Notyesi Inc, c/o Malusi & Company, East London, email mnotyesi@telkomsa.net.

Second and fifth respondents: Mr T Mjulelwa, Mjulelwa Inc, East London, email mjulelwainc@gmail.com.

Date heard: 3 December 2025

Date delivered: The judgment was delivered electronically by email to the parties' attorneys and the date and time for delivery is deemed to be Tuesday 27 January 2026 at 11h00.