CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 159/16

In the matter between:

LIMPOPO LEGAL SOLUTIONS	First Applicant
SANNIE TINTSWALO MALULEKE	Second Applicant
SINDILE CHAVANE	Third Applicant
SARAH MATODZI MAPONYANI	Fourth Applicant
and	
VHEMBE DISTRICT MUNICIPALITY	First Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Second Respondent
THULAMELA MUNICIPALITY	Third Respondent

Neutral citation:	*Limpopo Legal Solutions and Others v Vhembe District Municipality and Others* [2017] ZACC 14
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgment:	The Court
Decided on:	18 May 2017
Summary:	application for direct appeal — general costs rule in constitutional litigation — exceptional circumstances — inquiry on the appropriateness of the proceedings — abuse of process

constitutional litigation — leave to appeal granted — High Court misdirected itself by not applying the *Biowatch* principle — a basis exists to interfere with the High Court's exercise of a discretion

---

ORDER

On appeal from the High Court of South Africa, Limpopo Local Division, Thohoyandou:

The following order is made:

1. Leave to appeal against the High Court's order dismissing the application is refused.
2. Leave to appeal is granted against the costs order in the High Court.
3. The appeal succeeds with costs.
4. The costs order in the High Court is set aside and replaced with:

   "There is no order as to costs."

JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J):

Background

[1] This case involves another costs order granted by a High Court[1] against a non-profit organisation litigating in pursuit of constitutional rights. What is unusual

[1] For other recent instances, see *Hotz v University of Cape Town* [2017] ZACC 10; *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (*Lawyers for Human Rights*); and *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing* [2015] ZACC 4; 2015 (4) BCLR 396 (CC) (*Tebeila*).

about it is not just that costs were awarded, but that they were punitive – on an attorney and client scale.

[2] The applicants come before us by way of an urgent application for leave to appeal directly to this Court against an order of the High Court of South Africa, Limpopo Local Division, Thohoyandou (High Court).[2] The first applicant is a voluntary non-profit association based in Polokwane, Limpopo. It says it is aimed at protecting and exercising human rights and access to justice. The second, third and fourth applicants are Ms Sannie Tintswalo Maluleke, Ms Sindile Chavane and Ms Sarah Matodzi Maponyani. They describe themselves as three affected residents of Malamulele, Limpopo. The High Court observed in its judgment that this area has been "plagued by violent service delivery protests in the recent past".[3]

[3] The first respondent is the Vhembe District Municipality (Vhembe). The second respondent is the Minister of Environmental Affairs (Minister). The third respondent is the Thulamela Municipality (Thulamela). Only Vhembe is before us.[4]

[4] The application originated in urgent proceedings that the applicants brought against the respondents in the High Court. There they sought a final interdict directing all or any of the respondents to immediately dispatch a team of contractors to fix burst sewage pipeline(s) in Section B, Malamulele. Vhembe opposed the application. Its opposition was both vigorous and irate. It said that it became aware of the problem, for the very first time, when the applicants served their urgent application on it. Had the applicants informed it of the burst sewer through the normal channels – including just a simple phone call – the problem would have been attended to within 48 hours.

[2] Lamminga AJ.

[3] *Limpopo Legal Solutions v Vhembe District Municipality* [2016] ZALMPTHC 20 (High Court judgment) at para 9.

[4] In the High Court, Thulamela filed a notice of intention to oppose. However, the applicants abandoned any claim to relief against it. And they conceded that bringing the Minister to court was a misjoinder.

[5] More technically, Vhembe contended that, in any event, the applicants did not meet the requirements for an interdict. This was because the applicants had alternative remedies – most obviously, reporting the leak to their ward councillor or to the local authority. They had no justification for rushing precipitately to litigation.

[6] The applicants did not dispute that they had not informed Vhembe nor the ward councillor of the problem before launching their urgent application. Instead, they contended that they didn't know that it was the responsibility of Vhembe to attend to the problem, and not that of Thulamela. And, indeed, they said that the individual applicants had in fact reported the problem to Thulamela on two consecutive days – to no beneficial effect. They said Thulamela's officials did not direct them to Vhembe.

[7] It seems that the applicants, when instituting the urgent proceedings against both municipalities, Vhembe and Thulamela, were still confused as to which municipality bore the responsibility for the foul-smelling mess afflicting them.

[8] Despite this, the High Court adopted Vhembe's sense of irate indignation. It dismissed the application. And it did so with a punitive costs order. It ordered each of the applicants, organisational and individual, to pay Vhembe's costs, jointly and severally, on the attorney and client scale.

Main application

[9] The High Court's order dismissing the application is unassailable. Although the applicants made a brave face of seeking to challenge that order, they had no basis for doing so. The High Court ordered and received a prompt written report from Vhembe claiming that it was in the process of attending to the problem. Though the applicants complain that the sewage spillage has still not been fully resolved, that is not the issue here. Nor was it the issue in the urgent proceedings before the High Court. The issue was whether the applicants should have come to court entirely without notice to Vhembe. The High Court said no – correctly so. Leave to appeal against that order must be refused.

Sole issue: costs and procedure

[10] The Chief Justice issued directions inviting the parties to file written submissions solely on whether the High Court's costs order should be set aside or amended in any way, which they did. This Court has decided the application without an oral hearing.

Applicants' submissions

[11] The applicants submit that the High Court failed to appreciate and apply the *Biowatch*[5] principles. These provided that, in constitutional litigation against the state, even an unsuccessful private litigant is spared costs, unless the application is frivolous or vexatious. The application, according to the applicants, concerned important health and environmental rights. It was neither frivolous nor vexatious. So there was no basis for the High Court to depart from *Biowatch*.

[12] Further, though the High Court dismissed their application, the applicants were nevertheless successful. This was because, they say, Vhembe "admitted" in its report filed with the High Court that "there was a blockage of sewer system [that] could be unblocked fairly quickly." On this basis, and in the light of *Biowatch*, far from mulcting them in punitive costs, the High Court should have ordered Vhembe to pay their costs.

Vhembe's submissions

[13] Vhembe says the constitutional and statutory rights the applicants invoke have never been disputed. Instead, the applicants acted manifestly inappropriately by bringing the application without first alerting it of the problem. This was an abuse of process that went beyond even what this Court censured in *Lawyers for Human*

[5] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

Rights.[6] Hence a punitive costs order was warranted. The High Court's discretion was exercised judicially to protect its own process and the principles on which it acted cannot be faulted.

[14] Vhembe further submits that it is common cause that by the time the matter was heard, the problem had been resolved. To get Vhembe to attend to the problem required a simple phone call – not urgent court proceedings. It is generally accepted, and is a proper legal practice, to place a party on terms by way of a letter of demand before rushing to court. This is to avoid exacerbating the courts' tremendous workloads with resultant delays in the dispensing of justice.

[15] In particular, Vhembe argues that the punitive costs order – over and above ordinary costs – is warranted. The district municipality was ensnared by way of litigation brought with no prior warning: an abuse of process that warrants the unusual censure the High Court imposed.

Jurisdiction and leave to appeal

[16] An adverse costs award in constitutional litigation itself raises constitutional issues because of its potentially stifling effect on rights assertions.[7] The punitive costs award here seems to be unprecedented. It raises unprecedented issues. Leave to appeal must be granted.

High Court's exercise of discretion

[17] It is now axiomatic that a costs award is a matter of discretion and that there are limited grounds for interfering.[8] These grounds may include that the lower court did

[6] *Lawyers for Human Rights* above n 1.

[7] *Biowatch* above n 5 at para 10.

[8] Id at para 29.

not act judicially in exercising its discretion, or based its exercise of discretion on wrong principles of law or a misdirection on material facts.[9]

[18] On costs, the High Court found that there was no obvious reason to deviate from the general principle that the successful party should be awarded its costs. It took the attitude that the only issue was whether costs should be punitive. In the result, the High Court found that the applicants had failed to make out any case for the relief they claimed. And because the application should not have been brought in the first place, a costs order on an attorney and client scale was appropriate.

[19] When courts are called upon to exercise discretion on costs, there are two routes, depending on the case. The first applies in matters that are not constitutional litigation between a private party and the state. The general rule there is that, subject to exceptions not now material, the successful party should have costs.[10] The second applies in constitutional litigation between a private party and the state – and the general rule there is that a private party who is substantially successful should have its costs paid by the state[11] – but no costs order should be made if the state wins. The second route, like the first, is subject to exceptions.

[20] The High Court appreciated that the application entailed constitutional claims. But it followed the first route, the one in non-constitutional litigation. It reasoned that, because the applicants had lost, costs should follow – and the only question was whether they should be punitive. That was incorrect. The High Court misdirected itself and this Court is entitled and obliged to reconsider the costs award.

[9] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 41.

[10] *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (2) SA 621 (CC); 1996 (1) BCLR 1 (CC) at para 155.

[11] *Tebeila* above n 1 at para 4.

Appropriate costs order in the High Court

[21] The now well-established general rule in constitutional litigation between government and a private party is of course not an inflexible, under-all-circumstances, rule. As this Court pointed out in *Biowatch*—

> "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 immunise it against an adverse costs award."[12]

[22] In *Lawyers for Human Rights*, this Court, in upholding an adverse costs order against a constitutional litigant, noted that "[w]hether an application is manifestly inappropriate depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court".[13] So, whether particular conduct constitutes an abuse depends on the circumstances.

[23] Here, Vhembe's indignation at not being informed of the problem before being dragged to court is well understandable, as is the High Court's endorsement of that ire. Government is obliged to take reasonable legislative and other measures to protect the environment[14] and to provide access to healthcare.[15] As this Court pointed out in *Mazibuko*, "social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights".[16] "If one of the key goals of the entrenchment of social and economic rights is to ensure that government is responsive and accountable to citizens through both the ballot box and litigation," the Court said, "then that goal will be served when a

[12] *Biowatch* above n 5 at para 24.

[13] *Lawyers for Human Rights* above n 1 at para 20.

[14] Section 24(b) of the Constitution.

[15] Section 27(1)(a) and (2) of the Constitution.

[16] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 70-1.

government respondent takes steps in response to litigation to ensure that the measures it adopts are reasonable".[17] All this points to a cooperative process in which government and citizen engage, if at all possible, before litigating.

[24] The High Court held that it was common cause that had Vhembe "been aware of the need to act to resolve the problem, they would have done so. A simple telephone call would have resolved the matter".[18] It held that the application not only unnecessarily burdened its urgent roll, in fact, it delayed the fixing of the problem – because municipal officials whose energies could have been directed at managing the sewage spill were instead tied up with affidavits and consultations and in court.[19]

[25] Yet, as this Court pointed out in *Biowatch*, a costs order "may have a chilling effect on litigants who might wish to raise constitutional issues".[20] What happened here shows that the applicants are not solely to blame for the mishap in the High Court. The fact is, the individual applicants did report the problem. They did so to a public entity they believed was responsible for fixing it – Thulamela. And they did so *before* they rushed to court.

[26] And, instead of Thulamela directing them to Vhembe, where they should have reported the matter, Thulamela told them a team will be dispatched to look at the problem. The problem remained unfixed. And the individual applicants and their fellow residents continued to endure the noxious foul-smelling, health-threatening mess the sewage spillage inflicted on them.

[27] All this points this way. Misstep or no misstep, the applicants deserved a measure of leniency from the High Court. An adverse costs order was inappropriate. And a punitive order even more so.

---

[17] Id at para 96.

[18] High Court judgment above n 3 at para 25.

[19] Id at para 27.

[20] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 90.

[28] In *Plastic Converters Association of South Africa* the Labour Appeal Court held, in the context of non-constitutional matters, that—

> "[t]he scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."[21]

[29] In constitutional litigation matters between a private party and the state, even more so. This Court explained in *Helen Suzman Foundation*:

> "The Court should ordinarily be very loath to grant a punitive costs order in a case like this. This is constitutional litigation and parties should never be forced to be too careful to assert their constitutional rights through a court process, for fear of a costs order. And this would explain this Court's general disinclination to make costs orders against unsuccessful parties who chose to vindicate constitutional rights against the state. Punitive costs should therefore never be an easy option, regard being had to the *Biowatch* principles. But that is not to say that no costs could ever be ordered against those litigating against the state. On the contrary *Biowatch* itself said:
>
> > '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*. . . . [P]ublic interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause.
> >
> > [T]he 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,

[21] *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC) (*Plastic Converters Association of South Africa*) at para 46.

> the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.'"[22]

[30] Here, the High Court did not, against the background of *Biowatch*, award punitive costs for reasons it set out. On the contrary, it concluded that the punitive order was warranted only because the applicants "had failed to make out a case for the relief claimed and [the application] should not have been brought in the first place":

> "There is no good reason shown for the First Applicant's failure to ensure the matter was ripe for litigation. One would assume that they have the resources and knowledge to advise the community members they strive to assist and could have ensured that the correct institution is informed along the correct route, of the leak or blockage. The Applicants further failed to place any evidence before the court of the dereliction of any statutory duty by [Vhembe] to provide and maintain sanitary services to the community at Section B, Malamulele. For the court to grant the relief in the general terms prayed for, there should in the least have been evidence of the degree and nature of the failure of [Vhembe], such as information as to how many people or households are not being provided sanitation services and in what way [Vhembe] did not act appropriately to address the issue."[23]

[31] With respect to the High Court, which was dealing with the burdensome exigencies of a crowded urgent roll, this passage does show the weakness in its approach. No mention of "clear and indubitably vexatious and reprehensible conduct".[24] No explanation of conduct that demands "extreme opprobrium".[25] Nor anything pointing to something more than the applicants' high anxiety to get the sewage spill fixed – an anxiety every one of us should be able to understand.

---

[22] *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC)*;* 2015 (1) BCLR 1 (CC) at para 36.

[23] High Court judgment above n 3 at para 31.

[24] *Plastic Converters Association of South Africa* above n 21 at para 46.

[25] Id.

[32] And it is not inapposite to mention here, as we did in *Tebeila*,[26] that the first applicant, and those it represents, including the three individual applicants, are resident in remote rural areas, which, it is common knowledge, are often lamentably under-served by local and provincial government.

[33] For all these reasons, *Biowatch* must prevail. An adverse costs order should not have been imposed, still less a punitive costs order. The just and fair outcome, which this Court is bound to intervene to secure, is that each party must pay its own costs in the High Court.

Costs in this Court

[34] The applicants have had substantial success and should get their costs here.

Order

The following order is made:

1. Leave to appeal against the High Court's order dismissing the application is refused.
2. Leave to appeal is granted against the costs order in the High Court.
3. The appeal succeeds with costs.
4. The costs order in the High Court is set aside and replaced with:
   "There is no order as to costs."

[26] *Tebeila* above n 1 at para 15.

For the Applicants:	S Tebeile and K Maluleke instructed by Mampa Edwin Thupane Attorneys
For the First Respondent:	R J Raath SC and M Rantho instructed by Tshiredo Attorneys