



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 120/16

In the matter between:

LAWYERS FOR HUMAN RIGHTS

Applicant

and

MINISTER IN THE PRESIDENCY

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

MINISTER OF DEFENCE

Third Respondent

MINISTER OF POLICE

Fourth Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS

Fifth Respondent

NATIONAL COMMISSIONER OF POLICE

Sixth Respondent

**PROVINCIAL COMMISSIONER OF POLICE,
GAUTENG**

Seventh Respondent

**CHIEF OF THE SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

Eighth Respondent

Neutral citation: *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J

Judgment: The Court

Decided on: 1 December 2016

Summary: appeal against costs order only — general costs rule in constitutional litigation — exceptional circumstances — inquiry on the appropriateness of the proceedings — abuse of process — — High Court’s discretion to award costs

award of costs in a constitutional matter raises a constitutional issue — leave to appeal granted — High Court exercised its discretion judicially — no basis to interfere with High Court’s exercise of a discretion

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

The following order is made:

The application for leave to appeal is dismissed.

JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Musi AJ and Zondo J):

Introduction

[1] This appeal has its genesis in the national turmoil that affected all so deeply when attacks on non-South African nationals were occurring and large-scale armed forces operations took place in 2015. Under section 13(7) of the South African Police Service Act¹ (SAPS Act), the police and the army cordoned off areas in communities

¹ 68 of 1995.

to conduct search and arrest operations. Multiple raids took place as part of the joint operations. The authorities styled this Operation Fiela-Reclaim (main Operation).² On 8 May 2015 in Johannesburg, search and arrest operations were carried out in private homes in the early hours of the morning without warrants (Operation). Scores of people were arrested. The applicant, Lawyers for Human Rights (LHR), representing most of those arrested, challenged the constitutionality of the Operation.

[2] It launched an urgent application against eight state respondents³ in the High Court of South Africa, Gauteng Division, Pretoria (High Court). But it only did so six weeks after the Operation had been completed, on 23 June 2015. LHR asserted that the way the main Operation was implemented violated the Constitution because it was inconsistent with an array of legislation, including the SAPS Act, the Defence Act,⁴ the Refugees Act,⁵ the Criminal Procedure Act⁶ and the Immigration Act.⁷

[3] The urgent application failed. At issue in this Court is the costs order the High Court granted against LHR, an unsuccessful litigant claiming to enforce the Constitution. This Court has decided the application for leave to appeal against the order without an oral hearing. The Chief Justice issued directions inviting the parties to make written submissions, which they did.⁸

² Operation Fiela-Reclaim actions are conducted by member departments of the Inter-Ministerial Committee on Migration.

³ The respondents are: Minister in the Presidency (first respondent), Minister of Home Affairs (second respondent), Minister of Defence (third respondent), Minister of Police (fourth Respondent), Director-General of Home Affairs (fifth respondent), National Commissioner of Police (sixth respondent), Provincial Commissioner of Police, Gauteng (seventh respondent) and Chief of the South African National Defence Force (eighth respondent).

⁴ 42 of 2002.

⁵ 130 of 1998.

⁶ 51 of 1977.

⁷ 13 of 2002.

⁸ The parties were directed to file written submissions on whether the principles in *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) should have been applied when the High Court awarded costs.

*Litigation History**High Court*

[4] The High Court (Hiemstra AJ) framed the urgent challenge LHR brought to the constitutional validity of the main Operation as aimed at future raids. It was in this sense pre-emptive. But the Court found that LHR tendered no evidence that future illegal raids would occur. So it struck the application from its roll with costs on the basis that bringing it as an urgent matter was gravely inappropriate.

[5] LHR sought leave to appeal against the costs order. The High Court refused leave to appeal, again with costs. Then LHR unsuccessfully applied for leave to appeal – only against the costs order – to the Supreme Court of Appeal. That application, too, was dismissed with costs. It now applies for leave to appeal to this Court.

*In this Court**Lawyers for Human Rights' submissions*

[6] LHR submits that the application was lodged not to challenge the validity of the main Operation but the manner in which it was conducted. Lawful authorisation had not been obtained. The costs order against it, it says, flouts the general rule that costs should not be awarded against unsuccessful private litigants who seek to vindicate constitutional rights against state parties.

[7] LHR invokes the well-established test for determining whether costs should be awarded against a private party litigating constitutionally: was the litigation frivolous, vexatious or manifestly inappropriate? To be subject to an adverse costs order, the litigant's conduct must be worthy of censure. Here, LHR points out, the High Court correctly found that its application was not frivolous or vexatious. But the Court found that bringing the application on the basis of urgency was manifestly inappropriate. This, LHR says, is wrong. This is because, although the Operation had been completed when the application was launched six weeks later, the responsible

government officials were at that point not willing to give undertakings that they would not conduct more raids. This implicated possible future conduct. For this reason, it was appropriate for it to seek urgent relief.

[8] LHR urges this Court to endorse the approach the Supreme Court of Appeal adopted in *Phillips*.⁹ Mere impatience on a private litigant's part, and acting inappropriately in a technical or procedural sense, does not amount to vexatious or manifestly inappropriate conduct. In the light of this principle, the High Court did not exercise its discretion judicially. It considered neither *Biowatch* nor *Phillips*.

Department of Home Affairs' submissions

[9] The Minister and Director-General of the Department of Home Affairs (Department), second and fifth respondents, dispute LHR's contentions. The Department submits that LHR made no attempt in the urgent application to challenge the constitutional validity of section 13(7) of the SAPS Act. Its challenge impugned only *how* the raids were carried out during the Operation. These were matters of fact – challenged long after the events. The application was extremely belated; six weeks after the impugned conduct. The issues were by then purely academic.

[10] The Department also submits that there was no need for LHR to litigate on an urgent basis; and, even if the urgency was warranted, it should have afforded the Department and the other respondents reasonable time to file answering papers. Instead, they were afforded barely a day to file papers. This was not merely incorrect – it was manifestly inappropriate. Accordingly, *Phillips* and *Biowatch* do not apply. More so, *Biowatch* is relevant only in constitutional litigation. It is relevant to judgments on the merits. The issues raised here were not materially constitutional, and the merits were not considered. The High Court exercised a proper discretion in granting the costs order.

⁹ *Phillips v South African Reserve Bank* [2012] ZASCA 38; 2013 (6) SA 450 (SCA).

South African Police Service's and South African National Defence Force's submissions

[11] The South African Police Service and the South African National Defence Force, the sixth and the eighth respondents, submit that *Biowatch* is applicable in litigation launched to assert constitutional rights, where there is no impropriety in the manner in which the litigation has been undertaken. There must be a genuine, non-frivolous constitutional challenge. LHR launched the application primarily to interdict the state from performing its constitutional and statutory duties. Its object was not to assert constitutional rights. It was to obtain an order, on the facts, declaring the particular authorisation issued in terms of section 13(7) of the SAPS Act unconstitutional. This was totally improper because, when the application was launched, the authorisation had long been implemented and the events were done and dusted.

Assessment

Nature of the litigation

[12] The award of costs in a constitutional matter itself raises a constitutional issue. This Court has jurisdiction.¹⁰ And the main Operation affected the rights to privacy and dignity of those affected by the search and arrest operations. The issues at stake may affect the interests of the public at large. On this ground, too, the application raises a constitutional matter. Leave to appeal must be granted.

Costs order

[13] This Court in *Ferreira*¹¹ endorsed long-standing High Court and Appellate Division principles on costs awards.¹² Costs are in the discretion of the Court and, in general, the unsuccessful party must pay:

¹⁰ *Biowatch* above n 8 at para 17.

¹¹ *Ferreira v Levin NO* [1995] ZACC 13; 1996 (2) SA 621 (CC); 1996 (1) BCLR 1 (CC).

¹² See *Fripp v Gibbon & Co* 1913 AD 354 at 357-8; *Kruger Bros. & Wasserman v Ruskin* 1918 AD 63 at 69; *Union Government (Ministry of Railways and Harbours) v Heiberg* 1919 AD 447 at 484; *Merber v Merber*

“The [High] Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.”¹³

[14] The purpose of awarding costs to a successful litigant is—

“to indemnify him for the expense to which he has been put through having been unjustly compelled to either initiate or to defend litigation as the case may be. Owing to the operation of taxation, [however,] such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.”¹⁴

[15] But in *Biowatch*, for constitutional litigation, this Court substantially adapted this general approach. It held that the general rule is *not* to award costs against unsuccessful litigants when they are litigating against state parties and the matter is of genuine constitutional import.¹⁵

[16] And *Biowatch* makes it clear that this does not apply only to costs orders on the merits in constitutional cases. It applies also to what may be described as ancillary issues and points. For instance, here, LHR may have deserved protection not only in regard to the principal constitutional arguments it sought to advance, but in regard to

1948 (1) SA 446 (A) at 452-3; and *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W) at 716D.

¹³ *Ferreira* above n 11 at para 3. See also *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 701C-G.

¹⁴ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

¹⁵ *Biowatch* above n 8 at para 24.

the procedural means it chose to advance them. This principle is important. The threat of hefty costs orders may chill constitutional assertiveness. It may discourage parties from challenging constitutionally questionable practices of the state.¹⁶

[17] In both *Biowatch* and *Helen Suzman Foundation*,¹⁷ this Court emphasised that judicial officers should caution themselves against discouraging those trying to vindicate their constitutional rights by the risk of adverse costs orders if they lose on the merits. Particularly, those seeking to ventilate important constitutional principles should not be discouraged by the risk of having to pay the costs of their state adversaries merely because the Court holds adversely to them.

[18] This, of course, does not mean risk-free constitutional litigation.¹⁸ 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.¹⁹ 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.²⁰

[19] What is “vexatious”? In *Bisset* the Court said this was litigation that was “frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant”.²¹ And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by

¹⁶ See in general *id* at para 28.

¹⁷ *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at paras 36-8.

¹⁸ *Id* and *Biowatch* above n 8 at paras 20 and 23-4.

¹⁹ See *Helen Suzman Foundation id*. See also *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 36. This approach was underscored by the Supreme Court of Appeal in *Kini Bay Village Association v The Nelson Mandela Metropolitan Municipality* [2008] ZASCA 66; 2009 (2) SA 166 (SCA) at para 17.

²⁰ *Biowatch* above n 8 at para 20.

²¹ *Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D) at 608D-F.

one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.²²

[20] Whether an application is manifestly inappropriate depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court. In *Beinash*, Mahomed CJ stated there could not be an all-encompassing definition of “abuse of process” but that it could be said in general terms “that an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”.²³ The Court held:

“There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

‘When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.’

What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process’. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”²⁴

[21] Ultimately the inquiry on the appropriateness of the proceedings requires a close and careful examination of all the circumstances. This is what we have to do here. The considerations include the period of the delay between the raids and the

²² See also section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956.

²³ *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734F-G.

²⁴ *Id* at 734D-G.

application, the reasons for bringing the application and the prejudice, if any, the urgent proceedings caused the respondents.

[22] The application before the High Court may not have been fundamentally misdirected and so unreasonable that merely bringing it counted against LHR. And the principal relief LHR sought raised constitutional questions of pressing significance. It was seeking to protect the dignity and privacy of those affected. That was not what triggered the adverse costs order.

[23] Despite the constitutional dimensions of the application itself, the High Court considered the way the proceedings had been managed manifestly inappropriate – largely on the ground of their extreme belatedness, and the fact that they targeted an operation that was long gone and done. Indeed, the High Court indicated that while it would never suggest that LHR would launch a frivolous or vexatious application, “its action in having the matter placed on the urgent roll was uncalled for and inappropriate”. This was the basis for awarding costs adversely to LHR. The Court made an order it deemed appropriate to protect its process and exercised its discretion in doing so. Unless it exercised that discretion unjudicially or on a wrong principle, this Court has no basis to interfere.²⁵

[24] Despite LHR’s best efforts, it has advanced no acceptable basis on which this Court may conclude that the High Court exercised its discretion unjudicially. Nor is the costs order here likely to have a “chilling effect” on future litigation. The reason is that the High Court’s ire about the urgency and the extreme exaction LHR laid upon the respondents cannot by any stretch be regarded as unwarranted. The *Biowatch* principles should not be abused to avoid ordinary court process.

²⁵ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 83-9 and *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 82.

[25] Although the issues LHR raised before the High Court may in other circumstances have protected them if they lost the litigation, bringing them six weeks after the Operation – and giving the government respondents barely a day in which to respond – was not just imprudent. It was not proper.

[26] A worthy cause or worthy motive cannot immunise a litigant from a judicially-considered, discretionarily-imposed adverse costs order. The High Court here concluded that the application was inappropriately pursued. And that this warranted an adverse costs award against LHR. Applying *Biowatch* and *Helen Suzman Foundation*, it is impossible to fault its exercise of its discretion.

Costs in this Court

[27] Needless to say, LHR did not act frivolously or inappropriately in seeking leave in this Court to set aside the High Court costs order. It will be spared a costs order here.

Order

[28] The following order is made:

The application for leave to appeal is dismissed.

For the Applicant:

P Kennedy SC and J A Harwood
instructed by Lawyers for Human
Rights, Johannesburg Law Clinic

For the Second and Fifth Respondents:

G Bofilatos SC and T Mphahlane
instructed by the State Attorney

For the Third, Fourth, Sixth, Seventh
and Eighth Respondents:

B R Tokota SC and Z Madlanga
instructed by the State Attorney