



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited**

**CCT 61/17**

**Date application was lodged: 16 March 2017**

**Matter decided without oral hearing**

**Date of judgment: 26 September 2017**

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### **MEDIA SUMMARY**

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*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.*

At 10h00 on 26 September 2017 the Constitutional Court gave judgment in a direct appeal against a punitive costs order granted by the High Court of South Africa, Limpopo Division, Polokwane (High Court), against Limpopo Legal Solutions (LLS), a non-governmental organisation operating in the field of human rights.

On 29 May 2016 Eskom Holdings Soc Limited (Eskom) was informed that there was a loose electricity cable in Section C, Malamulele. On 30 May 2016 Eskom deployed a team of workers to the site. But the applicants nevertheless sought an interim order from the High Court calling on Eskom to show cause why a final order should not be granted directing it to dispatch a team to repair or replace the electricity cable.

An employee from Eskom informed LLS's lawyer that Eskom was addressing the complaint and urged him not to continue with the application. Before the application was heard, the employee called the lawyer and sent him an email as well as WhatsApp messages with photographs of the workers attending to the cable.

LLS nonetheless launched the application. On 31 May 2016 the High Court granted an interim order against Eskom, which was not represented in court. Eskom later appeared to oppose the order, seeking its dismissal with costs on a punitive scale (attorney and client) against LLS. (The second applicant, Mr Meshack Masingi, was to be excluded from any costs order.) Eskom maintained that the applicants misled the High Court by failing to disclose that Eskom was repairing the electricity cable at the time the proceedings were instituted and argued that it had already discharged its duty to ensure the residents' safety by that time. The High Court agreed that LLS had deliberately

withheld information from it that would have led to the dismissal of the application. The High Court accordingly discharged the interim order, dismissed the application, and ordered LLS to pay costs on the punitive scale.

In this Court, the applicants sought leave to appeal directly against the costs order. They submitted that the low-hanging electrical cable had been unsafe and that Eskom had a duty under section 7(2) of the Constitution to protect the right to a safe environment enshrined in section 24. Eskom contended that there was no constitutional issue and that the costs order was in any event justified. It argued that the High Court exercised its discretion to award costs judicially.

This Court held that the High Court exercised its discretion judicially when it granted Eskom costs on the punitive scale as between attorney and client. It applied the *Biowatch* principle that a court will not award costs against unsuccessful litigants against state parties in a case of genuine constitutional import, pointing out that the principle does not immunise all unsuccessful litigants from adverse costs orders: the important question is whether the litigation was conducted in good faith or designed to annoy or embarrass an opponent.

This Court considered that the conduct of the advocate for LLS was sufficiently egregious as to take LLS outside the protection of *Biowatch*. Launching and pursuing the litigation was vexatious, frivolous, and manifestly inappropriate. The High Court was therefore justified in awarding a costs order against LLS. In addition, the High Court was justified in granting a punitive costs order because LLS misled it by launching an urgent application seeking relief for a problem that its advocate knew was right then being fixed. Eskom was severely prejudiced, and its expenses should be minimised by an order on the punitive attorney and client scale.

Although this conduct warranted the punitive costs order in the High Court, the application to this Court was not frivolous, vexatious, or manifestly inappropriate. As such, this Court made no order as to costs in this Court.

The application for leave to appeal was therefore refused.