IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 441&442/2023

Case Number 441 / 2023

REPORTABLE

In the matter between:

AS	Applicant

and

THE MINISTER OF HEALTH	First Respondent
THE DIRECTOR GENERAL, DEPT OF HEALTH	Second Respondent
THE MINISTER OF SOCIAL DEVELOPMENT	Third Respondent

AND

Case Number 442 / 2023

B MM	First Applicant
JTM	Second Applicant

and

THE MINISTER OF HEALTH	First Respondent
THE DIRECTOR GENERAL, DEPT HEALTH	Second Respondent
THE MINISTER OF SOCIAL DEVELOPMENT	Third Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 19 JUNE 2024

KUSEVITSKY J

[1] This is an application for costs, with both matters having been consolidated for hearing and then subsequently withdrawn by the Applicants prior to the hearing thereof.

Brief background

[2] The consolidated applications[1] challenged the constitutionality of sections 303 of the Children's Act 38 of 2005 ("the Children's Act") and Regulation 10(2)(a) of the Regulations relating to the Artificial Fertilization of Persons[2] ("the impugned legislation"). Both applications seek to challenge the constitutionality of the impugned legislation as a precursor to obtaining further relief. It is apparent from both applications, that the parties seek to avoid the requirement of securing a surrogate mother and a court sanctioned surrogate motherhood agreement prior to commencing artificial fertilisation. The impugned legislation requires potential parents relying on surrogacy to have children, to secure a surrogate and to obtain a court sanctioned agreement with the surrogate mother that will carry the child that is yet to be conceived and carried to term.

[1]Both matters were issued on 17 January 2023. Case No.442/2023 was brought on an urgent basis with a set down date of 15 February 2023. Case No. 441/2023 was not brought on an urgent basis and scheduled for set down on 1 March 2023. On 23 January 2023, the AJP approved the consolidation of both matters for hearing on 1 March 2023.
[2] (GNR.175 of 2 March 2012 Government Gazette No. 35099)

[3] In the BMM application, the Applicants raised an urgent constitutional challenge as a precursor to embryo formation of their sperm with that of the eggs of a potential donor. They complained that the legislative requirement of having a surrogate motherhood agreement confirmed by a court prior to the commencement of any proceedings relating to *in vitro* fertilization is unconstitutional as it infringes their rights to dignity, equality and freedom and security of the person and specifically their section 12(2) (a) rights, i.e. the right to make decisions concerning reproduction.

[4] Similarly, in the AS application, the Applicant raised a constitutional challenge to the impugned legislation prior to seeking further relief and also sought the right to commence artificial fertilization of her stored eggs before securing a surrogate mother.

[5] First and Second Respondents ("the Respondents"), opposed the applications, averring, *inter alia* that there was no urgency and also highlighted the inappropriateness of the constitutional challenge raised in the BMM application and the constitutional challenge preceding the further relief sought in both applications. The Respondents contend that in the absence of a challenge to section 296 of the Children's Act and related sections of the Regulations, the constitutional challenge sought would serve no purpose. They aver that in order to achieve the purpose sought, the Applicants would have had to raise a comprehensive challenge to the surrogacy legislative scheme. The relief obtained by the Applicants in the BMM matter, i.e., the permission to proceed with a single extraction of eggs from their donor, was not the relief sought by the Applicants in this matter. Section 303 of the

Children's Act and section 68(3) of the National Health Act permitted the Applicants in both matters obtaining relief without the need for raising a constitutional issue. I raise this upfront in the consideration of whether there may have been partial success by the Applicant. There has not been.

February 2023 hearing dates

[6] On 15 February 2023, case no. 442/2023 served before me. It was brought on an urgent basis. At the time, counsel for the Respondents were not aware of case no. 441/2023 that had been consolidated and accordingly had no instructions relating to the latter matter.[3] The Respondents also highlighted the non-joinder of the Minister of Social Development. Accordingly, in both matters, on 20 February 2023 an order was granted joining the Third Respondent[4] and granting an amendment to paragraph 1 of the notice of motion. No order as to costs were granted.

[7] On 22 February 2023, relief in the urgent application of case no. 442/2023 was argued. Interim relief was granted relating to the commencement of the pre-extraction hormonal treatment of the donor and permitting the practitioners to do a single extraction of the eggs of the donor on or before the 31st March 2023. The eggs so extracted then had to be immediately cryopreserved. The practitioners were also prohibited from commencing *in vitro* fertilization of the donor eggs, which eggs had to remain cryopreserved until the matter was completed and finalised.

[8] In both matters, the further conduct of the matter was set out. Both applications were postponed for hearing to the 15th, 16th and 17th of May 2023. The

[3] It is not apparent from the correspondence requesting the consolidation that the letter was copied in to the State Attorney acting on behalf of the Respondents.
[4] The State Attorney abided the decision of the court.

Third Respondent was ordered to file its answering affidavit by 27 March 2023 and the First and Second Respondents were granted leave to file supplementary papers to their existing answering affidavit by 27 March 2023. The Applicants were required to file their replying papers by 17 April 2023.[5] Costs were to stand over for later determination. The Applicants did not comply with the court order. The Respondents complied with the court order by filing their respective papers timeously.

May 2023 hearing dates

[9] On 17 May 2023, the parties by agreement sought the postponement of the matters to 5, 6 and 7 September 2023. Subject to a caveat[6], costs stood over for later determination. Pursuant to the aforesaid order, the Applicants were to file their replying papers on 5 June 2023 and their heads of argument before 1 August 2023. Applicants did not comply with the court order, nor did they seek any extension of time or make any contact with the Respondents explaining their failure to comply.

The amicus curia application

[10] On the eve of the September hearing, on 21 August 2023, a potential *amicus curiae* sought to postpone the scheduled hearing dates so that they could consider the papers and determine whether they wished to participate or not. The Respondents indicated that they would oppose the application for admission at this late stage of the proceedings.

[5] Heads of Argument had to be filed by 24 April 2023 (Applicant) and 3 May 2023 (Respondents)
[6] Para 6 of the 17 May 2023 provides as follows: "*The issue of costs to stand over for determination noting that the Applicants in both matters failed to file their replying papers and Heads of argument, neither in accordance with the court order signed on 23 February 2023 and stamped on 28 February 2023, or at all. Either party may approach this Court for an order of costs if the Applicants withdraw their matters, singularly or jointly, before the re-scheduled hearing dates*."

[11] In this *amicus* application, Robynne Friedman deposed to an affidavit on behalf of the Surrogacy Advisory Group NPC ("SAG"). They ostensibly provide free education, advice and support to all women considering the act of surrogacy and to persons considering becoming parents through surrogacy. They state that in October 2022, SAG filed an application in the Pretoria High Court challenging the constitutionality of regulation 10(2)(a). This is the very same regulation that is being challenged in the main proceedings.

[12] Notably, in relation to these averments, the Court received correspondence from attorneys Gouse van Aarde Inc. on 10 May 2023, seeking directions on the basis, *inter alia*:

12.1 that in October 2022, "my client", SAG, filed a constitutional challenge to regulation 10(2)(a) of the regulations in the Gauteng High Court, Pretoria;

12.2 that these two applications were filed on 17 January 2023, after their client had already filed a constitutional challenge in the Gauteng High Court, Pretoria;

12.3 they could find no issued Rule 16A notices at the Western Cape High Court's notice board, or with the Chief Registrar;

12.4 the State Attorney provided Whatsapp photographs of both applications since their emails were offline;

12.5 On 4 May 2023, SAG obtained access to the papers from the Applicants' attorney;

12 .6 "*My client – and other members of the public at large – has the right in terms of Rule 16A to know on what basis the Western Cape applications are challenging the impugned provisions, in order to consider whether to approach the parties, or in the alternative the Court, to apply to be joined as amicus curia in the Western Cape applications*." ("own emphasis")

[13] In the merits, SAG averred that having gone through the papers, it was of the view that the main proceedings were moot and therefore 'not justiciable.'

[14] In its opposing affidavit, the Respondents stated that SAG themselves have not complied with Rule 16A (2) of the Uniform Rules of Court requiring any interested party wishing to participate in a matter raising constitutional issues to seek the written consent of all parties to the proceedings within twenty days after the filing of the affidavit or pleading in which the constitutional issue is first heard. They said that at no time did SAG seek the consent of the Respondents in the main application as a *amicus curiae*. In its reply, SAG averred that the Applicants in the main application, only put up their Rule 16A notices on or about 18 August 2023. This is seven months after the main applications were filed. They also averred that the Rule 16A mechanism relies on the appropriate notice being placed on the court's notice board. Without such notice, the timeframes for an *amicus curiae* application cannot start running. At this juncture, perhaps this would be an opportune time to revisit the requirements of this rule.

[15] It is trite that any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.[7] This notice is peremptory. The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.[8] The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.[9]

[16] Clearly, there is a reason why the Rule 16A notice must be stamped and given to the registrar. This is because any interested party, as contemplated in sub-rule (2), who wishes to participate in the proceedings challenging a constitutional issue, may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties. If written consent is not obtained, then the interested party may, within five days of the expiration of the 20-day period as prescribed, apply to court to be so admitted in the proceedings.[10] Furthermore, Rule 16A (5) is contingent on compliance with Rules 16A(2), (3) and (4) and application is required to be made to the court hearing the application within five days of the twenty-day period prescribed in sub-rule 2. Rule 16A does not make provision for an applicant to apply to a court for admission without first seeking the written consent of the parties to the proceedings.

[7] Rule 16A(1)(a)
[8] Rule 16A(1)(c)
[9] Rule 16A(1)(d)
[10] Rule 16A (5)

[17] The purpose of the rule is to enable parties interested in a constitutional issue to seek to be admitted as *amici curiae*, or as friend of the Court, because of its expertise on or interests in the matter before the Court, so that they can advance submissions in regard thereto.[11]

[18] Thus, it is evident, that in order for these aforementioned time periods to be triggered, the Rule 16A notice *must* be issued and date stamped by the registrar *at the time* of the filing of the relevant affidavit or pleading as contemplated in sub-rule (1)(a). In my view, a failure to have the Rule 16A notice date stamped by the registrar, would be fatal to the notice. In *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA)[12], the court stated the purpose of the rule thus:

> "[31] Rule 16A(1)(I) has accordingly to be interpreted in the light of the purpose for which it was enacted, viz. to bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases so that they may take steps to protect their interests by seeking to be admitted as amici curiae with a view to drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn (*Shaik v Minister of Justice and Constitutional Development*, supra, at 610H–I (para 24) and *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) (2002 (10) BCLR 1023; [2002] ZACC 13) para 5*)*."

[19] Although the issue in *Phillips* was somewhat different[13], that court reiterated the suggested practice to be followed with regard to compliance with Rule 16A, being, *inter alia*, that when the notice, having been prepared in terms of the rule and

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[11] See in general *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 27H-28B
[12] at 459B-D
[13] There, what had to be decided was whether a notice which correctly specified the statutory provisions being attacked without specifying the grounds of the alleged inconsistency, complied with the rule. *Philips* at para 55

handed to the registrar for the necessary action when the affidavit is filed, that it is advisable that the notice, when removed from the Court's notice board after the 20-day period has elapsed, be put in the court file and included amongst the necessary documents which go before a judge.

[20] In *casu* in both matters, all that forms part of the court record is a signed notice by the attorney dated 17 January 2023, with no indication that it had either been served on any of the respondents, or, more importantly, that it had been given to the registrar and date stamped for the appropriate action at the time the applications were issued. The consequence for non-compliance has a direct impact on the further conduct of the matter and so too, costs, and whilst the issue of costs is not in issue between the Respondents and SAG, the unintended consequence of the Applicants' non-compliance resulted in the attendant postponement of the matter. I will address this in due course.

[21] Needless to say, it is imperative for parties raising constitutional challenges, to comply with the requisite rules of court in such matters. As stated *supra*, the Applicants' Rule 16A notice seems only to have been placed on the Court's notice board on 18 August 2023. SAG, in reply argued that the time periods for *amici curiae* applications can only start running once a valid notice in terms of Rule 16A has in fact been placed on the court's notice board. I am in agreement with this contention since, as I have stated, the intention of the rule is to alert prospective interested parties of the proposed constitutional challenge. Of course, the situation is different if in fact interested parties are aware of the impending constitutional challenge, such as was the case in *casu*, and there was no indication that such notice had been filed

with the registrar at the time of issue and had seemingly been been filed late. I am also in agreement with the sentiments of the authors in *Erasmus*[14] for the approach to be adopted were there is non-compliance with Rule 16A by a party; Thus, if the person who raises a constitutional issue fails to give the requisite notice in terms of Rule 16A, any other party to the proceedings may file such a notice with the registrar and also give notice to each of the other parties, as well as to all persons who might have a direct and substantial interest in the issue. This is to ensure that unnecessary costs are not incurred in resultant postponements and delays of the matter for want of compliance.

Events leading up to the September 2023 hearing

[22] As I have stated, the *amicus* application was filed and they sought a postponement of the September hearings scheduled to commence on 5 September 2023. The matter was duly postponed. In the meanwhile, the Applicants in the main application did nothing to advance the matters; they did not file any replying papers, nor did they file any heads of argument. In fact, they were completely silent despite various attempts by counsel for Respondents to engage with them as to the conduct of the matter, or to illicit a response to correspondence sent.

[23] On 28 August 2023, the Respondents filed their opposing papers in the *amicus* application. The Respondents argue that the Applicants, as they did at the eleventh hour with respect to the May hearings, finally responded in a letter to the State Attorney on the 29 August 2023 seeking to withdraw the applications as they were allegedly rendered moot by certain occurrences, none of which were ever communicated to the Respondents. Prior to the stated intention to withdraw their

[14] Superior Court Practice, Second Edition, Vol. 2, D1-168

applications, Applicants failed to comply with any of the court orders obtained in February or May 2023.

[24] On 31 August 2023, the court was informed that the Applicants in the main application withdrew their applications and that the only issue requiring adjudication was costs in relation to the main application and that of the *amicus*. On 1 September 2023, this Court was informed that the latter application was settled on the basis that as between SAG and the Respondents, the parties agreed that each party will pay its own costs. On the 5th of September 2023, SAG filed a notice of withdrawel in the *amicus curiae* application.

The conduct of SAG

[25] From the 10 May 2023 correspondence to this Court, it is evident that SAG was aware of the main applications prior to 10 May 2023[15]. They also sought a directive to *inter alia*, "*exercise its rights to properly consider whether to intervene in the main application and prepare for same*". In that same letter, SAG confirmed that that they were made aware of the main application through the First Respondent's answering affidavit filed in the Pretoria application. Thus, from the time that SAG had access to the papers on 4 May 2023, it waited until the eve of the hearing of the main application on 5, 6 and 7 September 2023 to file its *amicus* application, nearly four months later. Such conduct is to be admonished, since the very role of an *amicus curiae*, is to assist the court and not to hinder nor obstruct the litigation process in a manner that causes unreasonable prejudice to both the Respondents and inconvenience to the Court. SAG's conduct regrettably amounted to an absolute

[15] They requested copies of the papers on 20 April 2023; on 26 April 2023 the State Attorney, because the emails had been down, sent photographs of both the notice of motions via *Wattsapp*; on 4 May 2023, they obtained access to the papers from the Applicants' attorney.

disregard for the court and for the parties and is to be censured in the strongest terms. They were aware of these applications, yet chose on the eve of the hearing to file their application. Nor did they request the written consent of the Respondents in the main application to participate as an *amicus curiae*. Their actions thus resulted in the incurring of unnecessary costs by the Office of the State Attorney, whose funds, it must be remembered, is ultimately borne by the tax-paying fiscus.

Submissions

[26] In argument in relation to costs, the Respondents rely on rule 41(1)(a) of the Uniform Rules of Court, which provides that a person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawel and may embody in such notice a consent to pay costs. They argued that the Applicants from the onset appeared to have abandoned their applications, alternatively they had no desire to pursue them to completion. They contend that the exceptions to the *Biowatch*[16] principles concerning costs in constitutional litigation apply to these applications and that the applications fall to be dismissed with costs, including the costs of the postponements. They also sought an adverse cost order for the manner in which the Applicants have conducted these applications.

[27] They argue that a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal

[16] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) at paras 22 and 23

representation. This means it should not be immunized from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court.[17]

[28] The Respondents referred to para 24 of *Biowatch* with regard to private parties that litigate against the State, which states the following:

> "At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it." ("own emphasis")

[29] The Applicants contend that the *Biowatch* principle ought to find application in this case. *Biowatch* established the general proposition that in litigation between the State and private parties seeking to assert a fundamental right, the State should ordinarily pay the costs if it loses and if it wins, each party should bear its own costs. They contend that the proceedings were neither frivolous nor vexatious when they were instituted. They contend that they were not aware that SAG had also instituted the very same challenge in another court. They argue that they should not be punished for withdrawing the applications when the matter was no longer justiciable. Also, simply because they have withdrawn the applications, so the argument goes, does not mean that the provisions initially challenged are not unconstitutional. They say that a cost order against their clients who are natural persons will have a

[17] *Biowatch supra* at para 18

crippling effect on them. They also say that it will also potentially have the effect of dissuading any other natural person from pursuing constitutional litigation, as was warned in *Biowatch*. They accordingly submit that it would be equitable under the circumstances if each party were ordered to pay their own costs.

[30] Respondents on the other hand argue that all of the principles applicable to costs orders in constitutional litigation arise from cases that were pursued to finality. The Respondents submit that in these applications, the Applicants made no effort to finalize their papers, failed to comply with court orders, were disrespectful to the Respondents and to the Court; failed to communicate with the Respondents and the Court and caused the Respondents to incur unnecessary costs. In the circumstances, the ordinary principles relating to costs in these circumstances should apply.

Evaluation

[31] It is trite that the award of costs is a matter which is within the discretion of the Court considering the issue of costs. In *Affordable Medicines Trust v Minister of Health*[18] the court re-emphasized the following:

> "[138] The award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. <u>There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs</u>. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case." ("Own emphasis")

[18] 2006 (3) SA 247 (CC) at 297B-C

[32] Referring to *Motsepe v Commissioner for Inland Revenue*[19], this Court articulated the rule as follows:

> "[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.[20]

[33] It seems to me as if the import of the words 'frivolous and vexatious', refers to not only the nature of the application itself, but also to *conduct* of the parties which would amount to being 'frivolous or vexatious'. With regard to the nature of the application, in *Affordable Medicines*[21] Ngobo J held that the fact that a litigant has pursued litigation with vigour was not a material consideration, and found that that *litigation* could not be described as vexatious or frivolous. This was confirmed in *Biowatch* where the court stated that the general approach of that court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse cost order.[22]

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[19] 1997 (2) SA 898 (CC) (1997 (6) BCLR 692)
[20] Ibid at para 30
[21] at 297G-H
[22] para 24 at 247A-B; See also reference to the Fn 28 in *Biowatch* referring to *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) at 144B-C, where Pickering J held that he was regrettably obliged to order an environmental NGO to pay costs in relation to an application that was unnecessary and unreasonable because its very real concerns had already been met, and the application was doomed to failure from its inception.

[34] However, in *Biowatch supra*, the court held that a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if *its conduct* has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the process of court.[23]

[35] In my view, the conduct of the Applicants in this matter may be construed as vexatious as a result of their unprofessional and unbecoming conduct, which conduct was not only an abuse of the court process, but an absolute and total disregard for court time and resources. Firstly, I am in agreement with the Respondents' contention that it is undesirable for constitutional challenges to be brought on an urgent basis.

[36] Secondly, throughout this litigation, the Applicants disregarded court orders from this Court and was obstructive in their silence towards the Respondents. It hardly needs restating that wilful non-compliance of court orders is analogous to disobedience of the court and a disregard for the rule of law. It is unfortunate that the Applicants will be saddled with these costs as a result of the conduct of their legal representatives and most certainly this would be one of those instances in which costs *de bonis propriis* would have been justified. However,no relief in this regard was sought and accordingly, I am of the view that costs on an attorney and client scale is warranted under the given circumstances.

[23] *Biowatch supra* at para 18G-H

[37] Even if I am wrong in my assessment, there are other reasons which weigh heavily in favour of sanctioning the Applicants. Rule 41(1) of the Uniform Rules requires a party intending to withdraw its litigation, to deliver a notice of withdrawal wherein it may tender costs.[24] Where a litigant withdraws proceedings, "*very sound reasons*" must exist why a Respondent should not be entitled to his costs. It is only in exceptional cases that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby.[25] Applicants have not filed notices of withdrawal, opposing affidavits, or tendered costs. The party withdrawing litigation is considered to be the unsuccessful litigant. A party opposing the application for an order of costs should place the grounds of his opposition before the court on affidavit.[26] The latter is especially relevant if the facts relied upon in opposing the application do not appear from the pleadings filed in the main proceedings and an affidavit is the only way whereby the basis of the opposition to an application for costs can be made.

[38] In an affidavit deposed to on 4 September 2023 by the Applicants' legal representative, Mr. Martin, in support of the consent that they sought from the Respondents to withdraw the applications, the following reasons were advanced *inter alia*:

38.1 In the case of AS, that the medical screening of the surrogate mother had occurred on 25 April 2023; although declared medically suitable, she required a 3-month waiting period to clear up an infection prior to re-

[24] *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape 2005 (6) SA 123 (ECD)* at 129E-130B and 131
[25] *Wildlife* supra at 129G-I
[26] *Nel v OVS Staatkonstruksie en Algemene Swelswerke* 1997 (3) SA 993 (O) at 997C

testing; psychological screening was completed on 16 August 2023; re-testing was completed on 24 August 2023 and as a consequence, bar some documentation from the applicant that remained the only aspect outstanding to place the applicant in a position to complete and institute her surrogacy application in terms of Chapter 19 of the Children's Act. He concluded that given the advancements made in regard to the surrogacy application, the applicant sought the consent from the Respondents to withdraw her application, which consent was granted on 29 August 2023.

38.2 In the BMM matter, he confirmed that the medical screening of the surrogate mother occurred on 28 November 2022; the surrogate mother was declared medically fit on 11 May 2023; the fertility clinic required updated blood tests which was processed on 6 July 2023; he stated that given the advancements made in regard to the surrogacy application, the applicant sought the consent of the Respondents which consent was granted on 29 August 2023.

[39] In argument, the Respondents aver that none of what is contained in these affidavits were ever communicated to them. In fact, as far as they were concerned, the legal representatives were preparing for the hearing in September 2023. With regard to the AS matter, Respondents argued that by 25 April 2023 and in the BMM matter, by 11 May 2023, both applications had become moot, because both Applicants decided to follow the procedure and requirements as set out in the respective legislation.

[40] Notably, in SAG's founding affidavit, they aver that after studying the papers in the main proceedings, it was clear to them that the main proceedings were moot and therefore not justiciable. In essence, it was contended that the expert evidence relied upon in the main proceedings, were, bar some amendments, virtually identical to the opinions relied upon by SAG in, *inter alia*, the Pretoria challenge in that there the expert evidence contemplated a situation where the intended commissioning parents have a *choice* between two fertility treatment paths prior to them securing a surrogate mother. The main proceedings there were diametrically different as the facts and circumstances of the particular applicants in the AS and BMM matters and were distinguishable[27] from the expert evidence relied upon.

[41] It was also noted in the founding affidavit, that in the case of BMM, they had already elected their choice, i.e. to subsequently have eggs retrieved from their egg donor and frozen. And, in the absence of expert opinion supporting their argument, they would not benefit from access to IVF prior to confirmation of their surrogacy agreement. In other words, the applicants in the BMM matter have, through their own actions after launching their application, rendered their own case moot and hence, not justiciable. With regard to the AS matter, SAG contended that the surrogacy application would most probably have been finalised prior to the hearing of the main application, which would have rendered the application moot. In any event, no supplementary affidavits during the course of the postponements[28], were filed by the Applicants to update the court and the Respondents of their progress.

[27] AS had already cryopreserved eggs from the outset of her case and BMM initially did not have cryopreserved eggs, but subsequently proceeded with egg donation and freezing the donated eggs.
[28] The attorney of record for the Applicants only filed supplementary affidavits on 4 September 2023 *after* the withdrawal of the applications on 29 August 2023 and the withdrawal of SAG's application on 1 September 2023.

[42] Five days after SAG launched their application to intervene, the Applicants sought consent of the First and Second Respondents to withdraw their applications, which consent was granted on the same day.

[43] In the main application, the Respondents, as already stated, opposed the applications, for amongst other reasons, the lack of urgency and the inappropriateness of the constitutional challenge raised in both matters.

[44] The Respondents contended that the Applicants challenged pieces of legislation that are inextricably linked to a comprehensive surrogacy scheme and artificial fertilisation scheme. A constitutional challenge of section 303(1) and regulation 10(2)(a) without a concomitant challenge to sections 296(1), 296(2), the definitions of artificial fertilisation in the Regulations and the Children's Act, regulation 18(2) and regulation 10(2)(c) would serve no purpose. The purpose of regulation 10(2) is to restrict the artificial production of embryos outside the body and to ensure that those formed, are for an identified recipient. In this respect, the specific recipient equates to the requirement of a surrogate mother as an essential party to the surrogate motherhood agreement. The object of regulation 10(2)(a) is, as the heading to regulation 10 stipulates, to control artificial fertilization and embryo transfer. Regulation 10 (2)(a) is part of a comprehensive scheme to control artificial fertilization and ensure that it is used for the purposes defined in the Act and the Regulations.

[45] The Respondents contend that as with the surrogacy scheme contained in Chapter 19 of the Children's Act, a challenge to Regulation 10(2)(a) without a

concomitant challenge of Regulation 18(2) would serve no purpose. In the context of conception by surrogacy, any isolated challenge to regulation 10(2)(a) would serve no purpose as other provisions of Chapter 19 of the Children's Act, including section 296(1), will militate against the commencement of artificial fertilisation as defined in the Act, from commencing without the confirmation of a surrogate motherhood agreement.

[46] In the BMM application, the application sought to challenge the constitutionality of legislation on an urgent basis. As I have already stated elsewhere, constitutional challenges brought on an urgent basis have been frowned upon by the Supreme Court of Appeal.

[47] At the outset, Respondents contended that the challenge was ineffective. By way of example, in the AS application, the Respondents submitted that the Applicant had recourse to the provision in section 68(3) of the National Health Act without the need for a raising a constitutional challenge as she had done. In the BMM matter, permission was granted to proceed with a single extraction of eggs from their donor. This was not relief sought by the Applicants in that matter. Section 303 of the Children's Act and section 68(3) of the National Health Act permitted that Applicants in both matters to seek the necessary relief without the need for raising a constitutional issue.

[48] It is evident that this is the path that the Applicants ultimately chose to follow and in doing so, knowingly or unwittingly, abandoned their applications. Did the Applicants choose to run a parallel application, in other words, following the laws

pertaining to surrogacy, whilst still keeping the applications 'alive'? Perhaps. But, it is not for this Court to speculate. What however is patently clear is that whilst the Applicants were silently following the legislative framework, counsel for Respondents, none the wiser, were preparing for a very complex constitutional legal challenge.

[49] In para 5 of the Order[29] granted on 17 May 2023, the Respondents put the Applicants on notice regarding costs. In adjudicating the question of costs, a Court is vested with a discretion to permit or disallow costs. In *Wildlife supra*[30], the court held that in exercising its discretion, the court should have due regard to the question whether, objectively viewed, the applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because of facts emerging for the first time from, for instance, the Respondent's answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after the launching of the main proceedings.

[50] In *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*[31], Davis J, after stating that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the state, and, indeed, the private community, accountable to the constitutional commitments of our new society, including the protection of the environment, refused to make an order of costs against the unsuccessful environmental applicant, but nevertheless ordered

[29] see fn6 supra
[30] at paras 132J-133h-144C
[31] 2002 (1) SA 478 (C) at 493C-E

the applicant to pay the wasted costs occasioned by the matter having been brought without justification on an urgent basis.

[51] As I have already stated, the supplementary affidavits of the Applicants attorney of record indicated the advancement of the surrogacy process that both Applicants had undertaken. These affidavits were filed prior to the hearing on costs, and, as dealt with elsewhere, ostensibly was deposed to to support the application of the Applicants' withdrawal. Rule 41(1)(c) provides that if no consent to pay costs is embodied in a notice of withdrawal, the other party, in *casu*, the Respondents, may apply to court on notice for an order for costs. The opposing party is entitled to oppose the application for costs and to place the grounds of their opposition before the court on affidavit, especially if the facts relied upon by them in opposing the application do not appear from the pleadings filed in the main proceedings.

[52] In *casu*, the Respondents argue that the supplementary affidavit filed, did not amount to '*very sound reasons'* which must exist as to why a defendant or respondent should not be entitled to his costs.[32] In *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* 2003 (3) SA 547 (C) at 550C-D, Van Reenen J stated that it is only in exceptional circumstances that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby.[33] Having regard to the content of the supplementary affidavits, I am of the view that, whilst the explanation given might be sufficient cause to withdraw an

[32] *Wildlife ibid* at 129G
[33] See also Wildlife at 129H-I

application, the supplementary affidavits fall short of providing cogent reasons, or very sound reasons, for challenging a cost order as contemplated in Rule 41(1)(c).

[53] In *Wildlife*[34], the court further held that a court is entitled to have regard to the affidavits in the main application in order to determine the issue of costs in terms of Rule 41(1)(c). I cannot see why this approach cannot be extended to affidavits by prospective *amici* even in instances where they are ultimately not so admitted, or where they themselves have withdrawn from the main proceedings. In *casu*, SAG supported the Respondents contention that both applications in the main were moot, and that it is evident that the Applicants had seemingly abandoned their applications.

[54] In any event, what is clear from the content of the supplementary affidavits is that, it *is* evident that the Applicants had abandoned their applications and instead chose to follow the relevant legislative requirements to Surrogacy. This was done without keeping the Court and the Respondents informed of these subsequent developments. This conduct makes a mockery of, and shows absolute disdain for the Court, its time and resources. Their conduct also, as I have found earlier, had the the attendant consequences of unnecessary costs being incurred by the Respondents, who had belaboured under the impression (due to the lack of communication by the Applicants), that the matter was for all intent and purposes proceeding and had, if the record in both matters is anything to go by, prepared for the hearings of the matters on that basis. This egregious conduct, again, showed an absolute disregard to both counsel employed to argue the matter.

[34] at129D-E

[55] For all of the reasons advanced, I can find no justifiable reason why the Respondents should not be entitled to their costs. I am also persuaded that costs on an attorney-client scale is appropriate in the circumstances of both matters. The egregious conduct by the Applicants legal representatives as enunciated above, warrants such Court censure.

[56] In the circumstances the following order is made:

ORDER

1. The Applicants in both matters are to pay the Respondents their respective costs on an attorney-client scale, which includes the Respondents costs occasioned by the withdrawal of the applications, the costs of the Rule 41(1)(c) proceedings and all postponements.
2. Such costs are to include the cost of two counsel where so employed.

D.S KUSEVITSKY
JUDGE OF THE HIGH COURT