



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 484/2021

In the matter between:

HELEN SUZMAN FOUNDATION

APPLICANT

and

**THE SPEAKER OF THE NATIONAL
ASSEMBLY**

FIRST RESPONDENT

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

SECOND RESPONDENT

**THE CABINET OF THE REPUBLIC
OF SOUTH AFRICA**

THIRD RESPONDENT

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

FOURTH RESPONDENT

**THE MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS**

FIFTH RESPONDENT

Neutral citation: *Helen Suzman Foundation v The Speaker of the National Assembly and Others* (484/2021) [2023] ZASCA 6 (03 February 2023)

Coram: DAMBUZA, PLASKET and MABINDLA-BOQWANA JJA, and BASSON and CHETTY AJJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be 11h00 on 03 February 2023.

Summary: Reconsideration application brought in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 – the inquiry is whether grave injustice would result if the order sought to be reconsidered were to stand – in this case the basis of the reconsideration application was that costs in an application for leave to appeal should not have been granted against the applicant based on the *Biowatch* principle – no evidence that the relevant principles were ignored or that discretion was exercised improperly in making the costs award.

ORDER

On application for reconsideration: referred by Maya P in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

The application is dismissed with costs.

JUDGMENT

Dambuza JA (Plasket and Mabindla-Boqwana JJA and Basson and Chetty AJJA concurring)

Introduction

[1] This is an application, brought by the Helen Suzman Foundation (HSF) in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013, for the reconsideration of an adverse costs order made pursuant to this court's dismissal of the HSF's petition for leave to appeal against an order of a full court of the Gauteng Division of the High Court, Pretoria (the full court). The President of this court referred the reconsideration of the costs order for argument in open court and the parties agreed that it should be determined without oral argument, in terms of s 19(a) of the Superior Courts Act.

[2] The background to this application is the following. The HSF brought an urgent application for declaratory relief against the Government of the Republic of South Africa, represented by the Speaker of Parliament, the President, the Cabinet, the Chairperson of the National Council of Provinces and the Minister of Co-operative Governance and Traditional Affairs (the Minister). The order

sought was essentially to the effect that Parliament had failed to fulfil its obligations, in terms of ss 42(3), 44(1), 55(1), and 68 of the Constitution, to provide a legislative response specific to the Covid-19 pandemic.

[3] In order to manage the Covid-19 pandemic, a national state of disaster had been declared by the Minister, in terms of s 27(1) of the Disaster Management Act 57 of 2002 (DMA). Regulations and directions had been issued in terms of the DMA concerning a broad range of issues, including the lockdown of the entire population and the control of economic activity. The HSF's application challenged the continued reliance of the government on the DMA as the source of authority for managing the pandemic. It contended that the Minister, the Cabinet, and the President were deliberately evading the open, accountable and participatory Parliamentary lawmaking processes envisaged by the Constitution, by failing to enact specific legislation to manage the pandemic, rather than governing by decree in terms of the DMA. It sought a declarator that Parliament had failed to initiate, prepare and pass legislation to regulate the state's response to the harm caused by the Covid-19 pandemic and that the Cabinet had failed to initiate that legislation as it was obliged to do under s 5(2)(d), and to further fulfil its obligations under s 7(2) of the Constitution, to 'respect, protect and fulfil the rights in the Bill of Rights regarding their legislative responses to the impact of Covid -19'. The government parties opposed the application on the basis that they were not under an obligation to pass specific legislation and that the DMA provided a proper, comprehensive legislative framework for management of disasters, including the Covid-19 pandemic.

[4] The full court rejected the contention by the HSF that the DMA was intended to be a stop-gap measure in times of disasters. It found that the question whether a positive obligation exists on Parliament and the Executive to legislate

is a fact specific enquiry, and that nothing in the language of s 7(2) of the Constitution created an obligation on the Cabinet and Parliament to initiate and pass specific Covid-19 legislation. It therefore dismissed the application.

[5] The full court ordered each party to pay its own costs. That costs order was premised on a finding that the HSF had sought to assert a ‘constitutionally discernible right’, in the public interest, and the matter raised important constitutional issues regarding the responsibilities of the government to legislate. The full court found that it was appropriate that the HSF be afforded the protection provided by the *Biowatch* principle (to which I shall refer more fully below) against an adverse costs order. It also made no order as to costs when refusing leave to appeal.

[6] The HSF then petitioned this court for leave to appeal. Its application was refused but this time, a costs order was made against it. In this application the HSF contends that it should have been given the benefit of the *Biowatch* principle once more, for the same reasons given by the high court. It argued that no argument on costs was made or considered in that application; that even those of the respondents who had requested that costs be awarded in their favour had advanced no reason as to why the *Biowatch* principle should not be applied; and that their argument rested only on the premise that there were no reasonable prospects of success on appeal.

[7] Section 17(2)(f) provides:

‘The decision of the majority of the judges considering an application [for leave to appeal] referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in exceptional circumstances, whether of his or her own accord or on application filed within a month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.’

Simply put, this subsection creates an opportunity for reconsideration of a decision made by this court on an application to it for leave to appeal. Importantly, the President of this Court permits such reconsideration only in exceptional circumstances. In *S v Liesching and Others*¹ the Constitutional Court held that the primary object of the section is to enable the President of this Court to deal with situations where grave injustice might otherwise result, and that it is not intended to afford disappointed litigants a further chance to obtain an order that had already been refused. In this case such injustice might result if an award of costs was made injudiciously, contrary to the established guiding principles on the awarding of costs by courts.

[8] There is no suggestion that the *Biowatch* principle has abolished the discretion vested in courts with regard to costs orders. Courts must, however, commence a consideration of a costs award from the premise that in constitutional litigation an unsuccessful private litigant in proceedings against the State ordinarily ought not to be ordered to pay costs. The principle, however, must be considered holistically. In *Biowatch Trust v Registrar, Genetic Resources and Others*² the principle was articulated thus:

‘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 the responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door’.

This principle is qualified. If a matter which otherwise falls within the principle ‘is frivolous or vexatious, or in any other way manifestly inappropriate, the

¹ *S v Liesching and Others* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) paras 138-139.

² *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 23. See too *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 138.

applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award'.³

[9] It was submitted by the HSF that the bar to justify departure from the *Biowatch* principle is set high. I agree. As already stated, the courts have set the bar at litigation that is frivolous, manifestly inappropriate and vexatious, and where the conduct of an unsuccessful private litigant deserves censure.⁴ In *Motala v Master, North Gauteng High Court, Pretoria*⁵ this court made the point that the *Biowatch* principle is not a licence to litigate with impunity against the State. It referred to the following remarks of the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency and Others*:⁶

‘[The *Biowatch* rule], of course, does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, *Biowatch* said, if the constitutional grounds of attack are frivolous or vexatious - or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the “character of the litigation and [the litigant's] conduct in pursuit of it”, even where the litigant seeks to assert constitutional rights.’

[10] In this Court the respondents did not suggest that the full court application was frivolous or vexatious litigation. Their argument was that the costs order against the HSF was properly made, based on events that unfolded after the full court had refused leave to appeal, but prior to the lodging in this Court of the HSF application for leave to appeal.

³ Para 24.

⁴ *Affordable Medicines Trust* (note 2) para 138.

⁵ *Motala v Master, North Gauteng High Court* [2019] ZASCA 60; 2019 (6) SA 68 (SCA) para 98.

⁶ *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) para 18.

[11] During that period this Court handed down judgment in *President, RSA and Another v Women's Legal Centre Trust and Others*⁷. The issue in that case was the State's failure to recognize and regulate Muslim marriages. The Women's Legal Centre Trust had sought a declarator couched in terms similar to those sought by the HSF in this case – that the state had a duty to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages. A further declaratory order sought was that the President and the Cabinet had failed to fulfil that obligation. In the alternative it sought a declarator that the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 be declared unconstitutional to the extent that there was no provision therein for recognition of Muslim marriages. Both pieces of legislation were found exclusionary and discriminatory for failure to regulate Muslim marriages. However, the court was concerned about separation of powers. For that reason, it refused to grant the declarator sought in the main prayer. It referred to the judgments of the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*⁸ and *Carmichele v Minister of Safety and Security and Another (Centre for applied Legal Studies intervening)*⁹ in which that court held that courts cannot direct the State to locate a response in one piece of legislation rather than another. The Court remarked on the absence of precedent of courts directing the enactment of legislation under s 7(2) of the Constitution. It held that for a court to order the State to enact legislation on the basis of s 7(2) alone in order to realise fundamental rights, would be contrary to the doctrine of separation of powers.¹⁰

[12] The respondents' argument was that this decision was already in the public domain when HSF launched the application for leave to appeal. HSF would

⁷ *President, RSA and Another v Women's Legal Centre Trust and Others* [2020] ZASCA 177; 2021 (2) SA 381 (SCA).

⁸ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at paras 65 to 68.

⁹ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001(4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 44.

¹⁰ *Women's Legal Centre Trust* (note 7) para 43.

therefore have been aware of the judgment. It should not have proceeded with the application. Doing so was unreasonable and placed the HSF outside the realm of the *Biowatch* protection, so it was submitted.

[13] The judicial discretion of a court on costs has not been abolished by the *Biowatch* principle. In public interest cases, however, the exercise of that discretion is guided first and foremost by *Biowatch* together with the traditional guiding principles, including the conduct of the parties in the litigation and success on merits.

[14] I cannot find any valid basis for the HSF's contention that this court did not 'apply' the *Biowatch* principle when considering the application for leave to appeal. To reach that conclusion one would have to assume that the court simply ignored the principle which, apart from being the primary guideline, had been pertinently brought to its attention through the judgment of the full court. The court was aware, from the judgment of the full court, that the *Biowatch* principle had been applied by the full court – and that it had done so not once, but twice. It would also have been aware of the respondents' reliance on the judgment in *Women's Legal Centre Trust* in the application for leave to appeal, particularly the contentions that the issues raised therein had been determined 'convincingly and conclusively', and that the HSF had acted unreasonably in seeking leave to appeal.¹¹ The costs award was made in this context.

[15] Given the submissions made to the court in the application for leave to appeal, together with the fact that *Biowatch* is not unqualified,¹² I am unable to

¹¹ The respondents referred to the judgment in the answering papers in the application for leave to appeal and HSF responded in its replying papers.

¹² See s16.

find that grave injustice would result if the decision sought to be reconsidered would stand. Consequently, the following order shall issue:

The application is dismissed with costs.

N DAMBUZA
ACTING DEPUTY PRESIDENT

Mabindla-Boqwana JA (concurring):

[16] I am in agreement with the ultimate conclusion and order proposed by my colleague in the first judgment. There is, however, one issue regarding the application that concerns me, which I consider important to express an opinion on. This has to do with whether s 17(2)(f) of the Superior Courts Act envisages the kind of application brought by the applicant for reconsideration. The issue is a bit nuanced. At first glance, it seems trifling. Yet, I believe that it warrants further thinking. I say so for the reasons that follow.

[17] Section 17(2)(f) provides that:

‘The *decision of the majority of the judges* considering an application [for leave to appeal] referred to in paragraph (b), or the *decision of the court*, as the case may be, *to grant or refuse the application* shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer *the decision* to the court for reconsideration and, if necessary, variation.’ (My emphasis.)

[18] This section confers a discretion on the President of this Court ‘to refer *a refusal of an application for leave to appeal* to the Supreme Court of Appeal for

reconsideration, and, if necessary, variation, in circumstances where an applicant *has been denied leave to appeal* by the Supreme Court of Appeal on petition pursuant to the provisions of section 17(2)(b)'.¹³ (My emphasis.)

[19] As stated in *Liesching*, the court reconsidering is not considering an appeal on the merits; rather, it is reconsidering *the decision refusing leave to appeal*. Essentially, the court is required to decide whether *the court below* and *the two judges of the Supreme Court of Appeal should have found that reasonable prospects of success existed to grant leave to appeal*'.¹⁴ (My emphasis.)

[20] The two judges of the Supreme Court of Appeal in the present matter refused leave to appeal the decision of the full court, with costs. The applicant is not aggrieved by the decision to dismiss the application for leave to appeal and is, therefore, content not to persist with a reconsideration of whether there were reasonable prospects of success on appeal. Rather, its discontent is limited to the costs order granted against it by the two judges. Put differently, this Court is not asked to consider whether the full court and the two judges should have found that there are reasonable prospects of success on appeal; which is the purpose of s 17(2)(f), in my view.

[21] My reading of s 17(2)(f) is that this Court, in reconsidering the decision of the Court that considered the petition, essentially steps into the shoes of the two judges by re-looking at the decision of the court below refusing leave to appeal and, if necessary, varying the decision of the two judges in respect of what was brought on petition.

¹³Liesching; para 118; see footnote 1.

¹⁴ Ibid para 36; see also *Notshokovu v S* [2016] ZASCA 112; 2016 JDR 1647 (SCA) para 2.

[22] In the present matter, the question of costs was not one of the issues which the two judges were called upon to consider when determining the petition. This is because, as regards costs, the full court had applied the *Biowatch* principle and had made no order as to costs. The applicant took no issue with that order.

[23] The application brought to the President of this Court and referred to us is not the decision of the full court and that of the two judges refusing leave to appeal. The costs order complained about was granted in the first instance by the two judges determining the petition. They did not change the decision of the full court in respect of costs on the merits (or otherwise) of the case, but instead only ordered costs in respect of the application for leave to appeal.

[24] Accordingly, the issue that the applicants have brought for reconsideration is a matter that ought to have been taken on appeal to the Constitutional Court, in my view. This Court is, therefore, not at liberty to change the costs order granted by the two judges. Only the Constitutional Court may vary that decision.

[25] What I am proposing is unrelated to the question of whether a costs order on its own can be appealed against. Instead, the issue that I am raising is whether a court reconsidering the result of a petition can consider any matter other than that which involves the question of whether the court below and the two judges considering the petition should have found that there indeed were reasonable prospects of success on appeal, which in essence is the purpose of s 17(2)(f).

[26] It may, conceivably, be argued that the costs order is part of the refusal decision. The difficulty with that argument is that, absent a reconsideration of the refusal for leave to appeal part of the order, the decision loses the character of the

sort contemplated for referral in terms of s 17(2)(f). This is because the order of the court below as to whether leave to appeal should have been granted, is no longer open for reconsideration. The substance for reconsideration is the refusal of the leave to appeal. Mindful of the fact that this has not been raised by the parties, I make no finding on this aspect.

NP MABINDLA - BOQWANA JA
JUDGE OF APPEAL

Appearances:

For appellant: M du Plessis SC with A Coutsooudis

Instructed by: Webber Wentzel, Sandton
Symington De Kok Attorneys, Bloemfontein

For first respondent: IV Maleka SC with M Salukazana

Instructed by: State Attorney, Cape Town
State Attorney, Pretoria
State Attorney, Bloemfontein