IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 62873/2014

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

28/2/19 .....
DATE SIGNATURE

In the matter between:

CENTRAL AFRICAN ROAD SERVICES **APPLICANT**

Vs

THE MINISTER OF TRANSPORT **FIRST RESPONDENT**

CROSS-BORDER ROAD TRANSPORT AGENCY **SECOND RESPONDENT**

JUDGMENT

---

[1] The Applicant, Central African Road Services (Pty) Ltd (CARS), brought an application reviewing and setting aside Government Notice No R 342 published on 6 May 2014 in Government Gazette No 37614, in terms of which the First Respondent (the Minister) promulgated Regulations under the Cross-Border Road Transport Amendment Regulations (the 2014 Regulations). CARS also sought a declaratory order that the 2014 Regulations are inconsistent with the Constitution.

[2] Although the papers contained a much broader dispute CARS at the hearing indicated that only two issues remained for determination. The first is whether the Minister failed to consult with the Board at all, or failed to do so properly, as required by section 51(a) of the Act. The second was a challenge to the new regulations 7(5) and (6). They provide for annual fee increases to counteract the effects of inflation. CARS contended that they are *ultra vires* and unduly vague.

BACKGROUND

[3] The Second Respondent is the Cross-Border Road Transport Agency (the Agency), which is a juristic person, established in terms of section 4 of the Cross-Border Road Transport Act, 4 of 1988 (the Act).

[4] The Agency is responsible for regulating cross-border transport. Section 4 of the Act states as follows:

"4. ***Establishment of Agency***

(1) A juristic person, known as the Cross-Border Road Transport Agency, is hereby established.

(2) Subject to the provisions of this Act, the Agency is capable in law of instituting, defending or opposing legal proceedings of whatever nature, of purchasing or otherwise acquiring, holding and alienating or otherwise disposing of movable or immovable property or any other real right or interest, of entering into contracts or doing such other things as juristic persons may by law perform and do.

(3) The Agency may perform all such acts and do such things as are reasonably necessary for or ancillary, incidental or supplementary to the performance of its advisory, regulatory and law enforcement functions as contemplated in this Act.

(4) The Agency may collect toll on behalf of the South African National Roads Agency Limited in terms of an agreement, between the Agency and the South African National Roads Agency Limited, concluded under section 28(1)(a) of the South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998).

[5] The Agency's primary source of revenue is the fees it charges for permits. The Minister prescribes the fees by regulations made in terms of s 51(a) of the Act. The current fees are still those prescribed by regulations made in 2003 (*the 2003 Regulations*).

[6] In 2011, the Minister sought to increase the Agency's fee structure. The Minister did so on 31 March 2011 by the promulgation of the Cross-Border Road Transport Amendment Regulations ("*the 2011 Regulations*").

[7] CARS challenged the validity of the 2011 Regulations. On 15 February 2013, the Court declared the 2011 Regulations invalid on procedural

grounds. Makgoka J (as he then was) suspended the order of invalidity for a period of six months to allow the Agency and the Minister to correct the defects.

[8] On 7 March 2013, CARS lodged an application for leave to appeal and the Agency sought to cross-appeal. The Minister and the Agency apparently mistakenly believed that they could not promulgate new regulations, until the appeals were finally disposed of. They therefore allowed the six-month period of suspension to lapse.

[9] CARS applied to this court for an order declaring that, on expiry of the period of suspension, the 2011 Regulations had been invalidated from the outset. On 1 November 2013, Heaton-Nicholls J declared that the 2011 Regulations were invalid with full retrospective effect, and that the Agency was only entitled to collect tariffs under the original 2003 Regulations.

[10] The Constitutional Court granted the Agency leave to appeal against the order of Heaton-Nicholls J. The Constitutional Court however dismissed the Agency's appeal on 12 May 2015.[1]

[11] The 2011 Regulations were thus invalidated with full retrospective effect. The Agency consequently became liable to refund operators who paid

[1] Cross-Border Road Transport Agency v Central African Road Services 2015 (5) SA 370 (CC)

tariffs in terms of the 2011 Regulations. This liability according to the papers amounts to three hundred and nineteen million rand.

[12] As a result of the aforesaid the Agency and the Minister commenced a fresh process to enact regulations to increase the Agency's permit fees. The Minister promulgated these Regulations on 6 May 2014 (the 2014 Regulations).

THE CONSULTATION REQUIREMENT

[13] CARS at the hearing stated that the Minister failed to comply with sec 51(1)(a) of the Act which says that the Minister may determine the Agency's permit fee structure "*after consulting the Board*".

[14] Section 51 reads as follows:

> "*51 **Regulations***
> *The Minister, after consulting the Board, may make regulations, not inconsistent with this Act, relating to –*
>
> (a) *The fee structure for permits and other fees*;
>
> *(b) The consignment notes and passenger lists; and*
>
> (c) *Anything that must or may be prescribed in terms of this Act.*"

[15] In argument it was made clear by Mr Budlender, on behalf of CARS, that the parties were in agreement pertaining to what the law requires with reference to a proper consultation, the parties however, cross swords on whether those requirements were met. I will first deal with the legal principles before applying it to the facts of this case.

[16] In **President of the Republic and Others [Reinecke]**[2] the following was said regarding a requirement to act after consultation:

> *"[W]here the law requires a functionary to act in consultation with another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act after consultation with another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary."*[3] [Court's emphasis]

[17] In **Electronic Media Network Limited and Others v E-TV (Pty) Ltd**[4] the Constitutional Court dealt with the question of what would constitute proper consultation and held that:

> *"... Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development it must mean that a genuine effort is being made to obtain views of industry or sector roleplayers and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must thus be allowed to reach a policymaker. But, consultation fulfils a role that is fundamentally different from negotiation."*[5]

[18] The following principles were laid down in **Electronic Media Network**:

---

[2] President of The Republic of South Africa and Others v Reinecke 2014 (3) SA 205 (SCA), [Reinecke]
[3] Reinecke, supra, at para 9, fn 11 quoting McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642 (C).
[4] Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others (CCT140/16; CCT141/16; CCT145/16) [2017] ZACC 17 (8 June 2017) (Electronic Media Network)
[5] Electronic Media, supra, at para 37.

a. The duty to consult "*requires no more than that the views of interested persons be obtained. This is to be done by publishing the text of the draft policy by notice in the Gazette.*"[6]

b. It is not "*intended to allow parties to exhaustively discuss or iron out divergent views until some mutually acceptable basis to proceed from*"[7] is agreed on.

c. The parties who must be consulted "*only have the right to ensure that their voices are heard during the consultation period before a final policy-determination is made.*"[8] Those interested parties ought to respond to the invitation to give input by speaking exhaustively when given the opportunity.[9]

d. It was made clear that the key question is whether interested parties were afforded the opportunity to be heard. It is not required that they avail themselves of this opportunity.[10]

[19] Furthermore in the matter of **Minister of Home Affairs & Others v Scalabrini Centre, Cape Town & Others**[11] it was stated that:

"[C]onsultation entails 'a genuine invitation to give advice and a genuine receipt of that advice', it is 'not to be treated perfunctorily or as a mere formality', and that engagement after the decision-maker has already reached his decision, or once his mind has already become 'unduly fixed', is not compatible with true consultation."[12]

---

[6] Electronic Media Network at para 42
[7] Electronic Media Network at para 42
[8] Electronic Media Network at para 42
[9] Electronic Media Network at para 43
[10] Electronic Media Network at para 44-47
[11] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA); [2013] 4 All SA 571 (SCA), at paras 42-43.
[12].Minister of Home Affairs, supra, at paras 42-43
13 2016 (1) SA 534 (WCC) (Tloulama)

[20] There does not seem to exist any prescribed form that the consultation process must take. **In Tloulama and Others v Speaker of the National Assembly and Others**[13] it was held that:

a. "*The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice.*"[14]

b. The consultation may take several possible forms: "*It may be formal or informal, oral or in writing. The essence of consultation is a communication of ideas on a reciprocal basis. The procedure is in the discretion of the person who has to consult. The procedure must, however, allow reasonable opportunity to both sides (the consulting and the consulted parties) to communicate effectively and achieve the purpose for which prior consultation is prescribed.*"[15]

[21] In **Maqoma v Sebe NO and Another** [16] Pickard J held that:

> *"The word "consultation" in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis*[17]*."*

---

14 Tlouamma at para 92
15 Tlouma at para 92
16 Maqoma v Sebe NO and Another 1987(1) SA483 (CK) (Maqoma)

17 Maqoma 490 C

[22] It was argued by counsel for the Agency, in my view correctly, that from the above the following principles crystallised:

a. The consultor is not required to obtain the concurrence of the consultee. It is merely required to give serious consideration to the consultee's views.

b. The consultor need do no more than invite the consultee to make representations and, if the latter does so, to give serious consideration to them. If the consultor invites the consultee to make representations, but the latter fails to do so, the consultor need not take the matter any further.

c. The consultation is not required to take any particular form. The requirement of consultation does not mean that the consultor and consultee have to meet. They can for instance engage in writing or via emissaries. Their form of communication is flexible.

[23] One needs to apply the aforementioned principles to the facts of this case in order to determine whether there was compliance with sec 51(1) of the Act. Seeing that the Minister promulgated the 2014 Regulations in response to the Court's declaration of invalidity of the 2011 Regulations, The consultation between the Board and the Minister prior to the enactment of the 2011 Regulations therefore remained relevant. As a result the proclamation of the 2014 Regulations, must be seen against the broader background which ultimately led to the promulgation of the 2014 Regulations.

[24] The process that led to the enactment of the 2011 Regulations was, that the Agency, the Board and the Minister embarked on lengthy consultation processes, beginning in 2010, to determine and agree on a method to turn the Agency around. The Board developed funding scenarios and presented those funding model scenarios to the Minister. The Minister gave input to the Board on the proposed funding models.

[25] On 28 August 2010, the CEO of the Agency met with the Deputy Minister of Transport informing him that as part of its business processes planning, the Agency had concluded that a two hundred million rand cash injection would be required over the following three years in order to put it on the path to recovery.

[26] On 23 September 2010, the CEO of the Agency made a presentation to the Minister of Transport, setting out the functions of the Agency and explaining the funding challenges faced by the Agency. On 1 November 2010, the CEO of the Agency presented a memorandum to the Minister motivating at length for the increases proposed in the 2011 Regulations. The Minister approved the motivation on 17 November 2010.

[27] After the 2011 Regulations were struck down, a process followed which led to the promulgation of the 2014 Regulations. On 19 November 2013, the Department of Transport published a notice requesting comments on a draft of the 2014 Regulations.

[28] The following stakeholders submitted comments in response:

a. CARS

b. Road Freight Association

c. South African Bus Operators Association

d. South African Chamber of Commerce and Industry

[29] On 10 April 2014, the Director-General of Transport sent a memorandum to the Minister. The memorandum -

a. informed the Minister of the history necessitating the enactment of the 2014 Regulations, including the litigation history;

b. explained to the Minister the impact on the Agency's operations arising from the full retrospective effect of the orders of the High Court;

c. expressly informed the Minister that the full retrospective effect of the judgment would "*clearly render the Agency, both technically and commercially insolvent*";

d. informed the Minister of the financial consequences for the Agency if the 2014 Regulations were not approved, including that the Agency would only be able to sustain itself through its cash reserves for another 10 months;

e. set out the necessity of finalising and approving the 2014 Regulations to allow the Agency to continue to discharge its legislative mandate and to continue to operate as a going concern.

[30] On 16 April 2014, the Department of Transport held a stakeholder consultation with all parties, including CARS, that commented on the Draft Regulations.

[31] On 23 April 2014, the Board met. The minutes of this meeting record that the Board had already been interacting with the Minister concerning the 2014 Regulations by the time that the meeting occurred. The following was stated in the minutes "*the Minister was made to appreciate the importance of finalising the draft 2013 Regulation prior 07 May 2014*". The Board anticipated a further engagement with the Minister at a meeting which was to be held on 29 April 2014. The minutes also reveal that the Board considered the comments of stakeholders and resolved to develop different scenarios.

[32] On 29 April 2014, the Board held the further meeting to consider the draft Regulation, but the Minister was unable to join that meeting and requested that two board members and the company secretary met with her at her residence later on that same day. The Chairperson, CEO and company secretary were authorised to meet with the Minister on behalf of the Board. A document was prepared for the meeting, setting out the different scenarios. There is no indication that the Board resolved to accept the document or to propose a certain scenario to the Minister, but it is clear that the document was prepared for the meeting.

[33] On 29 April 2014, the Minister met with the emissaries of the Board. At that meeting the Chairperson informed the Minister that the Board had

considered reducing the tariff and had asked the management of the Agency to develop various scenarios indicating possible benefit to the industry. The Chairperson presented the various scenarios to the Minister and recommended scenario seven. The Minister noted the feedback and requested that the revised draft Regulations with a motivation be submitted to her for her consideration and final approval.

[34] The scenarios which were put to the Minister, and which were set out in the papers were the following:

1. Scenario – discounting the rates at 15%

   This will result in the Agency reporting a decrease of R21.9m on permit revenue from R167.9m to R146m, with an expected deficit of R27.6m and a projected positive cash balance of R42.6m

2. Scenario – discounting the rates at 10%

   This will result in the Agency reporting a decrease of R15.3m on permit revenue from R167.9m to R152.5m, with an expected deficit of R20.9m and a projected positive cash balance of R49.3m

3. Scenario – discounting the rates at 5%

   This will result in the Agency reporting a decrease of R8.4m in revenue from R167.9m to R159.5m, with an expected deficit of R14.9m and a projected positive cash balance of R56m by the end of March 2015.

4. Scenario – reducing application fees on passenger Operators to R160 and on freight to R500 (from R570 and R760)

   This will result in the Agency reporting a decrease of R12.9m on permit revenue from R167.9m to R155m, with an expected deficit if R17m and a projected positive cash balance of R52m.

5. Scenario – reducing application fees on passenger Operators to R160 and on freight Operators to R550 across the board

   This will result in the Agency reporting a decrease of R9.9m on permit revenue from R167.9m to R158m, with an expected deficit if R15m and projected positive cash balance of R55m.

6. Scenario – reducing application fee on freight to R570 and leave passenger at April 2011 rates as proposed

   This will result in the Agency reporting a decrease of R8.2m on revenue from R167.9m to R159.7m, with an expected deficit if R13.9m and a projected positive cash balance of R56m.

7. Scenario – reducing application fee on passenger Operator's to R160 and R570 on freight across the board

   This will result in the Agency reporting a decrease of R8.2m on revenue from R167.9m to R159.7m, with an expected deficit of R13.9m and a projected positive cash balance of R56.3m

[35] On 30 April 2014, the Director-General of Transport submitted a further memorandum to the Minister. This memorandum demonstrated that the Board's emissaries had consulted with the Minister on 29 April 2014 and had considered the Minister's inputs into the 2014 Regulations. The Minister considered the comments made by stakeholders, as well as the Agency and the Department's responses to those comments. The Minister considered the Agency's report on the consultation meeting that it held with stakeholders. On 1 May 2014, the Minister approved the Regulations, having considered the memorandum.

[36] It must be inferred, in the light of all the facts, that the Board mandated the emissaries to speak on its behalf to the Minister. This is confirmed by a note made by Ms Mabe on 30 April 2014, where she reported to the Board. This note indicated that the Chairperson informed the Minster that the Board had considered reducing the tariff and had requested the Agency to develop different scenarios. It was also noted that the Chairperson presented all the scenarios and that she recommended scenario 7. It is also important to note that the Minster noted the

feedback, requested the Draft Regulations together with the motivation indicating the amendments that have been affected to be submitted to her for her consideration and approval.

[37] After this the Director General's final report to the Minster followed. The purpose of this note was to update the Minster on the consultation process followed and he requested the Minister to consider and approve the amendment to the Regulations.

[38] Mr Budlender argued that the aforesaid process did not constitute proper consultation as required by the Act, as there is no indication that the Chairperson conveyed the Boards' views, he argued that she seemed rather to have conveyed her own views. He argued that the Board had to decide what its views were and that should have been conveyed to the Minister. He based this argument on the fact that sec 51 required consultation with a specific entity, the Board. Mr Trengrove SC, on behalf of the Agency argued however that the Minister was required to do no more than to afford the Agency an opportunity to make representations to the Minster and this did happen. He argued that the Minister invited the Board to send its emissaries to convey its views.

[39] It would seem to me that if the principles that crystallised from the aforementioned authorities are analysed , that no more is required than an opportunity to convey views should be afforded and that these views should be awarded fair consideration.

[40] In my view the whole process since the initial consideration of the 2011 Regulations, right through to the promulgation of the 2014 Regulations illustrated that there was indeed proper consultation between the Minister and the Board, as required by law. The fact that the Minister only met with emissaries of the Board on 29 April, is not fatal, as the facts indicate that there was significant interaction between the Minister and the Board since 2010, and specifically with reference to the 2014 Regulations. If one considers the case law and principles pertaining to what would constitute proper consultation and apply it to what actually occurred here, the unavoidable conclusion is that the Minister complied fully with the consultation requirement as set out in section 51 of the Act.

INFLATIONARY FEE INCREASES

[41] The second point raised by CARS was that the inflationary related fee increases as set out in Regulation 7(5) and (6) are *ultra vires* with sec 51(1)(a) and inconsistent with sec 33 of the Constitution. It was also argued that these regulations were vague.

[42] Regulations 7(5) and (6) of the 2014 Regulations provide for annual inflationary fee increases as follows:

> *"7(5) The amount of an application fee as prescribed in Schedule 1 and a permit fee as prescribed in Schedule 2 will escalate each year on 1 April by an amount that is in line with the year-to-year increase in the official Consumer Price Index and rounded off to the nearest ten South African Rand.*
>
> *7(6) The Agency must before 1 April of the year in question revise Schedule 1 and Schedule 2 in accordance with sub-regulation (4) [sic]*

and publish any proposed adjustment to a prescribed application fee and permit fee in the Gazette."

[43] CARS challenged these sub-regulations on two grounds. The first was that it is not competent for the Minister to legislate for future changes in the permit fees. CARS alleged that the Minister acted *ultra vires* with section 51(a) of the Act, and inconsistent with section 33 of the Constitution. Mr Budlender argued that the Minster cannot put in place a regulation which will last forever, until it is amended, He argued that in doing so the Minster will no longer be exercising a discretion. He furthermore argued that sec 33 of the Constitution does not permit the Minster to act in this way. He said that the duty on the Minster has to be exercised from time to time. The argument was that the Minster is required to apply his/her mind from time to time as to the appropriate fees.

[44] Section 51(a) empowers the Minister to make regulations "*relating to the fee structure for permits and other fees*". There is nothing in this empowering provision that limits the Minister to the current fees, or to indicate that the Minister has to exercise his/her discretion on a yearly basis, or within certain time intervals. All that is required is that the Minister exercise a discretion prior to the Regulations' promulgation.

[45] It is also unclear on what basis it can legitimately be argued that the promulgation of the 2014 Regulations is inconsistent with section 33 of

the Constitution[18]. The fact that the Minister exercised her discretion to link the fee increase to the CPI does in my view not result in a contravention of sec 33. The fact that fee increases are calculated in this way, do not imply that the Minister will not apply her mind from time to time or that she may not amend these Regulations in due course, if circumstances require it. Ironically the tariffs that apply at this point in time are those that were determined during 2003, a fact which resulted in serious financial problems for the Agency.

[46] Regulations 7(5) and (6) do not provide for any real increases in the prescribed fees, therefore the complaint that the regulations result in an automatic increase does not hold water. They merely cater for the loss in the value of money due to inflation over time. Their only purpose and effect are to maintain the real value of the fees at their current level. There is no need for any fresh exercise of discretion by the Agency or the Minister to do so in the light of the link to the CPI. The mechanism chosen must clearly be competent, as it only links the adjustment to the CPI, which may or may not change on a year on year basis.

---

[18] **Just administrative action**

33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair

(2) Everyone whose rights have been affected by administrative actions has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in sub-section (1) and (2), and;

(3) promote an efficient administration

[47] The second ground of attack is that regulations 7(5) and (6) are void for vagueness. CARS contended that the Regulations mean that the annual increase must be equal to the rise in the CPI over the year up to 1 April every year, but must be published before that date. That is not possible, so it was argued, because one does not know before 1 April precisely what the increase will be. The argument was that the regulation either gives the Agency some discretion, on how to pick a date, which will be *ultra vires*, or it does not give a discretion, which implies that no one quite knows what it means.

[48] However the regulations do not require the fee increase to be determined on the basis of the increase in the CPI up to 1 April every year. They merely say that the fees increase "*by an amount that is in line with the year-to-year increase*" in the CPI and that the Agency must determine and publish the increase. Counsel for the Agency argued, in my view correctly, that the Agency may in other words determine the increase on the basis of the increase in the CPI, over the year, up to the date of its determination, albeit before 1 April. The result is that the Agency will then have to publish the increase so determined, before it comes into effect on 1 April.

[49] One needs to establish whether the "*void for vagueness*" doctrine find application as argued by CARS. In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others vs Chief Executive Officer of the**

Social Security Agency and Others[19] the Constitutional Court restated the reason for the inclusion of vagueness as a ground of review under PAJA in **Allpay**.[20] The requirement that legislation and administrative action be clear and ascertainable serves the following essential purpose:

> *"'[L]aws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."* [21][Court's emphasis]

[50] The 2014 Regulations do not fall foul of the constraint set out in **AllPay**[22], as the Agency is required to determine the increase so that it is "*in line with the year-to-year increase*" in CPI over the year up to 1 April, and to publish its determinations before 1 April. Furthermore once the Agency publishes its determination, all those affected by it will immediately know what is required of them and will be able to regulate their conduct accordingly. There is accordingly no unlawful delegation of the Minister's discretion to the Agency, nor any material uncertainty which would render the regulations void for vagueness.

[51] As a result I am of the view that both the challenges raised by CARS are without merit.

[52] As a result the application should be dismissed.

---

[19] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) ("Allpay")
[20] Allpay paras 87-88
[21] Allpay at para 87, citing Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at para 108
[22] supra

COSTS

[53] CARS argued that if they fail they should not be burdened with costs on the principles set out in **Biowatch Trust v Registrar Genetic Resources and Others**[23] the principles set out in this matter, regarding litigation relating to Constitutional matters are now trite. The starting point should be the nature of the issues before Court[24]. It was argued by the Respondents that due to the fact that CARS was pursuing a commercial interest and is capable of paying the costs if it did not succeed, the principles of **Biowatch** should not apply.

[54] In this regard the following that was stated in **Biowatch** is of importance:

> *[17] ... Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution*[25].

[55] It was further stated :

> *[18] ... that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the State should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. ...*[26]"
>
> [Court's emphasis].

---

[23] CCT80/08 [2009] ZACC 14, 2009(6) SA 232 (CC) [Biowatch]
[24] Biowatch, supra, par 16
[25] Biowatch, supra. Par 17
[26] Biowatch, supra

[56] And further:

> *"[20] Nevertheless, even allowing for the invaluable role played by public- interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the State. At the same time public-interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice*[27]*."* [Court's emphasis]

[57] In the light of the aforesaid I am of the view that the principles in **Biowatch** are indeed applicable. CARS instituted action in order to pursue its constitutional rights, and as a result, and in accordance with **Biowatch** a costs order against them would be inappropriate.

[58] Consequently I make the following order:

a). The application is dismissed.

b) Each party to pay its own costs

---

[27] Biowatch, supra, par 48

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:	3 DECEMBER 2018
DATE OF JUDGMENT:	28 FEBRUARY 2019
ATTORNEY FOR APPLICANT:	MARIUS SWART ATTORNEYS
ADVOCATE FOR APPLICANT:	ADV S BUDLENDER
ATTORNEY FOR 1ST RESPONDENT:	STATE ATTORNEY
ADVOCATE FOR 1ST RESPONDENT:	ADV V S NOTSJE (SC) ADV J A MOTEPE (SC)
ATTORNEY FOR 2ND RESPONDENT:	SAVAGE JOOSTE & ADAMS
ADVOCATE FOR 2ND RESPONDENT:	ADV W TRENGROVE (SC) ADV N FERREIRA