CONSTITUTIONAL COURT OF SOUTH AFRICA

Lawyers for Human Rights v Minister in the Presidency

CCT 120/16

Date of judgment: 1 December 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 1 December 2016, the Constitutional Court handed down judgment in an application for leave to appeal from the High Court of South Africa, Gauteng Division, Pretoria concerning an adverse costs award in constitutional litigation. The judgment deals with the application of the *Biowatch* principle (*Biowatch Trust v Registrar, Genetic Resources*) which provides that even when parties litigating against state parties lose a case, they are generally spared an adverse costs award, provided the case was of genuine constitutional import.

In this case, Lawyers for Human Rights (LHR) was dealt an adverse costs award by the High Court and sought to appeal against it.

During attacks on non-South African nationals that took place in 2015, the army, police and Home Affairs officials carried out large-scale search and arrest operations: Operation Fiela-Reclaim (Operation). On 8 May 2015, search and arrest operations were carried out without warrants in private homes in Johannesburg in the early hours of the morning. Scores of people were arrested.

More than six weeks later, on 23 June 2015, LHR, representing most of those arrested, launched an urgent application against eight state respondents. LHR asserted that the way the Operation was implemented violated the Constitution because it was inconsistent with an array of legislation, including the SAPS Act, the Defence Act, the Refugees Act, the Criminal Procedure Act and the Immigration Act. It gave the government respondents barely a day's time in which to respond to the urgent application.

The High Court took issue with this. It found that the urgent application was premature because it challenged the constitutional validity of future raids – yet LHR had offered no evidence that in future raids would be illegal. The raids about which it complained were long in the past – and seeking to bring an application in extreme urgency six weeks after the events was improper. The application was struck from the roll with an adverse costs order against LHR.

LHR sought leave to appeal from the High Court. This was refused, with costs. It then turned to the Supreme Court of Appeal, seeking to appeal only against the costs order. This application, too, was dismissed with costs. LHR then applied to the Constitutional Court for leave to appeal against the High Court costs orders.

Before the Constitutional Court, LHR contended that the urgent application was lodged not to challenge the validity of the Operation but the manner in which it was conducted. Lawful authorisation had not been obtained. And although the Operation had already been completed when the application was launched, the responsible government officials were not willing to give undertakings that they would not conduct more raids. It was therefore appropriate for it to seek urgent relief as it did.

LHR submitted that the High Court did not exercise its discretion judicially in ordering it to pay costs. This was because it failed to apply the *Biowatch* principle as developed by the Supreme Court of Appeal in *Phillips v South African Reserve Bank*. There, the Supreme Court of Appeal found that mere impatience on a private litigant's part, and acting inappropriately in a technical or procedural sense, does not amount to vexatious or manifestly inappropriate conduct.

The Minister and Director-General of the Department of Home Affairs opposed LHR's application. They submitted that LHR's challenge of how the raids were carried out concerned only facts – and it was brought long after the events. When the application was launched, the issues were already purely academic. And, even if the urgency was warranted, it should have afforded the government respondents reasonable time to file answering papers. It was manifestly inappropriate afford them barely a day.

The South African Police Service and the South African National Defence Force also opposed the application. They submitted that the *Biowatch* principle is applicable in litigation launched to assert constitutional rights, where there is no impropriety in the manner the litigation has been undertaken. There must be a genuine, non-frivolous constitutional challenge, which was not the case here. LHR launched the application primarily to interdict the state from performing its constitutional and statutory duties. Its object was not to assert constitutional rights. It was to obtain an order, on the particular facts, declaring the particular statutory authorisation issued unconstitutional. This was totally improper because, when the application was launched, the particular authorisation had long been implemented and the events were done and dusted.

The Constitutional Court found that the application for leave to appeal engaged its jurisdiction. This was because the award of costs in a constitutional matter raises a

constitutional issue. However, it held that it was unable to intervene to overturn the High Court's finding that the urgent application was manifestly inappropriate. The Court found that LHR did not provide any basis for it to conclude that the High Court had exercised its discretion unjudicially in making the adverse costs award. The Court noted that the High Court controls its own process, and does so with a measure of flexibility. Even where the litigant seeks to assert constitutional rights, the Court must always consider the character of the litigation and the litigant's conduct in pursuit of it. The Court further noted that the adverse costs order was not triggered by the merits of LHR's application.

The Constitutional Court cautioned against the abuse of the *Biowatch* principle. It does not mean risk-free constitutional litigation. The Court concluded that a worthy cause cannot immunise a litigant from a judicially considered, discretionarily imposed adverse costs order.

Hence the application to appeal against the adverse costs order was dismissed – but without a costs order in the Constitutional Court.