CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/17

In the matter between:

LIMPOPO LEGAL SOLUTIONS	First Applicant
MESHACK MASINGI	Second Applicant
and	
ESKOM HOLDINGS SOC LIMITED	Respondent

Neutral citation:	*Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* [2017] ZACC 34
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:	26 September 2017
Summary:	Costs — general rule in constitutional litigation — exceptional circumstances — abuse of process Constitutional litigation — leave to appeal — High Court not applying *Biowatch* — application nevertheless manifestly inappropriate — punitive costs order in High Court warranted

ORDER

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

The following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs in this Court.

JUDGMENT OF THE COURT

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):

Introduction

[1] The first applicant, Limpopo Legal Solutions, is no stranger to litigating in this Court. In the past year alone, it has launched no fewer than five applications for leave to appeal.[1] This application was filed on 16 March 2017. In it, Limpopo Legal

[1] On 6 June 2016, under case number CCT 119/16 *Limpopo Legal Solutions v Vhembe District Municipality* [2017] ZACC 30 (*Limpopo Legal Solutions II*), the first applicant sought leave to appeal against the judgment and order, including the costs order, of the High Court of South Africa, Limpopo Local Division, Thohoyandou (Semenya AJ). This Court granted leave to appeal against the High Court's decision on standing and costs and upheld the appeal.

On 12 July 2016, under case number CCT 159/16 *Limpopo Legal Solutions v Vhembe District Municipality* [2017] ZACC 14 (*Limpopo Legal Solutions I*), the first applicant urgently applied for leave to appeal directly to this Court against the judgment and order, including the punitive costs order, of the High Court of South Africa, Limpopo Local Division, Thohoyandou (Lamminga AJ). This Court upheld the appeal against the costs order only.

On 6 April 2017, under case number CCT 85/17 *Limpopo Legal Solutions v Vhembe District Municipality*, the first applicant sought leave to appeal directly to this Court against the judgment and order of the High Court of South Africa, Limpopo Division, Polokwane, in terms of which the High Court dismissed a recusal application brought by the first applicant with costs (Phatudi J). This Court dismissed the application for leave to appeal with costs.

Solutions seeks leave to appeal directly against the order of the High Court of South Africa, Limpopo Division, Polokwane (High Court). The High Court (Kgomo J) discharged a rule *nisi*, granted on 31 May 2016, and dismissed the application with costs on the scale as between attorney and client.

Parties

[2] Limpopo Legal Solutions, established on 10 May 2016, is a non-profit organisation and a voluntary association. It operates in a largely rural area of South Africa that is remote from the main urban centres. Its sole stated purpose is to promote and protect the exercise of human rights. The organisation's constitution, attached to the application, lists Advocate Tsundzuka Kevin Maluleke in its schedule of initial members. The second applicant, Mr Meshack Masingi, is an adult residing at Stand No 459, Section C, Malamulele, Limpopo Province. The respondent is Eskom Holdings Soc Limited, a state-owned entity established to generate and supply electricity, including to residents of Section C, Malamulele.

[3] This Court has decided the application without an oral hearing and without written submissions.[2]

Background

[4] These facts are not disputed. On 29 May 2016, Eskom received a telephone call or complaint.[3] There was a loose electricity cable in Section C, Malamulele. That very same day, Eskom dispatched a technician to the site to investigate. The technician confirmed that although the cable was hanging lower than normal, it was out of reach from cars and pedestrians. In addition, it was covered with a plastic

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And recently, on 2 June 2017, under case number CCT 134/17 *Limpopo Legal Solutions v Vhembe District Municipality*, the first applicant once again sought leave to appeal directly to this Court against an adverse costs order awarded by the High Court of South Africa, Limpopo Local Division, Thohoyandou (Mushasha AJ). This Court dismissed the application for leave to appeal with no costs order.

[2] Rule 13(2) of the Rules of this Court provides: "Oral argument shall not be allowed if directions to that effect are given by the Chief Justice."

[3] *Limpopo Legal Solutions v Eskom Holdings Limited* [2017] ZALMPPHC 1 (High Court judgment) at para 6.

shield.[4] This meant that it could not endanger the safety of the residents. The very next day, on 30 May 2016, Eskom deployed a team of workers to the site.[5]

[5] Undaunted by Eskom's prompt response, the applicants launched an urgent application in the High Court on that same day, 30 May 2016.[6] Around 11:30, Eskom was served with the papers.[7] The applicants sought a rule *nisi* calling on Eskom to show cause why a final order should not be granted directing Eskom to dispatch a team of specialists or technicians to Section C, Malamulele to repair or replace the exposed, damaged, low-hanging electricity cable.[8] The repair was said to be necessary to guarantee the safety of "vulnerable children, motorists or affected residents of Section C, Malamulele".[9] The application specified the time of appearance at Court was 17:30 that same day.[10] Mr Maluleke represented the first applicant.

[6] While Mr Maluleke was still waiting for the papers to be issued out of the High Court, Eskom's employee, Ms Mhlwatika, called him on his cell phone. She informed him of good news: Eskom was addressing the complaint there and then. Right away. She urged Mr Maluleke, in the light of this, not to continue with the urgent application.[11]

[7] Ms Mhlwatika phoned Mr Maluleke a second time to verify that the legal hounds had been re-kennelled. His cell phone was off.[12] Ms Mhlwatika's punctiliousness was undeterred. She then sent an email to Mr Maluleke, confirming

[4] Id.

[5] Id at para 8.

[6] Id at para 1.

[7] Id at para 9.

[8] Id at para 1.2.

[9] Id.

[10] Id at para 9.

[11] Id at paras 11-2.

[12] Id at para 12.

that the complaint was being attended to. Again, she requested him to hold off the urgent application.[13] Mr Maluleke received this email at 17:03 on 30 May 2016.[14]

[8] Ms Mhlwatika's energy and public-spiritedness were not done yet. She had photographs of the workers, taken on-site, as they were attending to the lapsed cable. A WhatsApp message with these photographs was forwarded to Mr Maluleke at 17:11.[15] All this *before* the time set out in the urgent application for the matter to be called in Court.

[9] None of this availed. Mr Maluleke went ahead with the urgent application. He successfully moved it in Court the next day, on 31 May 2016. Eskom, understandably, did not appear. Why should it? There was no reason for it to appear. Yet, in Eskom's absence, the Court granted an interim order against it. The return date was 28 June 2016 (later extended to 2 August 2016).[16]

[10] When Eskom heard that, despite its energetic and immediate efforts, an order had been granted, it rose in opposition. Indignant opposition. It sought dismissal with costs on the scale as between attorney and client, payable by the members of the first applicant only. The second applicant was to be specifically excluded from any costs order.[17]

[11] On 2 August 2016, the rule *nisi* was further extended to 10 October 2016. On that date, the application was postponed *sine die* (without assigning a day for further hearing), and the rule *nisi* was extended until it was confirmed or discharged.[18]

[13] Id.

[14] Id at para 13.

[15] Id at para 14.

[16] Id at paras 2 and 4.

[17] Id at para 3.

[18] Id at para 5.

High Court

[12] The question before the High Court was whether the applicants were justified at all in moving the application before the Judge President on 31 May 2016.[19] Eskom maintained that the applicants misled the Court.[20] They moved the application despite Eskom's assurances to them – assurances backed up by WhatsApp photographs – that their complaint was already receiving immediate attention. What was more, Eskom said, the applicants were not honest about urgency.[21] Worse still – they failed to disclose to the Court that Eskom was in the process of repairing the electricity cable at the very time the proceedings were instituted.[22] Eskom said that it had already discharged its duty to ensure the residents' safety the day before the application was moved in Court.[23]

[13] The Court agreed with Eskom. It held that the applicants deliberately withheld vital information.[24] Had they not, in all likelihood, the Court on 31 May 2016 would have refused to grant the interim order.[25] Mr Maluleke failed to inform the Court when he moved the application on that day that Eskom's technicians had already started fixing the cable. Nor did he tell the Court that, by the time argument was ultimately heard, the cable could be expected to have been repaired.[26]

[14] Despite knowing that Eskom was attending to the problem, the applicants barged ahead with the urgent application. This, the High Court held, was conduct of the "utmost dishonesty".[27] It was "irrational, ill-thought, capricious and/or

[19] Id at para 15.

[20] Id at para 16.1.

[21] Id.

[22] Id.

[23] Id at para 16.4.

[24] Id at para 18.

[25] Id.

[26] Id.

[27] Id at para 23.

superfluous".[28] What the applicants were seeking had in fact already been attained. The Court asked, "So what next!"[29] We agree that this was reprehensible.

[15] Worse was that the applicants just did not let go. They insisted on pursuing the litigation eight months down the line. All this justified discharging the rule *nisi* and not merely dismissing the application. There had to be costs, and those costs had to be on the scale as between attorney and client.[30]

Before this Court

[16] The applicants seek leave to appeal directly against the order, including the costs order of the High Court. Relying on section 24 of the Constitution,[31] they submit that the low-hanging electricity cable was not safe for members of the Malamulele community. They further submit that section 7(2) of the Constitution imposes a duty on Eskom to protect the right to a safe environment enshrined in section 24.[32] In addition, they take issue with the adverse costs order and submit that the High Court overlooked that this was constitutional litigation. The applicants claim no order as to costs at all was appropriate because the first applicant was just an unsuccessful litigant claiming to enforce rights.

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[28] Id at para 43.

[29] Id at para 23.

[30] Id at para 56. The High Court, at para 50, stated that counsel for Eskom requested that costs be paid by the first applicant and its members jointly and severally, specifically excluding the second applicant from any adverse costs order. Despite this, the High Court did not single out the first applicant in its order. This Court will proceed on the basis that any costs to be awarded should be awarded against the first applicant only.

[31] Section 24 of the Constitution provides:

> "Everyone has the right—
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> (a) to an environment that is not harmful to their health or wellbeing; and
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> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
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> (i) prevent pollution and ecological degradation;
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> (ii) promote conservation; and
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> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[32] Section 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[17] Eskom opposes. It vigorously supports the High Court's order, including the costs award. It contends that there is no constitutional issue, and that the costs order was anyhow justified. The application was dead in the water by the time it was heard and the rule *nisi* granted – dead, vexatious, and frivolous. The High Court exercised its discretion judicially to protect its own processes. It was entitled to do so. There is no reason for this Court to interfere.

[18] The applicants' contention that the High Court erred in discharging the rule *nisi* and dismissing the application has no shred of merit. The applicants failed to establish the requirements for a mandamus. The High Court's findings are unassailable.

[19] But what of the costs order?

Costs order

[20] A costs award, of course, falls within a court's discretion.[33] An appellate tribunal cannot willy-nilly intervene. The grounds for interfering are limited. Khampepe J aptly summarised the applicable standard:

> "When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—
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> > 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in

[33] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC). See also *Limpopo Legal Solutions I* above n 1 at para 17 and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at paras 83-5. Khampepe J described the type of discretion exercised when awarding costs as a "true" discretion as opposed to a "loose" discretion. The distinction is important in order to ascertain the appropriate standard of review by an appellate court.

the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'"[34]

[21] In *Limpopo Legal Solutions I*, this Court clarified and reaffirmed the principles on costs orders:

> "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. 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 – but no costs order should be made if the state wins. The second route, like the first, is subject to exceptions."[35] (Footnotes omitted.)

[22] *Biowatch*[36] fundamentally clarified the nature of costs in constitutional litigation. The general rule is not to award costs against unsuccessful litigants when they are litigating against state parties and the matter is of genuine constitutional import.[37] This Court recently explained the reason – to avert the chilling effects of an adverse costs order:

> "In both *Biowatch* and *Helen Suzman Foundation* this Court emphasised that judicial officers should caution themselves against discouraging those trying to vindicate their constitutional rights by the risk of adverse costs orders if they lose on the merits. Particularly, those seeking to ventilate important constitutional principles should not

[34] *Trencon* id at para 88 (quoting *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11). See also *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) at para 42:

> "Interference on appeal in a lower court's exercise of a discretion is possible only if the discretion was not judicially exercised." (Footnote omitted.)

[35] *Limpopo Legal Solutions I* above n 1 at para 19 (citing *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (2) SA 621 (CC); 1996 (1) BCLR 1 (CC) at para 15 and *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing* [2015] ZACC 4; 2015 (4) BCLR 396 (CC)).

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

[37] *Lawyers for Human Rights* above n 33 at para 15 (citing *Biowatch* id at para 24).

> be discouraged by the risk of having to pay the costs of their state adversaries merely because the court holds adversely to them."[38] (Footnote omitted.)

But *Biowatch* drew a limit. The line was this – applications that are "frivolous or vexatious, or in any other way manifestly inappropriate", get no shelter from adverse costs.[39] *Biowatch* does not allow risk-free constitutional litigation.[40] The worthiness of an applicant's cause "will [not] immunise it against an adverse costs award".[41]

[23] In *Lawyers for Human Rights*, this Court had to consider an adverse costs order against a party litigating to secure constitutional rights. It gave content to the *Biowatch* exceptions.[42] It held that "vexatious" litigation is—

> "litigation that [is] 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious."[43] (Footnotes omitted.)

And a "manifestly inappropriate" application was described as an application that is "so unreasonable or out of line that it constitutes an abuse of process of court".[44]

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[38] Id at para 17.

[39] *Biowatch* above n 36 at para 24. See also *Limpopo Legal Solutions I* above n 1 at para 21.

[40] *Lawyers for Human Rights* above n 33 at para 18 (citing *Biowatch* above n 36 at paras 20, 23-4 and *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 paras 36-8).

[41] *Biowatch* above n 36 at para 24.

[42] *Lawyers for Human Rights* above n 33 at paras 19-21.

[43] Id at para 19.

[44] Id at para 20. See also para 21, where the Court held: "Ultimately the inquiry on the appropriateness of the proceedings requires a close and careful examination of all the circumstances".

High Court's exercise of discretion

[24] Did the High Court exercise its discretion unjudicially or in a manner that justifies interference? Here, we should see that the costs order the Court granted was two-layered. First, there was a costs order against a litigant seeking to vindicate constitutional rights. That, in itself, requires warrant under *Biowatch*. But, second, the Court went further. It awarded costs on a punitive scale. This was because the applicants' conduct was "irrational, ill-thought, capricious and/or superfluous".[45]

[25] The High Court was justified in describing the first applicant's conduct in this way. But what of *Biowatch*? The applicants argue that the High Court failed to consider its principles. Because the case raises important constitutional issues, so the argument goes, the High Court should not have made any costs order at all.

[26] This argument previously assisted the first applicant in persuading this Court to reverse an adverse or punitive costs order following dismissal of its urgent application. In *Limpopo Legal Solutions I*, the High Court of South Africa, Limpopo Local Division, Thohoyandou (Thohoyandou High Court) dismissed an application with punitive costs. This Court set aside that order on the basis that the Thohoyandou High Court had failed to adequately justify the costs order:

> "*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."[46]

[27] The applicants there did not dispute that they had not informed the respondent or the ward councillor of the problem before launching their urgent application. Instead, they contended that they did not know that it was the responsibility of the respondent, Vhembe District Municipality, to attend to the problem.[47] The applicants

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[45] High Court judgment above n 3 at para 43.

[46] *Limpopo Legal Solutions I* above n 1 at para 33.

[47] Id at para 6.

were confused about which municipality, Vhembe District Municipality or Thulamela Municipality, bore responsibility to attend to the problem. This formed the basis for this Court's merciful intervention in setting aside the adverse costs order. Confusion, not impropriety.

[28] In *Limpopo Legal Solutions II*, this Court set aside an adverse costs award by the Thohoyandou High Court.[48] There, the Thohoyandou High Court lumped the first applicant with costs without referring to *Biowatch* at all. In overturning that costs order, this Court said:

> "[T]he High Court overlooked the approach to costs relevant to constitutional litigation as set out in *Biowatch*. It simply adopted the approach that costs follow the result. It should not have awarded costs. In doing so, it applied a wrong principle on costs in constitutional litigation against the state. That the court *a quo* decided the issue of costs on a wrong principle entitles this Court to interfere with the exercise of its discretion on costs. Accordingly, this Court should interfere with that decision and set it aside."[49]

[29] In *Limpopo Legal Solutions I*, the conduct in bringing the litigation was not so egregious as to fall within the *Biowatch* exceptions.[50] Similarly, in *Limpopo Legal Solutions II*, this Court saved the first applicant from a costs award on the basis that there was no manifest impropriety in the manner in which the litigation was conducted.[51] These decisions are way off the present case. They do not assist the first applicant. There was no suggestion in those cases that the first applicant jumped the gun or behaved as egregiously as here in misleading the High Court.

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[48] *Limpopo Legal Solutions II* above n 1 at para 16.

[49] Id at para 17.

[50] *Limpopo Legal Solutions I* above n 1 at paras 27 and 33.

[51] *Limpopo Legal Solutions II* above n 1 at para 17.

[30] And this is not an instance where the High Court failed to explain or justify its costs order. The Court substantiated its reasons for awarding costs with convincing detail.[52]

[31] In *Biowatch*, this Court emphasised that in determining whether an adverse or punitive costs order against a private party in constitutional litigation is warranted, regard must be had to the conduct of the parties. In particular, for the *Biowatch* principle to protect an unsuccessful private party against an adverse costs order, there must be no "impropriety in the manner in which the litigation has been undertaken".[53]

[32] In *Helen Suzman Foundation*, this Court cautioned that a "court should ordinarily be very loath to grant a punitive costs order" in constitutional litigation.[54] However, the Court hastened to qualify this. It did not "say that no costs could ever be ordered against those litigating against the state".[55]

[33] Here, the first applicant's conduct in launching and pursuing the litigation was vexatious, frivolous, and manifestly inappropriate. The litigation was initiated without good cause. It served no serious purpose or value. And it was entirely unreasonable. All this fell without grip through the *Biowatch* safety net. The High Court was therefore justified in awarding a costs order against the applicants.

[34] But what of the scale of costs?

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[52] High Court judgment above n 3 at paras 18-9, 23, 43, 47-55.

[53] *Biowatch* above n 36 at para 20.

[54] *Helen Suzman Foundation* above n 40 at para 36. The Court continued:

> "On the contrary *Biowatch* itself said:
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> > '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.'" (Emphasis in original.)

[55] Id.

Punitive costs order

[35] In *Nel*,[56] the then-Appellate Division held:

> "The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."[57]

[36] Here, the first applicant actively misled the High Court to secure its interim order. Where a losing party "lower[s] [its] ethical and professional standard[s] in pursuit of a cause",[58] as happened here, that party can obviously not invoke *Biowatch* to escape liability for costs. That could include the unusual rebuke of granting a punitive costs order against a constitutional litigant. Indeed, a court may consider it just to award a punitive costs order against the unsuccessful party, not just as punishment, but also to protect the successful party against being left "out of pocket".

[37] The Court in *Nel* explained that a costs order on a scale as between party and party is *theoretically* meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by him in the litigation. However, as *Nel* noted, this is hardly the case.[59] Almost invariably, party and party costs that a successful litigant may recover from the unsuccessful party are not enough to fully cover the expenses incurred by the successful party in the litigation. Even an attorney and client recovery often falls short.

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[56] *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597.

[57] Id at 607.

[58] *Biowatch* above n 36 at para 20.

[59] *Nel* above n 56 at 607.

[38] Here, the first applicant abused the High Court's processes. It misled the Court. It launched the urgent application seeking relief for a problem that, to the knowledge of its officers and its legal counsel, was there and then being fixed. The High Court's view that counsel was dishonest in taking the interim order the next day was, regrettably, warranted. And we must not forget that Eskom was severely prejudiced. It was dragged through unmeritorious litigation that it was at pains to avoid from the outset by doing its job – promptly and responsively. It is impossible to say that the High Court failed to exercise an impeccable discretion in concluding that the applicants' conduct must be met with the severest of rebukes in the form of a punitive costs award. Nor is there any reason why Eskom's exposure to out-of-pocket legal expenses should not be minimised by an order on the attorney and client scale. There is, therefore, no basis for this Court to intervene in the High Court's costs order.

[39] In *Quagliani*,[60] Sachs J lambasted the applicant's lawyer for bringing a last-minute application to postpone this Court's delivery of judgment:

> "It appears that at the very last moment in the prolonged litigation, what had until then been commendable eagerness to serve the best interests of his client, transformed itself into excess of zeal. As I have pointed out, it is quite unacceptable for a legal representative to clutch at each and every straw, giving false hope to a client, even if the motive is to do one's best on behalf of the client. The failure of the attorney to acknowledge the utter inappropriateness of the application is most unfortunate. It evinces a lapse of professional judgment rather than firmness of purpose."[61]

[40] These remarks are fitting. And the applicants' lawyer would do well to heed them. In *Quagliani*, attorney and client costs were awarded against the lawyer for conduct far less improper than here.

[60] *President of the Republic of South Africa v Quagliani* [2009] ZACC 9; 2009 (8) BCLR 785 (CC) (*Quagliani*).

[61] Id at para 9. In this case, the Court awarded punitive costs against Mr Quagliani because of the impropriety in seeking the postponement. Significantly, this judgment was handed down a few months before *Biowatch*.

[41] Although *Biowatch* changed the costs landscape for constitutional litigants, it gives no free pass to cost-free, ill-considered, irresponsible constitutional litigation. An applicant seeking to vindicate constitutional rights must respect court processes. The first applicant has embroiled itself in litigation since its inception in 2016. A more considered, cautious approach would be helpful all round.

Costs in this Court

[42] A costs award in constitutional litigation raises constitutional issues. In the High Court, the applicants sought to invoke constitutional prescripts against Eskom, a state party, though they were unsuccessful.

[43] In an unprecedented departure from the general rule, the High Court granted a punitive costs order against the applicants. Although the applicants, in the manner in which they conducted their litigation in the High Court, themselves authored the punitive costs order in that Court, their application in this Court was not frivolous or vexatious, or manifestly inappropriate. *Biowatch* must therefore apply before this Court. Each party must pay its own costs in this Court.

Order

[44] The following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs in this Court.