



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Of Interest

Case no: 3865/2021

In the matter between:

BORDER DEEP SEA ANGLING ASSOCIATION	First Applicant
KEI MOUNTH SKI BOAT CLUB	Second Applicant
NATURAL JUSTICE	Third Applicant
GREENPEACE ENVIRONMENTAL ORGANISATION	Fourth Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
THE MINISTER OF FORESTRY, FISHERIES AND ENVIRONMENT	Second Respondent
BG INTERNATIONAL LIMITED	Third Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA BV	Fourth Respondent
IMPACT AFRICA LIMITED	Fifth Respondent

LEAVE TO APPEAL JUDGMENT

Govindjee J

Background

[1] The applicants launched an application to interdict the third, fourth and fifth respondents (described for convenience as ‘Shell’) from undertaking seismic survey operations under Exploration Right 12/3/252 (‘the seismic survey’) from 1 December 2021 onwards (‘the urgent application’). The urgent application was dismissed with costs, to include the costs of two counsel where employed, on 3 December 2021 (‘the judgment’).

[2] The applicants’ attorney addressed correspondence to the court on 14 December 2021. Relying on *Biowatch*,¹ he enquired whether the court would be inclined to vary its cost order *mero motu*. The court afforded the respondents’ attorneys the opportunity to respond. Shell’s view was that variation of the costs order would be inappropriate for various reasons. The applicants filed a notice of application for leave to appeal the whole judgment on 20 December 2021. The following directive was issued on 28 January 2022:

- ‘1. The court is disinclined to vary its judgment in respect of costs *mero motu* in terms of Rule 42.
2. The presiding judge is available to hear the application for leave to appeal virtually on 23 or 25 March 2022 ...
3. Prior to hearing this application, counsel will be requested to address the court on the following point:
 - a. Given the judgment in *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 [*Estate Garlick*] at 503, is the court debarred from hearing counsel on the appropriateness of the order of costs and possibly altering the order of costs already pronounced by it?

[3] The opposed application for leave to appeal was eventually set down for hearing on 19 May 2022. By that time, the applicants had indicated their intention to proceed only in respect of the question of costs. The remaining grounds for seeking leave to appeal are the following: an appeal would have a reasonable prospect of

¹ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

success because costs should not have been ordered against the applicants in the circumstances, alternatively costs should not have been awarded against the applicants on a proper exercise of the court's discretion in terms of s 32(2) of the National Environmental Management Act, 1998 ('NEMA').²

The urgent application and costs

[4] The applicants sought various forms of relief in their notice of motion dated 29 November 2021. In addition to applying for a rule nisi interdicting Shell from undertaking the seismic survey, the applicants contemplated the filing of a separate application reviewing and setting aside various decisions of the first respondent. Relevant for present purposes was the prayer that 'unless [an] application for review and setting aside of the decisions in annexure A has been instituted by 10 January 2022, any order made ... shall lapse' and the prayer 'that costs stand over for later determination'. Shell argued that the application should be struck from the roll with costs, alternatively be dismissed with costs, including the costs of two counsel. Similar submissions were advanced in heads of argument, counsel for the first respondent arguing that the application should be struck from the roll with costs. The issue of costs was not addressed in any further detail during argument, and the applicants made no submissions on *Biowatch* or s 32(2) of NEMA.

Reconsideration of the costs order

[5] In *Estate Garlick*, the court confirmed the general rule that an order of court, once pronounced, cannot be altered or amended. This is because the court is then functus officio, 'so that [the judge] cannot thereafter alter, supplement, amend, or correct the judgment.'³ Various exceptions were noted, including the following:⁴ 'If, however, counsel in arguing on the merits did not deal with questions of costs (as often happens, for good reasons) the Court in giving judgment after the adjournment may take one of two courses. It may give judgment on the merits and then invite counsel to argue on

² National Environmental Management Act, 1998 (Act 107 of 1998).

³ *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 ('*Estate Garlick*') at 502. Courts are entitled to base their judgment and to make findings in relation to any matter flowing fairly from the record, the heads of argument or the oral argument itself without forewarning: *Thompson v SABC* 2001 (3) SA 746 (SCA) at 749H-I.

⁴ *Estate Garlick* *ibid* at 503, 504.

costs before making its order as to costs; or it may straightaway make an order of costs, without inviting argument, but in the latter case it always does so with the implied understanding that it is open to the mulcted party, or his counsel, to be heard on the order of costs. If as the result of hearing him the Court alters its views as to the costs, it would not consider itself debarred from altering the order of costs already pronounced by it. It seems therefore that this is another exception to the general Roman-Dutch rule that an order once pronounced is unalterable.’

[6] De Villiers JA added the following:⁵

‘The party desiring to be heard must however *apply* within a reasonable time *to be heard* ... If he decides to ask *to be heard* as to the costs he *must then apply* to the Registrar of this Court to fix a day for hearing argument on the question of costs ... *The essential point is that the party feeling aggrieved by the order of costs must apply to be heard on the questions of such costs within a reasonable time after the order of costs is pronounced by the Judge.*’ (Own emphasis).

[7] In *Estate Garlick*, counsel on both sides had refrained from dealing with the issue of the costs of the appeal during their argument. After hearing argument, the court announced that it would take time to consider its judgment, which was delivered some 20 days later, including an order holding Estate Garlick responsible for costs of the appeal. Although counsel present to note the judgment did not raise any objection at the time, the attorneys representing Estate Garlick ‘applied to the Registrar of this Court [the following day] to arrange for the hearing of an application praying the Court to stay the issue of the order as to costs until such time as the Court could be reconstituted as composed when the appeal was heard, in order that the Estate Garlick might then be heard on the question of costs’.⁶ This prompted De Villiers JA to conclude that the attorneys had acted promptly, so that the costs order was stayed and an opportunity afforded for the reconstituted court to hear argument on costs.⁷

[8] As counsel for the respondents argued, the present setting is different. While there was correspondence requesting the court to vary its costs order mero motu,

⁵ *Estate Garlick* ibid at 505.

⁶ *Estate Garlick* ibid at 501.

⁷ *Estate Garlick* ibid at 505, 506.

there has been no application to be heard on the issue.⁸ A similar situation arose in *Union Government v Gass*.⁹ In that matter there had been no argument on costs advanced before court. The Appellate Division held, with reference to *Estate Garlick*, that it had been open to the appellant to apply to be heard on the issue of costs once it ascertained that costs had been awarded against it. No such application had been made.

[9] The court directive raising the possibility of such a hearing, and even the possibility of an alteration of the costs order, does not change that position. This is not mere formalism. The lack of a proper application negates proper ventilation of the possible reasons for reconsideration. No transcript of the urgent application was obtained and the parties are not entirely clear as to what was said and what was omitted during argument. The respondents were expected to argue possible reconsideration without knowing the precise basis for suggesting that reconsideration was warranted in this instance, perhaps because of what transpired during argument in the urgent application. There are material differences between a letter requesting *mero motu* reconsideration and variation, a directive seeking clarification on whether courts, in general, are permitted to reconsider their orders, and an actual application to be heard on an issue given the specific facts of a particular matter.

[10] It follows that there is no basis for reconsideration of the costs order in the present instance. It might be added that, in my view, a reasonable time has now elapsed for such an application. It may also be completely impractical to allow applications for reconsideration, on the strength of *Estate Garlick*, whenever a full-blown argument on costs has not materialised. In any event, the arguments to be advanced in the event of reconsideration mimic the arguments advanced in the application for leave to appeal, focusing on *Biowatch* and NEMA. For reasons that

⁸ The correspondence dated 14 December 2021 indicated as follows: 'We would be grateful if you could inform us as soon as possible whether or not you intend to vary the judgment *mero motu*. If you are not so inclined, we shall immediately make an application in terms of Rule 42 ... this letter should, however, not be construed as a waiver or acquiescence of our clients' rights of appeal and / or any of their other rights, which remain reserved.' Other than the application for leave to appeal, no further application for variation or reconsideration followed.

⁹ *Union Government v Gass* 1959 (4) SA 401 at 412D-H.

follow, even if an application for reconsideration had been countenanced on the material presently before the court, the outcome would remain the same.

The application for leave to appeal

[11] Section 17(1) of the Superior Courts Act¹⁰ provides:

‘Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- (b) the decision sought on appeal does not fall within the ambit of s 16(2)(a) [i.e the appeal must have a practical result]; and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[12] Section 17(1)(b) establishes that an appeal may only be granted where the decision sought on appeal does not fall within the ambit of s 16(2)(a). That section provides:

- ‘(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.’

[13] The applicants have not made out any case for exceptional circumstances in their notice of application for leave to appeal.¹¹ I accept, nonetheless, and notwithstanding their failure to argue the point, that an unjustifiable departure from application of the *Biowatch* principles, or failure to exercise a discretion as to costs with full cognisance of s 32 of NEMA, would satisfy that requirement and warrant leave to appeal being granted.

¹⁰ Act 10 of 2013.

¹¹ See *IGS Consulting Engineers & Another v Transnet Soc Limited* [2022] ZASCA 63 para 27.

[14] In my view, however, the facts of this matter are such that this is not the case. The application was launched to interdict Shell's seismic survey. The review of decisions of the first and second respondents, possibly engaging constitutional issues more directly, was to be a separate matter and was never launched. Those respondents participated in the proceedings only to add support to Shell's submissions regarding urgency and filed no papers in the matter. The focus of the application was on Shell, and not, for example, on the exercise of constitutional rights against an organ of state.¹² While matters ancillary to genuine constitutional cases are covered by *Biowatch*,¹³ it cannot be said that the crux of the urgent application was constitutional in nature. The matter involved nothing more than the application of the facts, with little dispute on the papers,¹⁴ to the well-established requirements for interim relief. Its essence was not constitutional in nature. To illustrate the point, it simply cannot be the case that *Biowatch* applies to every interim interdict application pending a review on the basis that the constitutional right to just administrative has been invoked. The result is that even though it cannot be said that the application was 'frivolous' or 'vexatious', the *Biowatch* principle could not operate in the applicants' favour against any of the respondents.¹⁵

[15] As to the argument based on s 32(2) of NEMA, it is so that a court may exercise a discretion in deciding not to award costs against an unsuccessful applicant in applicable matters concerned with the protection of the environment. To do so, however, the court should believe that 'the person or group of persons acted reasonably ...' In this instance, as the judgment explains, the applicants' submissions regarding the detrimental impact of the seismic survey on the environment, and marine life in particular, were, at best, speculative. In complete contrast to the application that followed in *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*,¹⁶ there was a paucity of supporting material on the aspect of 'reasonable apprehension of

¹² *Mkhatshwa v Mkhatshwa* 2021 (5) SA 447 (CC) paras 16, 18. Also see *Minister of Safety and Security and Another v Schuster and Another* [2018] ZASCA 112 ('Schuster') paras 25, 26.

¹³ See *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (1) SA 645 (CC) para 16.

¹⁴ Para 16 of the judgment.

¹⁵ See *Schuster* supra fn 11 para 26.

¹⁶ Bloem J in *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG); [2021] ZAECGHC 118 para 65.

irreparable harm'.¹⁷ The application was, in that sense, premature and launched with haste in an unreasonable fashion with no prospects of success. As a result, and absent the application of the *Biowatch* principle, the ordinary approach to costs must apply. The exercise of the discretion in awarding costs was therefore based on the correct facts and legal principles and an appeal on costs has no reasonable prospects of success. There is also no other compelling reason why an appeal on costs should be heard in this matter.

Order

[16] The application for leave to appeal is dismissed with costs.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:19 May 2022
Delivered:07 June 2022

Appearances:

¹⁷ Paras 34 and 35 of the judgment.

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