IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: D11938/2022

In the matter between:

ETHEKWINI MUNICIPALITY **FIRST APPLICANT**
THE EXECUTIVE MAYOR OF ETHEKWINI MUNICIPALITY **SECOND APPLICANT**

and

ACTIONSA **FIRST RESPONDENT**
THE MINISTER OF TOURISM OF THE REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**
THE MINISTER OF FORESTRY, FISHERIES AND ENVIRONMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**
THE MINISTER OF WATER AND SANITATION OF THE REPUBLIC OF SOUTH AFRICA **FOURTH RESPONDENT**
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA **FIFTH RESPONDENT**
KWAZULU NATAL MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **SIXTH RESPONDENT**

KWAZULU NATAL MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT: TOURISM AND ENVIRONMENTAL AFFAIRS **SEVENTH RESPONDENT**

ORDER

The following order is made:

1. The applicants' application for leave to appeal is dismissed with costs, including the costs of two counsel, on scale C.
2 The first respondent's application for leave to cross-appeal is dismissed with costs on scale C.

JUDGMENT

Mathenjwa J (Poyo Dlwati JP and Olsen J concurring)

Introduction

[1] The first applicant, eThekwini Municipality and the second applicant, the Executive Mayor of eThekwini Municipality (the applicants) who served as the seventh and eighth respondents in the main application, are seeking leave to appeal the whole judgment and order issued by the full court sitting as a court of first instance on 9 February 2026.[1] Leave is sought to appeal to the Supreme Court of Appeal on the grounds of both reasonable prospects of success and compelling reasons. The first respondent opposes the leave to appeal.

[2] The first respondent who was the applicant in the main application is seeking leave to cross-appeal the decision of the full court relating to the award of costs in favour of the second to sixth respondents (the respondents). The respondents oppose the application for leave to cross-appeal against the costs order.

[1] Reported as *Action SA v Minister of Tourism and Others* 2026 (4) SA 174 (KZP).

Grounds of appeal

[3] The applicants outlined the following ten grounds for leave to appeal as presented in their heads of argument and oral submissions to this court:

(a) In their first ground of appeal, the applicants argued that the court should not have concluded that the first applicant had failed to properly maintain its infrastructure, especially after the court had recorded the first applicant's evidence as to the condition of the infrastructure and the consequences of the April 2022 floods.

(b) The second ground pertains to the court's neglect in applying a standard of reasonableness when assessing and concluding that the first applicant had failed to properly maintain, repair, replace, or install essential infrastructure to prevent the release, flow, or resettlement of sewage and/or untreated effluent into the environment.

(c) The third ground concerns the court's failure to implement the *Plascon-Evans* rule[2] when faced with what was purported to be a significant material dispute of facts.

(d) In their fourth ground, the applicants assert that given the court's finding that no specific legal provisions had been violated, it should have found that the first respondent failed to establish a cause of action against them.

(e) The fifth ground deals with the importation of the order granted in *Democratic Alliance v Ethekwini Metropolitan Municipality and Others*[3] into this case. Although the two applications were not consolidated the court noted in paragraph 82 of its ruling that it would issue an order partly in line with the *Democratic Alliance* decision.

(f) The sixth ground addresses an alleged inconsistency in the court's judgment, where the court indicated in paragraph 82 of the judgment that the conditions at the wastewater treatment works (WWTW) and pump stations were addressed by an action plan, which is not reconcilable with the subsequent unparticularised finding of non-compliance by the first applicant.

---

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[3] *Democratic Alliance v Ethekwini Metropolitan Municipality and Others* [2025] ZAKZPHC 142 (*Democratic Alliance*).

(g) The seventh ground concerns a declaration regarding constitutional mandates and obligations under s 172 of the Constitution, which was made without specifying or identifying any constitutional provision that had been breached.
(h) The eighth ground centres on the allegation that the court failed to identify water legislation as a law of general application, as defined by s 36 of the Constitution.

(i) The ninth ground pertains to the reporting order for E. coli. The applicants contend that the directive for weekly publication of E. coli readings is not supported by evidence presented during the court proceedings.
(j) The tenth ground concerns the costs awarded against the first applicant.

[4] It is essential to recognise that the main application in this instance was considered alongside the main application in *Democratic Alliance.* While the cases were not consolidated, they addressed similar issues. The applicants and first respondent had the same counsel (the other respondents had a different counsel). In light of this, there is significant overlap between these two matters.

Legal principles

[5] It is trite that a court may grant leave to appeal only if it is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason for the appeal to be heard by an appeal court.[4] Those prospects of success 'must not be remote, there must exist a reasonable chance of succeeding'.[5] Even in cases where there appears to be no reasonable prospects of success, it remains necessary to determine whether there are compelling reasons for the court of appeal to hear the matter which may include inconsistent rulings on similar matters, the interests of justice, an important question of law, or a discreet issue of public importance that will have an effect on future disputes.[6] It is apposite that leave to appeal is not sought against the lower court's reasoning, but against the substantive court order.[7]

---

[4] Section 17(1)*(a)* of the Superior Courts Act 10 of 2013.
[5] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.
[6] *Ramakatsa and Others v African National Congress* [2021] ZASCA 31 para 10.
[7] *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] ZASCA 21; [2012] 4 All SA 149 (SCA)
para 17.

Analysis

[6] Turning to the application at hand, concerning the first ground of appeal related to the aftermath of the April 2022 floods, it was argued on behalf of the applicants that after acknowledging the evidence provided by the first applicant regarding infrastructure conditions and the repercussions of those floods, specifically noting that a decision to upgrade water and sanitation infrastructure was limited by funding availability, the conclusion that the first applicant had failed to properly maintain, repair, replace, or install essential infrastructure seems contradictory. It is important to highlight that the court's finding stemmed from the first applicant's non-compliance with directives issued by both the fourth and seventh respondents. Additionally, according to the first applicant's own version, challenges associated with aging infrastructure were present even before the April 2022 floods occurred. Thus, it can be concluded that unrepaired aging infrastructure existed prior to those floods.

[7] Regarding the applicants' contention that due to financial constraints it was unable to stop and prevent pollution, this court considered the same issue based on the same facts in *Ethekwini Metropolitan Municipality v Democratic Alliance*,[8] and held that:

'… The applicant's assertion that it had done what could be expected of it, despite the established shortfalls in outcomes, is based fundamentally on alleged financial constraints. That is a difficult defence to sustain absent a clear analysis of the allocation of the municipality's funds to other spheres of activity. The underlying facts, or data, concerning that are within the knowledge and control of the applicant, and without that data a court is left with no option but to assess what is reasonable by looking principally at outcomes; especially such as are indubitably unacceptable by reason of the challenges they pose to public health. …'

Although it is not within the terrain of the court to interfere with the manner in which the first applicant prioritises its budget, the long unattended causes of pollution to the rivers, beaches, public space and private homes which has adversely impacted the environment and wellness of human beings demonstrate the failure of the first applicant to take reasonable measures to stop and prevent pollution. The persistent pollution affecting rivers, beaches, public areas, and private residences, having

[8] *Ethekwini Metropolitan Municipality v Democratic Alliance and Others* [2026] ZAKZPHC 97 para 16.

detrimental effects on both the environment and human health, illustrates the first applicant's failure to take reasonable measures to halt and prevent pollution.

[8] Regarding the second ground concerning the court's alleged error in conducting a reasonableness inquiry when concluding that the first applicant did not adequately maintain or install the necessary infrastructure to prevent sewage and/or untreated effluent from contaminating the environment, it is important to note that paragraphs 38 to 39 of the court's judgment outline the directives issued by the fourth respondent. These directives mandated that the first applicant take action to halt and mitigate pollution affecting rivers, beaches, and public areas. The first applicant's lack of reasonable measures to address or avert pollution is demonstrated by the significant time elapsed since these directives were issued, as well as the detrimental effects of its actions on both the environment and human health.

[9] Regarding the third ground of appeal concerning the court's failure to apply the *Plascon-Evans* principle in favour of the applicants due to the claimed material and extensive dispute of facts, it is important to note that the fourth and seventh respondents presented undisputed evidence indicating they issued multiple directives for the first applicant to rectify the pollution resulting from its malfunctioning WWTW and pump stations. The first applicant did not adhere to these directives. Consequently, there is no material or genuine dispute of fact regarding the first applicant's non-compliance with directives aimed at halting and preventing pollution.

[10] Regarding the fourth ground relating to the contention that in the light of the court's finding that in respect of almost all the legislation relied upon by the first respondent, no specific provision of legislation was said to have been breached, the applicants submitted that the court should have found that no cause of action had been established by the first respondent against the applicants. It remains clear that the focus of the first respondent's case against the applicants revolved around the first applicant's failure to fix wastewater infrastructure and prevent sewage discharge and water resource contamination. It is essential to reference undisputed evidence presented in court by the KwaZulu Natal Member of Executive Council for Economic Development, Tourism, and Environmental Affairs (the seventh respondent), who

was the sixth respondent in the main application. The seventh respondent outlined specific directives mandated for compliance by the first applicant under the National Environmental Management Act 107 of 1998 (NEMA).

[11] On 8 June 2022 the seventh respondent issued a pre-directive in terms of s 28 (4) of NEMA requiring the first applicant to stop causing sewage from entering several rivers in the eThekwini region. Although the first applicant responded to the directive, it failed to comply with the directive. On 17 October 2022 the seventh respondent issued another pre-directive regarding the pollution of the Ohlanga River due to damaged infrastructure at the Ohlanga pump station. Despite an undertaking by the first applicant that the pump station would be repaired within five weeks, it failed to repair the pump station and the pollution continued. Subsequently the seventh respondent had to lay criminal charges against the first applicant based on its various contraventions of NEMA.

[12] Furthermore, from paragraphs 38 to 39 in the judgment, the Minister of Water and Sanitation of the Republic of South Africa (the fourth respondent), who was the third respondent in the main application spelt out specific complaints of violation of environmental legislation which the first applicant failed to address. On 13 May 2022 the fourth respondent issued a directive in terms of ss 19(3) and 20(4) of the National Water Act 36 of 1998 directing the first applicant to stop pollution of water and the environment emanating from various WWTW due to its malfunctioning after the April 2022 floods. Despite engagement the first applicant failed to comply with the directive. Furthermore, the fourth respondent notified the first applicant of a complaint related to sewage overflow from the main trunk sewer line in Umlazi into the Mlazi River which was received on 27 July 2022. On 17 October 2022, the fourth respondent notified the first applicant of another complaint regarding sewage entering the Ohlanga River, but the first applicant failed to address these complaints. Therefore, the evidence clearly shows specific directives and provisions of legislation that were breached by the first applicant.

[13] The fifth ground concerns the importation of the order granted in *Democratic Alliance*. The court stated in paragraph 82 of its judgment that ‘An order, partly, in line with the order granted in the *Democratic Alliance* matter, will be issued in this

matter.' It has been noted earlier that the first applicant was also a respondent in both the *Democratic Alliance* case and the main application in this matter, where an order was sought regarding similar complaints about high levels of E. coli and pollution. In the *Democratic Alliance* case, the court directed that the first applicant prepares and submit an amended action plan within two months following its judgment. Similarly, in the main application in this matter, the court directed the first applicant to file an amended action plan within two months after delivery of the *Democratic Alliance* judgment. Thus, the court effectively avoided issuing duplicate orders against the same respondent concerning identical issues related to E. Coli and pollution.

[14] With respect to the sixth ground concerning the alleged inconsistency in the court's judgment, which is allegedly based on the court's determination that both the WWTW and pump stations were included in the action plan submitted by the first applicant while also concluding that there was a failure to adhere to this plan, it should be pointed out that any claims of contradiction are baseless. The court found that although the matters related to the WWTW and pump stations were addressed in the action plan, it was not followed through. Consequently, the court mandated that amendment be made to the action plan, as the deadlines for actions outlined in it had passed without any implementation.

[15] Regarding the seventh ground concerning the declaration of constitutional mandates and obligations under s 172 of the Constitution, without specifying which constitutional provision was violated, it is important to note that there was clear evidence presented to the court. The primary issue for determination by the court was whether the first applicant had contravened the provisions of NEMA and s 24 of the Constitution. Consequently, it is evident from the judgment that the conduct of the first applicant was ruled unconstitutional due to its violation of s 24 of the Constitution.

[16] The eighth ground concerns the alleged error by the court in failing to recognise that the water legislation qualifies as a law of general application in terms of s 36 of the Constitution, and that the reasonableness criteria within this legislation limits the right outlined in s 24. This contention reflects a misunderstanding of the

provisions of s 36. An examination under s 36 is only warranted if the challenged legislation limits the Bill of Rights. None of the respondents argued that any legislation imposes limitations on s 24 or any other provision of the Bill of Rights. The respondents based their case on the applicants' non-compliance with both legislative and constitutional provisions. Since the limitation of the Bill of Rights through any legislation was not presented as an issue in court, this appeal ground lacks merit.

[17] Regarding the ninth ground concerning the absence of evidence to support the order for the weekly publication of E. coli readings, this assertion lacks merit. In paragraph 1 of the judgment, the court explicitly stated that this case pertains to the high levels of E. coli found at the beaches. It is widely acknowledged that numerous beaches were closed due to these high E. coli levels. The presence of untreated raw sewage entering rivers and beaches, stemming from malfunctioning WWTW and pump stations, clearly indicates that high E. coli levels at the beaches continued to pose a threat to the environment and human health. Consequently, the court's directive for weekly reporting on E. coli was grounded in evidence presented during the proceedings.

[18] The tenth ground of appeal relates to the costs order. The first applicant contended that since the first respondent only obtained a relief which was formulated in a draft order; had failed to obtain a substantive relief sought in the notice of motion and had failed against every party except the first applicant it should not have been awarded costs. Furthermore, it was contended on behalf of the first applicant that the court should have found that each party pays its own costs after it had found that the first respondent's heads of argument and practice notes were deficient. Conversely, the first respondent contended that the costs order against the first applicant was justified since the first respondent obtained a declaration of constitutional default against the first applicant, an organ of state, primarily responsible for sewage that caused the pollution.

[19] The award of costs is a matter which is within the discretion of the court considering the issue of costs, which must be exercised judicially having regard to all

the relevant considerations.[9] It is trite that in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.[10] In the instant case the first applicant, an organ of state lost against the first respondent. Therefore, the principle that applies in cases of unsuccessful constitutional litigation against the State is not relevant here. It is important to note that the pollution problem caused by the first applicant's defective WWTW was highlighted to the first applicant, yet it neglected to address it for an extended period. The first respondent would not have faced litigation costs had the first applicant responded to the complaint regarding the pollution when it was initially raised.

[20] I have demonstrated that the applicants lack any reasonable prospects of success based on the grounds of appeal presented. Furthermore, there are no compelling reasons for the matter to be heard by an appeal court since our courts have previously addressed similar issues concerning the duty of various spheres of government in fulfilling their constitutional obligations. For these reasons, the applicants' application for leave to appeal must fail with costs.

First respondent's cross-appeal

[21] This then brings me to the cross-appeal filed by the first respondent against the court's order directing it to pay the costs of suit incurred by the second to seventh respondents. The first respondent argued that the court made an error by failing to apply the substantive principle established in *Biowatch Trust v Registrar, Genetic Resources and Others*,[11] which asserts that a private litigant genuinely attempting to uphold constitutional rights against the State should not be liable for the State's costs, even if they are unsuccessful. Additionally, the first respondent maintained that while a deviation from this principle is warranted in cases deemed frivolous, vexatious, manifestly inappropriate, pursued with improper motives, or otherwise abusive, its case presented before the court was legitimate. It successfully claimed against one of the respondents, who serves as the first applicant in this instance. The first respondent argued that the court's rationale for deviating from the *Biowatch* principle specifically citing that a letter of demand had not been sent to the

[9] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 138.
[10] Ibid.
[11] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

respondents prior to initiating proceedings does not justify departing from this established principle.

[22] Conversely, the respondents opposed the first respondent's leave to cross-appeal the costs order. The second to seventh respondents argued that the costs order imposed on the first respondent was not merely a consequence of the first respondent losing against them. They maintained that this costs order was founded on the court's substantive factual and legal assessments regarding the conduct of the respondents, who had exercised their constitutional and statutory powers appropriately. It is noteworthy that while the court acknowledged the *Biowatch* principle, it found that this case warranted an exception to that principle. In paragraphs 83 to 85 of its judgment, the court clarified that the costs order against the first respondent was justified by the manner in how it managed its litigation.

[23] The fact that the first respondent does not challenge the court's finding that it failed to establish any cause of action against the respondents aligns with the finding that its litigation was both frivolous and vexatious. In my view, the fact that this case pertains to constitutional litigation against an organ of state does not negate its frivolous nature. The litigant pursued relief without establishing a valid cause against the State. In paragraph 67 of the judgment, the court noted that the first respondent's heads of arguments failed to adequately address and engage with the evidence and related submissions. Furthermore, in paragraph 68, it was pointed out that the first respondent neglected to specify any legislative provision purportedly violated by the respondents, nor did it clarify how such a breach occurred.

[24] I have demonstrated that the first respondent's application lacks any reasonable prospects of success based on the grounds of the cross-appeal presented. For these reasons, the first respondent's application for leave to cross-appeal must fail with costs.

Order

[25] The following order is made:

1. The applicants' application for leave to appeal is dismissed with costs, including the costs of two counsel, on scale C.

2 The first respondent's application for leave to cross-appeal is dismissed with costs on scale C.

_____

MATHENJWA J

_____

POYO DLWATI JP

_____

OLSEN J

APPEARANCES

Date of Hearing : 14 August 2026
Date of Judgment : 6 November 2026

Counsel for first and second applicants: Mr V Gajoo SC with Mr I Veersamy and Ms M Mtati

Counsel for first respondent : Ms G Y Benson
Instructed by : MVMT Attorneys
c/o Tomlison Mnguni James Attorneys

Counsel for second to sixth respondents : Mr S Giba
Instructed by : State Attorney Durban