CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 155/14

In the matter between:

TEBEILA INSTITUTE OF LEADERSHIP, EDUCATION, GOVERNANCE, AND TRAINING Applicant

and

LIMPOPO COLLEGE OF NURSING First Respondent

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF HEALTH, LIMPOPO PROVINCE Second Respondent

Neutral citation:	*Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another* [2015] ZACC 4
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ, and Tshiqi AJ
Judgment:	The Court
Decided on:	26 February 2015
Summary:	Appeal against costs order — general costs rule in constitutional litigation — avoid deterring parties from pursuing constitutional claims — exceptional circumstances warranting intervention — costs order set aside

ORDER

1. Leave to appeal is granted.
2. The appeal succeeds with costs.
3. The costs order of the High Court is set aside.
4. The respondents must pay the applicant's costs in the High Court.

JUDGMENT

THE COURT

[1] At issue is a costs order granted by the High Court of South Africa, Gauteng Division (functioning as Limpopo Division, Polokwane) (High Court) – more particularly, the part of it that deprived the applicant of the costs it incurred when it successfully challenged an exclusion the first respondent applied when admitting students. The applicant, a non-governmental educational institution in a rural area of Limpopo Province, brought a constitutional challenge to the admissions policy of the first respondent, the Limpopo College of Nursing (College). The policy required aspiring nursing students to have obtained a school-leaving certificate "not more than three years ago". This, the applicant complained, irrationally and unfairly excluded many worthy prospective students who had left school more than three years previously.

[2] The High Court (Makgoba J) agreed. It condemned as insufficient the justification the College and the second respondent, the Member of the Executive Council for the Department of Health, Limpopo Province (MEC), attempted to proffer

in defence of the bar. The Court found it unwarrantable under both section 9(1) and section 9(3) of the Bill of Rights, and ruled it constitutionally invalid.

[3] So the applicant succeeded, ringingly. But then came the glitch. Instead of granting the applicant its costs, the High Court's order specified that "[e]ach party shall pay its own costs".[1] This deprived the applicant of the costs it had to incur to overturn the ban. In delivering its reasons, the High Court explained its ruling thus:

> "The case before me does not warrant an award of costs against the unsuccessful party in that the issues raised in this matter are of a constitutional nature."

[4] This was very plainly a mistake. The applicant was entitled to its costs. The general principle in constitutional litigation was laid down in *Biowatch*.[2] In that case, this Court found that the general rule in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, while, if unsuccessful, each party should pay its own costs.[3]

[5] What is more, in *Biowatch* the Court held that, when departing from the general rule, a court "should set out reasons that are carefully articulated and convincing". This, it noted, "would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future".[4]

[6] In saying this, the Court had in mind the case before it, where a member of the public, litigating to protect constitutional rights, was unjustly saddled with an adverse costs award, but what it said applies equally to other deviations from the general rule.

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[1] The applicant brought its application on an urgent basis. The High Court granted the applicant the substantive order it sought, together with the impugned costs order, on 27 August 2014. The High Court furnished the reasons for the order on 8 September 2014.

[2] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[3] Id at para 43.

[4] Id at para 25.

Courts must "carefully and convincingly articulate" why they deprive members of the public of their costs when they successfully challenge constitutional injustices.

[7] The Court in *Biowatch* set out the rationale for ruling that successful private litigants get their costs when litigating against organs of state, but are not saddled with the state's costs when losing.[5] It explained that adverse costs orders have a chilling effect on parties seeking to assert constitutional rights. But it noted further implications, observing that "[m]eritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences".[6] And it added, presciently for the arguments in this case, that—

> "[s]imilarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse."

[8] The applicant invokes precisely this point. It says that its right of access to courts, and that of other litigants, is impeded, because the costs order here will make it reluctant to litigate against the state where this is necessary, because of the risk of not being indemnified for its costs even when it succeeds.

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[5] The full passage in the *Biowatch* judgment at para 23 reads:

> "The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. 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 not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door." (Footnote omitted.)

[6] Id.

[9] And, indeed, the applicant's fears have an added edge here as there was no lapse, inadvertent, procedural or technical, that could have justified depriving it of its costs. The applicant appears to have conducted its case impeccably. So there was no basis at all for departing from the general rule.

[10] The costs order granted by the High Court seems to have been a mere slip. In an inadvertent transposition of logic, the Court appears to have taken the rule that protects unsuccessful constitutional applicants from adverse costs orders, and applied it for the benefit of state institutions here by depriving the applicant of the favourable costs award to which it is entitled.

[11] In these circumstances, the applicant asks this Court to overturn the costs order. This Court issued directions on 3 December 2014 requiring the parties to submit short argument on whether it is in the interests of justice to approach this Court directly, instead of the Full Court[7] of the High Court and the Supreme Court of Appeal, and on the merits of the challenge to the costs order.

[12] The respondents oppose. They contend that the High Court did not exercise its discretion capriciously or incorrectly. But that is wrong. In this case, the High Court did not elaborate its reasoning for depriving the applicant of its costs. Its order was plainly an inadvertent misapplication of the *Biowatch* logic. That constituted a clear misdirection. If it is shown that a court exercised its discretion based on incorrect principles of law, an appeal court may interfere with that exercise of discretion.[8]

[13] The more difficult question – which the respondents fail to address – is whether this Court should use its clout to intervene and fix the mistake. That involves difficult issues of institutional power, energy and time. Few appellate courts countenance

[7] A Full Court is the statutory term for a bench of three High Court judges sitting as an appeal court of that Division. See sections 1 and 16(1)(a)(i) of the Superior Courts Act, 10 of 2013 and section 20(2)(a) of the repealed Superior Courts Act, 59 of 1959.

[8] See *Giddey N.O. v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 19.

appeals on costs alone, and indeed the statute regulating appeals from a High Court to a Full Court or the Supreme Court of Appeal has long provided that an appeal may be dismissed on the sole ground that the decision sought "will have no practical effect or result" and that, save under exceptional circumstances, the question whether there would be any practical effect or result must be determined "without reference to any consideration of costs".[9] The practical impact of this provision is that appeals on costs alone are allowed very rarely indeed.[10]

[14] All this makes this Court reluctant to correct the mistake here. And we have given careful consideration to the alternative. This is to dismiss the application and send the applicant back to the High Court, in order to seek its leave to appeal against the costs order to the Full Court. But, as shown above, that course may fail on the very point that appeals against costs orders alone are not countenanced. So, for the applicant, that would likely be a dead end.

[15] There are considerations militating in the applicant's favour in this Court. The subject of the challenge it litigated, namely access to further education, was plainly constitutional.[11] And those on whose behalf it brought the challenge – students in the

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[9] Section 16 of the Superior Courts Act 10 of 2013, entitled "Appeals generally", provides:

> "(1) Subject to section 15(1), the Constitution and any other law—
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> . . .
>
> (2) (*a*) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
>
> (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

This provision was almost identically contained in section 21A(1) and (3) of the Supreme Court Act 59 of 1959.

[10] This Court's decision in *Coetzee v National Commissioner of Police and Another* [2013] ZACC 29; 2013 (11) BCLR 1227 (CC) (*Coetzee*) provides an illustration. The Court refused leave to appeal against an adverse costs award of the Supreme Court of Appeal because the issue at stake was not constitutional. The challenge to the Supreme Court of Appeal's findings was largely factual. To the same effect is this Court's decision in *Justice Alliance of South Africa v Minister for Safety and Security and Others* [2013] ZACC 12; 2013 (7) BCLR 785 (CC), where this Court refused to set aside adverse costs awards against the applicant on the basis that the challenge it brought was not based on any infringement of a fundamental right in the Constitution (see para 15).

[11] In this respect, the present case differs from *Coetzee* id and is more like *Stainbank v South African Apartheid Museum at Freedom Park and Another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) (*Stainbank*). That matter involved a recusation challenge. This Court plainly had constitutional jurisdiction. While rejecting the

country's rural areas – are entitled to particular respect for their social and constitutional entitlements.

[16] Moreover, there are exceptional circumstances warranting this Court's intervention.[12] First, this is the first time this Court has been confronted with a case where a litigant who has successfully vindicated constitutional rights has been deprived of its costs. The case therefore makes a singular claim for intervention.

[17] Second, it is nearly six years since this Court handed down *Biowatch*. The applicant's plaint affords this Court a useful opportunity to restate the principles laid down in *Biowatch* and to emphasise the rationale behind them. In particular, the case serves as a reminder to judicial officers handing down costs orders that litigants successfully asserting their constitutional rights against state institutions should get their costs unless there are "carefully articulated and convincing" reasons to deprive them of those costs.

[18] For these reasons, the interests of justice favour granting the applicant leave to appeal. They also favour intervening to set aside the costs award. There will be a consonant order.

Order

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constitutional challenge, the Court held that the applicant's related complaint, about the High Court's costs order, was an issue connected with a constitutional issue, which gave it jurisdiction (see para 27).

[12] See *Stainbank* id at para 29 and *Biowatch* above n 2 at para 11.

For the Applicant:	S Tebeile and K Mokwena instructed by Obi Matlaila Attorneys.
For the Respondents:	C Brand SC and O Mudau instructed by State Attorney, Polokwane.