CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 100/17

In the matter between:

NIEKARA HARRIELALL Applicant

and

UNIVERSITY OF KWAZULU-NATAL Respondent

Neutral citation:	*Niekara Harrielall v University of KwaZulu-Natal* [2017] ZACC 38
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgment:	Jafta J (unanimous)
Decided on:	31 October 2017
Summary:	Review application — admission policy — right to education — access to further education *Biowatch* principle — costs — constitutional litigation — State obligation

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ORDER

On appeal from the Supreme Court of Appeal the following order is made:

1. Leave to appeal against the merits is refused.
2. Leave to appeal is granted against the orders of the High Court and the Supreme Court of Appeal on costs.
3. The appeal on costs is upheld.
4. The costs orders granted by the High Court and the Supreme Court of Appeal are set aside.
5. No order as to costs is made in relation to proceedings in this Court.

JUDGMENT

JAFTA J (Nkabinde ADCJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

[1] This is an application for leave to appeal against the order of the Supreme Court of Appeal in terms of which the applicant's appeal was dismissed with costs. The applicant is Ms Niekara Harrielall, a student at the University of KwaZulu-Natal (University). She has cited the University as a respondent.

[2] In 2015 the applicant applied for admission at the University to study for an MBChB degree, as she aspires to be a medical doctor. However her application was unsuccessful. In order to improve her prospects for admission, the following year, the applicant registered for the degree of Bachelor of Medical Science (Anatomy) in 2015. When applications for the 2016 intake were open, she applied again under the policy described as "mature students" which is defined in these terms:

> "3. MATURE STUDENTS
> Mature students will comprise 20% (40 students) of the class. Mature students are categorized as follows:

> a). Candidates who have completed the Matriculation/Grade 12 examination and exceeding the minimum standards for entry into the MBChB programme as defined above; and have done a year or more of a degree course at a recognised university in South Africa; and achieved outstanding results (Open). Twenty five percent (10 students) will be from this open competitive category.
> b). BSc and BMedSc access programmes (reflecting Quintile 1 and 2 students) - racial groups do not apply for the selection of Quintile 1 and 2 students (BSc/BMedSc Access). Fifty percent of the mature students (20 students) will be from the BSc and BMedSc access programmes (reflecting Quintile 1 and 2 students).
> c). Twenty-five percent (10 students) will be from BSc/BMedSc graduates from Health Science related degrees, (Health Sciences Open)."

[3] Of the three categories of mature students, the applicant's application qualified to be assessed in terms of category (a) which applies to candidates who have completed matric and have also done a year or more of a degree course at a university in South Africa. In addition to her matric qualification, the applicant had done a one year course in the Bachelor of Medical Science (Anatomy) at the same University. But this category comprises only of 10 students within the broader category of mature students consisting of 40 students in all.

[4] As places in the first year course of the MBChB programme are limited, competition for admission is fierce. For example, in category (a) for the 2016 intake, there were 161 candidates, including the applicant. Some of them had completed their degree courses and yet all of them were competing for 10 places. When the selection in that category was made the applicant was again unsuccessful.

[5] Aggrieved by this decision the applicant launched a review application in the KwaZulu-Natal Division of the High Court (High Court), asking that Court to set aside the decision of the university. She contended that the University had failed to consider and apply its own admission policy in declining to admit her to the relevant programme. The matter was opposed by the University which averred that her application was considered together with 160 other applications. These applications were merited in accordance with academic qualifications achieved by each applicant.

Those with completed degree qualifications scored higher points and as a result they took up all 10 available places. All undergraduates, including the applicant, were not successful.

[6] The High Court dismissed the application with costs on the ground that the applicant had failed to show that the relevant policy was not applied in determining her application for admission. However, leave to appeal to the Supreme Court of Appeal was granted in her favour. But her appeal was dismissed with costs.

[7] Undeterred by the failures in those Courts the applicant lodged an application for leave to appeal in this Court. On 24 July 2017, the Chief Justice issued directions[1], calling on the parties to file written submissions on whether in determining the costs orders, the High Court and the Supreme Court of Appeal should have followed *Biowatch*.[2]

[8] The parties have filed written submissions and the matter was determined without oral argument.

[9] With regard to the merits, we are satisfied that the application must fail as it bears no prospects of success. It is quite apparent that the relevant policy was applied in determining the applicant's request for admission. She was not successful because she was competing against candidates who were more qualified than she was. Those who ended up being selected for the limited number of places had scored more points

[1] The Chief Justice issued the following directions:

> 1. The parties are directed to file written submissions of not more than 15 pages on:
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> 1.1 Whether *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) should have been followed by the High Court and the Supreme Court of Appeal when deciding the issue of costs.
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> 2. The applicant must file her submissions on or before 11 August 2017.
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> 3. The respondent must file its submissions on or before 18 August 2017.
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> 4. Further directions may be issued.

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

due to their better qualifications. This illustrates a proper and fair application of the admission policy, the validity of which was not questioned in these proceedings.

[10] But we are not persuaded that the High Court and the Supreme Court of Appeal were entitled to depart from the *Biowatch* principle which requires that an unsuccessful party in proceedings against the State be spared from paying the State's costs in constitutional matters. The High Court's judgment does not refer at all to this principle. It appears that that Court applied the ordinary rule that says costs follow the result and the unsuccessful party must pay costs of the successful one. In *Biowatch* this Court made it plain that this rule should not be applied to constitutional matters.

[11] Although *Biowatch* was decided eight years ago, it seems that the other courts are yet to embrace its principle. This is apparent from the growing number of matters that come before this Court where the issue of not applying *Biowatch* is raised. This is unfortunate. In *Biowatch* this Court laid down a general rule relating to costs in constitutional matters. That rule applies in every constitutional matter involving organs of State. The rule seeks to shield unsuccessful litigants from the obligation of paying costs to the state. The underlying principle is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights.

[12] However, the rule is not a licence for litigants to institute frivolous or vexatious proceedings against the State. The operation of its shield is restricted to genuine constitutional matters. Even then, if a litigant is guilty of unacceptable behaviour in relation to how litigation is conducted, it may be ordered to pay costs. This means that there are exceptions to the rule which justify a departure from it. In *Affordable Medicines* this Court laid down exceptions to the rule. Ngcobo J said:

> "There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. 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."[3]

This Court takes active cognisance of these limitations on the *Biowatch* principle, which it recently applied in *Lawyers for Human Rights*.[4]

[13] In yet another *Lawyers for Human Right*[5], this Court defined the exceptions to the *Biowatch* rule. It stated:

> What is "vexatious"? In *Bisset* the Court said this was litigation that was "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.

[14] Absent these exceptions, the *Biowatch* rule must be followed. If a court, as the High Court did here, applies the principle that an unsuccessful party must pay costs of a successful party in a constitutional matter involving the State, interference with the ensuing award of costs would be justified. In that event, a wrong principle would have been followed in the exercise of a discretion. And this would constitute justification for setting aside the costs order on appeal.

[15] Here it cannot be gainsaid that the University is an organ of State. It is a public institution through which the State discharges its constitutional obligation to make access to further education realisable.[6] In *Hotz* this Court overturned costs orders

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[3] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138 (*Affordable Medicines*).

[4] *Lawyers for Human Rights v Minister of Home Affairs* (CCT38/16) 2017 ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC).

[5] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC).

[6] Section 29(1) of the Constitution provides:

> "Everyone has the right—

issued by the High Court and the Supreme Court of Appeal in litigation between a university and its students. It was stated:

> "It is now established that the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. UCT is recognised as a public institution in terms of the Higher Education Act. The rationale for this rule is that an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule."[7]

[16] With regard to costs, the Supreme Court of Appeal here held that the *Biowatch* principle did not apply because "no constitutional issues were implicated".[8] And that the case was simply a review under the Promotion of Administrative Justice Act[9] (PAJA) of an administrative decision of the university. This is not correct.

[17] The constitutional issues raised by the case are two-fold. First, a review of administrative action under PAJA constitutes a constitutional issue. This is so because PAJA was passed specifically to give effect to administrative justice rights guaranteed by section 33 of the Constitution. Moreover when the University determined the application for admission, it exercised a public power.

[18] According to jurisprudence of this Court, the review of the exercise of public power is now controlled by the Constitution and legislation enacted to give effect to it. It is not controversial that a review of administrative action amounts to a constitutional issue. In *Pharmaceutical Manufacturers* this Court declared:

(a) to basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

[7] *Hotz v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC).

[8] *Harriellal v University of KwaZulu-Natal* (493/2016) [2017] ZASCA 25 (Supreme Court of Appeal judgment) at para 9.

[9] 3 of 2000.

> "The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. . . Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to the other arms of government and the constraints subject to which public power has to be exercised".[10]

[19] Second, in applying for admission the applicant sought to have access to further education for training that would qualify her to practise medicine. Section 29(1)(b) of the Constitution guarantees her access to further education. Although this provision does not guarantee the right to undertake studies of one's own choice a decision that prevents them from pursuing their chosen studies implicates the right of access to education. The fact that the applicant was admitted into another programme does not change the fact that her access to the relevant institution was limited.

[20] Accordingly, the High Court and the Supreme Court of Appeal should have followed and applied the *Biowatch* principle in determining costs. Their failure to do so warrants intervention by this Court.

[21] In the result the following order is made:

1. Leave to appeal against the merits is refused.
2. Leave to appeal is granted against the orders of the High Court and the Supreme Court of Appeal on costs.
3. The appeal on costs is upheld.
4. The costs orders granted by the High Court and the Supreme Court of Appeal are set aside.
5. No order as to costs is made in relation to proceedings in this Court.

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[10] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 45.

For the Applicant:	Shepstone & Wylie
For the Respondent:	Pather and Pather Attorneys