



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

CASE NO: 582/2024

In the matter between:

NHLANHLA GENUKILE

Applicant

and

WALTER SISULU

First Respondent

WALTER SISULU UNIVERSITY: REGISTRAR

DR L. NTONZIMA

Second Respondent

MINISTER OF HIGHER EDUCATION, SCIENCE

AND TECHNOLOGY

Third Respondent

JUDGMENT

PITT AJ

Introduction

[1] This matter came before court as an urgent application for a declaration of a violation of the applicant's right to education in terms of section 29(1) of the Constitution¹. The applicant also seeks an order declaring the first and second respondent's conduct of excluding and/or barring him from registering and enrolling for a diploma at the Walter Sisulu University (the University), unlawful and in breach of the respondents' constitutional obligation in terms of section 29(1)(b) of the Constitution². In addition, the applicant asserts that the respondents have breached a contract that came into existence when he accepted his admission by the first respondent into the Diploma in Human Resources Management qualification at its Butterworth campus.

[2] The applicant further asked the court to issue a *mandamus*, directing and compelling the first respondent, the University, and second respondent, the Registrar of the University, to remedy the breach of contract by allowing and assisting him to register and enrol for the diploma at the University, Butterworth campus within two days of the order. She/he further seeks other ancillary relief.

[4] The application was opposed by the first and second respondents only, the applicant having indicated that no relief was sought against the third respondent, the Minister of Higher Education, Science and Technology.

¹ The Constitution of South Africa, Act 108 of 1996.

² This section of the Constitution provides that everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

Facts relevant to the application

- [5] The salient facts upon which the application is brought are as follows:
- (a) The applicant completed and submitted an online application to be admitted to study towards a Diploma in Human Resources Management (the Diploma) at the University. The applicant did not state the date on which he completed and submitted the application.
 - (b) He received various offers from various institutions including the first respondent.
 - (c) He was officially admitted and accepted by the University to study towards the Diploma, after which he rejected all other offers which he had received from various other institutions. He accepted the offer from the University. He attached a screenshot to his founding affidavit of the status which showed him as having been admitted for the Diploma. When his admission was confirmed, a contract came into being between him and the University that he would be admitted to the qualification for he qualified provided that he met the requirements for that qualification and paid the required registration fee.
 - (d) According to the applicant, it was an oral term of the contract between the applicant and the first and second respondents the applicant was to pay a registration fee.

- (e) The applicant requested to speak to the second respondent, still on 26 January 2024, to whom he indicated that he accepted the offer to enrol for the Diploma in Human Resource Management. He also indicated to the second respondent that he took all necessary steps to honour the salient terms and conditions, and that he even “attempted to make a payment of a registration fee amounting to R 4 800.00”. However, such attempts were not successful because of his inability to register through the student portal.
- (f) He sought assistance but was told that he could only be assisted on Monday, 29 January 2024.
- (g) On the same day, he attempted to register and enrol for the Diploma on the online portal of the University, but he could not process the registration and enrolment. He attempted numerous times to submit his registration but was later on the same day informed by the online portal that the qualification intake was filled to maximum capacity.
- (h) The first respondent informed the applicant that they do not have space to accommodate him to study for the qualification they had offered, and he accepted this. That being the case, the applicant maintained that the first respondent should have registered and enrolled him for the Diploma.

The issues for determination

[6] I am called upon to decide if the applicant entered into a contract with the first respondent and if such contract was breached.

[7] In their opposition of the application, the first and second respondents raised a defence that there was no contract between the applicant and the first and second respondents. In their answering affidavit deposed to by the second respondent, the first and second respondents contend that the applicant should have brought his application for the review of the decision of the first respondent not to admit and enrol him as a student of the first respondent. The third respondent has not filed any answering affidavit, presumably because no relief is sought against him.

[8] The applicant did not file a replying application. It was submitted on behalf of the applicant that this was because of the urgency of the matter.

Factual submissions on behalf of the first and second respondents

[9] The second respondent functions in terms of the university's Institutional Statute, and such functions include supporting the vice-chancellor on the management and administration of the university at an institutional level. He also ensures that the university complies with statute, relevant legislation, national higher education policies and the policies and rules of the university.

[10] The first respondent is a public higher education institution as defined in terms of section 33 of the Higher Education Act No. 101 of 1997 and is governed by its Institutional Statute which was published in the Government Gazette by Notice No. 37235 dated 17 January 2014.

[11] The Council of the University is empowered by the enabling legislation, with the approval of the Senate, to determine entrance requirements for admission for a course of study. The university published its own rules in its prospectus to give effect to the entrance requirements for admission. The applicant was admitted to the Faculty of Management and Public Administration Sciences for a Diploma in Human Resources Management.

[12] A total of 8 198 applicants applied to be registered for the Diploma at the University for the study year 2024, of which 2 434 met the admission requirements. There are 168 positions available for study of the Diploma at the University.

[13] The applicant, as well as all other applicants for the Diploma, were advised by SMS, email and correspondence that registration for this qualification was subject to the availability of space.

[14] The applicant was a privately funded student, and the status of his application with the Student Financial Aid Scheme (NASFAS) was pending at the time he was expected to register for the Diploma.

[15] Even though the applicant met the minimum admission requirements, it was not a guarantee that the applicant would be registered at the University, it also did not vest the applicant with a legal right to be so registered. This is because there are substantially more candidates who meet the requirements than there are places in the quota allocated to the university in any year. The Diploma which the applicant applied for was fully subscribed to.

[16] The first and second respondents go on to state that a selection process subject to the availability of space in the course must therefore be applied, which, as they claim, the applicant does not appear to appreciate.

[17] It is the first and second respondents' assertion further, that there is no proof that the applicant paid the required registration fee. In fact, the first respondent denies that the applicant paid the registration fee. It is their version in this regard that non-payment of the registration fee is a bar to registration.

[18] The respondents further state that the university's admission and entrance policies are fair and transparent. The enabling legislation of the university empowers Council of the university, with the approval of Senate, to determine the entrance requirements for admission for a course of study and the number of students which may be admitted to any particular course of study.

[19] To give effect to the determinations referred to in the previous paragraph, the university has published its own rules in its prospectus, which provide as follows:

- a) Once a course becomes fully subscribed, the university may not register further students regardless of whether they have been provided with an admission letter. Students are notified once the course is fully subscribed by the online portal.
- b) Historically, once registration opened and because of the numbers of students seeking registration, so the first and second respondents assert, courses in the past have become fully subscribed within thirty minutes. This is why registration is done online and on a first-come-first-served basis.
- c) For a good reason, say the first and second respondents, it is imperative that the university completes the process of registration of incoming students timeously. If registration is delayed because of a lack of funding, it impacts upon the duration of the academic year and teaching time.

- d) Should the university register and admit more students than it has spaces for, it will be penalised by the Department of Higher Education and Training (the Department).
- e) Students who exceed the number of available spaces will not receive subsidies from the Department, which already funds 31 000 students studying at the university.
- f) The university does not have the funding to pay for any students in excess of the permitted number, as well as residence costs, tuition and the required textbooks. The number of students in campus residences is limited and also already over the limit.
- g) There is obvious prejudice to the university because if it registers more students than its capacity, this will cripple the university financially to the detriment of all its students.
- h) The university will have to fund all students who are registered and admitted over the permitted limit for the full extent of their courses of study for up to four years. This will also affect teaching because the university will have to employ additional staff and overuse its already strained infrastructure.

- i) Further according to the respondents, from previous experiences, students who fund their own studies do not succeed because they cannot access residences without the subsidy, and they accumulate debt to the university. These students are also forced to stay in residences off campus. According to the University's policy, if a student is not funded, they have to pay 80% of a R 25 000.00 entrance expense which they cannot do.
- j) The University's policy is further that if a student owes fees for previous years of study, they are required to pay approximately 15% thereof to be registered for the next year of study, which students who fund their own studies cannot afford.
- k) The consequences cannot be mitigated by the university unless it controls its registration processes tightly.

[20] The University received 357 622 applications for admission to study in 2024, of which only 31 000 can be admitted, thus putting immense pressure on the University. It can only admit 7 322 students into the first year of study. The 4 million residents in the former Transkei prefer WSU as their first choice to register to study their tertiary education. They do not consider other tertiary institutions for registration and admission outside this part of the Eastern Cape, and this adds more pressure on the university.

[21] While the applicant may have a constitutional right to education, that right does not extend to enrolment or registration at the university.

[22] The first and second respondents also deny that there was a contractual relationship concluded between the applicant and the first respondent. This is because it was dependant upon the availability of spaces within the Diploma. All students are required to pay registration fee to finalise their registration, and the applicant did not do so.

[23] It is the first and second respondents' contention that the applicant can obtain admission to other institutions of education.

The law

[24] Section 29(1)(b) of the Constitution provides that everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

[25] Since the applicant bases his cause of action on breach of contract by the first respondent, it is important to consider the principles governing the time at which it can be said a contract has been concluded. The applicant alleges that the contract between the university and himself was established when he received 'acceptance offers' from the first and second respondents to study at the University towards a Diploma in Human Resources Management.

[26] It is trite law that a contract is concluded between persons when there is acceptance of an offer.³ It is further trite law that a contract is breached when a material term of that contract has not been complied with by one of the parties thereto.⁴

[27] Agreement, as a necessary ingredient of a contract, must be agreement in the sense of a meeting of the minds or coincidence of the wills of the contracting parties, or *consensus ad item*.⁵

[28] A condition is an external fact on which the existence of an obligation or juristic act depends.⁶ The fulfilment of a condition must be alleged and proved by the party relying on the contract, so too the breach must be alleged and proved by the person relying thereon.⁷

[29] A contract subject to a suspensive condition creates a real and definite contractual relationship between the parties.⁸ The eligible portion of the contract is suspended, pending fulfilment of the suspensive condition.⁹ The contract therefore only comes into full force and effect and is enforceable in accordance

³ *Aimler's Precedents of Pleadings*, Harms, LexisNexis, Ninth Edition, p. 195; see also *CGEE Alstom Equipments et Enterprises Electriques v GKN Sankey (Pty) Ltd* 1987(1) SA 81 (A) at 90. Also see *Ally v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N) 149F-150H.

⁴ See also *Christie's The Law of Contract*, LexisNexis, 8th Edition, p.619.

⁵ *Christie's*, at p.11.

⁶ See *Aimler's Precedents and Pleadings*, *supra* at p. 111.

⁷ *Supra*; see also *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A). Also see *Parson's Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA)

⁸ See *Aimler's op cit*, p.112.

⁹ *Supra*.

with its terms when the condition is fulfilled.¹⁰ Further, a party cannot enforce any rights arising from the agreement until the condition has been fulfilled.¹¹

See *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A).

[30] If the condition is not fulfilled, the contractual consequences fall away and no claim for damages flows from the contract's failure.¹²

[31] In *Dirk Fourie v Gerber* 1986 (1) SA 763 (A) it was held that fulfilment of a suspensive condition after the passing of a reasonable time, or after the time limit imposed, does not give rise to a binding obligation.¹³

[32] It is so that when a party to a contract prevents fulfilment of a condition, upon the fulfilment of which that party would become bound, with the intention of frustrating such fulfilment, the unfulfilled condition will be deemed to have been fulfilled.¹⁴

See *Scott v Poupard* 1971 (2) SA 373 (A).

The legislative framework governing the University.

[33] The University is a public higher education institution as defined in section 33 of the Higher Education Act No. 101 of 1997 and is governed by the Institutional Statute of Walter Sisulu University which was published in Government Gazette No. 37235 dated 17 January 2014.

¹⁰ *Supra.*

¹¹ *Supra.*

¹² *Aimler's* at p. 112.

¹³ *Supra.*

¹⁴ *Aimler's* at p.113.

[34] Section 37 of the Act makes provision for the Council of the University, together with its Senate, to make its own determination of entrance requirements in respect of each particular higher education programme offered by the University for an academic year, as well as the number of students who may be admitted for a particular programme and the manner of their selection.

[35] In terms of section 32(1) of the Act, the Council of a university may also make institutional rules to give effect to the Institutional Statute (the Statute). In furtherance of this provision, section 7(1) of the Statute provides that the Council governs the university subject to the Act and the Statute.

[36] Section 7(3) of the Statute provides that the Council has the powers and functions to determine the student admission policy of the university, after consultation with the Senate. The Council may also determine the entrance requirements in respect of the particular programmes, the number of students that may be admitted for a particular programme and the manner of their selection, as well as the minimum requirements for readmission to study at the University.

[37] The rules of the University are published in its annual prospectus, have legal force and are applicable to and binding on all students enrolled at the university and/or prospective students.

[38] In terms of Rule 1.5 in the prospectus, the University reserves the right to set a selection criteria, in addition to the minimum admission requirements, and to apply such criteria to admit or refuse admission to specific qualification and programmes, taking into consideration the university's targets and capacity to offer the qualifications and programmes concerned. The Rule goes further to state that a limited number of students with appropriate degrees may be considered for admission, and that graduate students are assessed on the basis of their post-matric results as well as their matriculation results.

Discussion

[39] As part of the relief, the applicant contended that the first and second respondents' conduct which resulted in the applicant's inability to register and enrol for a Diploma in Human Resources Management at the University be declared as a violation of his rights, and that excluding the him from registering and enrolling for the same Diploma be declared unlawful and in breach of the constitutional obligation in in terms of section 29(1)(b) of the Constitution.

[40] The applicant submitted that his right in terms of section 29(1)(b) was violated by the first and second respondents when they failed to make available to him further education through reasonable measures and to ensure that it is accessible. This is based on the allegation that the first and second respondents have barred him from registration and enrolment at the University towards a Diploma in Human Resource Management.

[41] In the founding affidavit, the applicant alleges that this right was further violated by the first and second respondents in that they have failed to make available further education through reasonable measures and to ensure that it is accessible when they barred him from registration and enrolment towards the Bachelor's degree of Education. The last allegation is misplaced in the circumstances. It has always been the applicant's case, as I understood it, that he was barred from registering for the Diploma and not Bachelor of Education. The applicant cannot claim the right to register for this Degree when he was not admitted for it. On the facts, the applicant has not made out a case for this relief.

[42] The applicant submits that his cause of action is based on breach of contract, in that the university made it impossible for him to perform in terms of the contract, namely, paying the required registration fee after he had been admitted to the Diploma for which he had applied. The first and second respondents denied that the applicant paid the required registration fee and that this was a bar to registration.

[43] The applicant maintains that he had complied with all the terms of the contract except for paying the required registration fee.

[44] When asked if the applicant had paid the required registration fee, Mr *Madubela* responded in the affirmative. But when asked where in the affidavit this was so, he hesitated and referred to paragraph 6.7 of the founding affidavit. Here the applicant alleged that "*I paid the registration fee*".

[45] At paragraph 5.5 of the same founding affidavit, the applicant alleges that he attempted to make payment of a registration fee amounting to R 4 800.00, but that “[s]uch attempts were halted by my inability to register through the student portal”. He did not allege how he attempted to pay the registration fee and he does not provide any proof of such attempts.

[46] The applicant again in paragraph 6.6 of his founding affidavit alleges that he called the University and indicated that he was accepting the offer and proceeded to pay the registration fee on the same day.

[47] The applicant contradicts himself in the paragraphs in his founding affidavit referred to above. When asked if the applicant had provided proof that he had made payment of the required registration fee, Mr *Madubela* could not refer the court to such proof in the founding affidavit.

[48] From the above, it is clear that the condition relating to the payment of the required registration fee was not complied with by the applicant. But the applicant’s case is that the first and second respondents made it impossible for him to pay by barring him from being able to continue with his registration on the university’s portal. The applicant did not in his founding affidavit supply further details of how exactly he was barred from doing so.

[49] From a further examination of the facts of the instant application, the following emerges: The applicant alleges that there was a contract between him and the University, and as part of the contractual terms agreed to by him and the

first and second respondents, he would pay the registration fee after the offer was made and accepted by him. If that is the case, which is denied by the first and second respondents, there must be a meeting of minds, or the parties must be *ad idem* as to the existence and terms of the contract. It ought to follow from this that there was no meeting of minds, therefore, there cannot be a contract. In any event, if there was such a contract a contract, there was a suspensive condition of payment of the required registration fee by the applicant, which fee was not paid.

[50] The first and second respondents in their answering affidavit alleged that they have limited numbers for the Diploma which the applicant had applied for registration to the university. Admission to this Diploma and any other course of study at the University is not guaranteed and subject to the first-come-first-served rule. The first and second respondents submitted that the applicant delayed finalising his registration process and was ‘kicked out of the system’ because the course of study for which he had applied was full before he could pay the registration fee to finalise the process of registration.

[51] Therefore, even though the applicant’s admission was complete, except for the payment of the registration fee, the process would only have been finalised upon such payment. In essence, another prospective student beat the applicant to the position which they had both competed for, so to speak.

[52] The first and second respondents in their answering affidavit alleged that meeting the requirements for registration does not vest the applicant with the right to be registered.

[53] The applicant alleged that he had rejected all other offers from other universities and institutions of higher education when he was admitted to study at the University. No further information was provided in support of this allegation. The first and second respondents in their answering affidavit stated that these allegations are unknown to them, and therefore not admitted. Nothing turns on this allegation in any event.

[54] The applicant can therefore not rely on this unsubstantiated allegation as a factor in favour of his cause of action. There was no proof provided by the applicant.

[55] The applicant contended that his attempts to pay the required registration fee of R 4 800.00 were unsuccessful, but that he was unable to register through the student portal. No further explanation is given as to how the applicant was unable to register in this way, nor was any proof provided thereof.

[56] The applicant referred the court to the decision of *Mbana v University of Walter Sisulu and two others* (846/2023) [2023] ZAECMHC 9 (7 March 2023), a decision of this Division by the Honourable Jolwana J. The respondents were exactly the same as in this matter, so were many of the facts.

[57] In referring the court to this decision, the applicant did not indicate whether the applicant relied on the facts of the case or the legal principles therein. The applicant did however argue that the principle of breach of contract was relied on in support of the applicant's case.

[58] The relevant portions of the *Mbana* decision are as follows:

“He submits that on the same day that he received the offer, he accepted it by phoning the University on 0[...]. During that call he requested to talk with the registrar. His call was transferred to the office of the registrar. This is when he indicated his acceptance of the offer of admission to the University. He then took all the necessary steps to comply with the salient terms and conditions of the offer. In this regard he made a payment of the registration fee in the sum of R4 600.00 into the bank account indicated in the admission letter. He emailed his proof of payment to m[...] and requested registration clearance.”

[59] As can be seen from the above, the facts are almost identical to those of the present application, except that the applicant in the *Mbana* case had actually paid the required registration fee. This distinguishes the two cases from each other.

[60] Further, the applicant in the *Mbana* case provided proof of the payment as an annexure to the founding affidavit in support of the allegation that he had paid the required registration fee.

[61] In *Mbana*, the applicant had applied for registration and admission to study at the University in July of the previous year already. This is a fundamental difference in the facts to the present matter.

[62] The only strong reference which the applicant can take from *Mbana* is that it supports the applicant's allegation that there was a contract between the applicant and the university and subsequent breach of that contract. However, that contract was alleged and proved on facts different to those in the present matter.

[63] The applicant in this matter relied on breach of contract but failed to prove such contract and its breach. The facts alleged by the applicant did not support a contract between the applicant and the university, nor did the facts support a breach of such contract. If there was such a contract, it was subject to a suspensive condition of payment of the requisite registration fee. This condition was not complied with and therefore the contractual consequences fall away.

[64] The fulfilment of the suspensive condition did not take place within the time limit imposed or after a reasonable time, and therefore does not give rise to a binding obligation on the first and second respondents.

[65] There is no evidence that the first and second respondents frustrated the fulfilment of the suspensive condition by the application, otherwise the unfulfilled condition would have been deemed to have been fulfilled. The applicant alleged that the University blocked him from completing his registration online when he attempted to pay the required registration fee, but

there was no allegation or proof that this was done intentionally by the first and second respondents to frustrate the applicant.

[66] In application proceedings, such as this one, the affidavits take the place not only of the pleadings in an action, but also of the evidential evidence which would be led at a trial in action proceedings.¹⁵

[67] I am constrained to remind the parties that the application was brought on urgent basis, and the applicant chose not to file a replying affidavit to the first and second respondent's answering affidavit due to the urgency of the matter. This was confirmed by the applicant's Counsel at the beginning of the hearing of the application.

[68] In motion proceedings, there are three sets of affidavits filed.¹⁶ It is common cause that in this application only two sets were filed. In urgent applications, parties file their necessary affidavits in support of their respective cases on truncated timeframes. Due to the urgency of the matter, parties file these affidavits hurriedly with the information at their disposal. A party is afforded extra time to file an affidavit at the request of such a party to the court, and provided that such a request is not opposed.

See *Standard Bank of South Africa Ltd v Sewparsingal* 2005 (4) SA 148 (C) at 153H.

¹⁵ Erasmus, *Superior Court Practice*, Volume 2, Juta, D1-56 and 57. See also *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972(1) SA 464 (D) at 469C-E.

¹⁶ Erasmus, *op cit*, D1-67.

[69] The applicant was provided with an opportunity by the court to file a replying affidavit at the beginning of the hearing, but the applicant declined this opportunity and indicated that he will not be filing a replying affidavit.

[70] It was held in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234 (C) at 235 that if the material facts are in dispute and there is no real dispute for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as they are stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.¹⁷ There is no material dispute of facts between the parties, nor was an application made for the referral to oral evidence of any of the issues between the parties.

[71] The matter is one that is capable of being determined on the affidavits filed by the parties. However, the first and second respondents did not admit the facts relied on by the applicant in the founding affidavit for the relief sought. What falls to be considered is whether the respondent's version is nonetheless sustainable, or whether it is untenable, warranting its rejection.

[72] The version of the first and second respondents on the facts remain unchallenged by the applicant. This is because the applicant did not file a replying affidavit dealing with the allegations made by the respondent which I consider to be material to the issues for determination in this matter.

¹⁷ Erasmus, D1-76.

[73] The applicant's allegation that he had rejected the offers to study at other institutions for registration and admission is unsubstantiated and remains to be proved. The applicant did not provide any facts as to the names of these other institutions and for which courses of study the applicant had applied. Besides, the applicant should have secured his registration and admission with the University first before rejecting all other offers at other universities and institutions.

[74] The applicant alleged that he sought assistance but was told that he could only be assisted on Monday, 29 January 2024. No detail is provided as to what type of assistance was sought, how, or from whom.

[75] The first and second respondents contended that once a course becomes fully subscribed, the University may not register further students regardless of whether they have been provided with an admission letter. This makes full sense because the University will encounter problems with overcrowding if they have to admit every student who applies for registration and admission despite there being no space left for students.

[76] The first and second respondents also contended that the Diploma for which the applicant had applied was fully subscribed. If the University accepts more students that it has spaces for, as submitted by the first and respondents, the third respondent will penalise the University.

[77] The first and second respondents submitted that registering more students than they have places for would cripple the University financially to the detriment of all its students. This would also greatly compromise the administrative processes of the University.

[78] The court should dismiss an application where there are fundamental disputes of fact on the papers and the applicant failed to make out a case for the relief claimed. This is such a case where there are fundamental disputes of fact and the applicant failed to make out a case for the relief claimed. The application falls to be dismissed.

Costs

[79] Although the applicant did not argue that he is unable to pay the legal costs of the respondents should the application not succeed, I will deal with the issue of costs in greater detail than is normally done.

[80] Mr *Hobbs*, Counsel for the respondents, submitted that costs of the application should follow the cause. The normal order is that if an application fails, the applicant must pay the costs occasioned by the application.

[81] It is common cause that that application entails the promotion and protection of a right entrenched in the Constitution, namely the right to education. The applicant's founding affidavit sets out as much. The applicant

seeks to enforce his right to education with this application. This was also confirmed by Mr *Hobbs* on the issue of costs.

[82] In the Constitutional Court decision of *Biowatch v Trust v Registrar Genetic Resources and Others*¹⁸ it was held that the case involved “litigation in which private parties with competing interests were involved, not to settle a legal dispute between themselves, but in relation to determining whether the state had appropriately shouldered its constitutional and statutory responsibilities”. Although the present case is not identical to the *Biowatch* case, the principle regarding costs finds application here.

Conclusion and order

[83] I conclude that the applicant has not proved his case and the application must fail. I make the following order:

1. The application is dismissed.
2. Each party shall pay its own costs.

DV PITT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

¹⁸ 2009 (6) SA 232 (CC).

Counsel for the Applicant : *Adv Madubela*

Instructed by : L Nqeketo Inc Attorneys
Mthatha

Counsel for the Respondents : *Adv Hobbs*

Instructed by : Drake Flemmer & Orsmond (EL)
Mthatha

Heard on : 13 February 2024

Judgment delivered on : 27 February 2024