

**BIOWATCH SHIELD, COSTS
LIABILITY FOR ABUSE OF
PROCESS AND CROSSFIRE
LITIGATION**

***Biowatch Trust v Registrar Genetic Resources*
2009 (6) SA 232 (CC)**

1 Introduction

While costs are traditionally dealt with at the tail end of proceedings and invariably in the concluding segment of a court's judgment, they nevertheless continue to be consequential. This is especially so in respect of how access to constitutional justice is pursued and levered. The outlines of the progressive costs awards jurisprudence in constitutional and public interest litigation are encapsulated in *Biowatch Trust v Registrar Genetic Resources* (2009 (6) SA 232 (CC) (*Biowatch*); see also *Ferreira v Levin* NO 1996 (2) SA (CC), *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)). *Biowatch* established the general proposition that in litigation between the State and private parties seeking to assert a fundamental right, the State should ordinarily pay costs if it loses. The *Biowatch* shield seeks to mitigate the "chilling effects" cost orders could have on parties seeking to assert their constitutional rights – even where unsuccessful. The threat of hefty costs orders may chill constitutional assertiveness. It may deter parties from challenging questionable practices of the State (*Motsepe v CIR* 1997 (2) SA 898 (CC) par 30; *Affordable Medicines Trust v Minister of Health supra* par 138). This is particularly so in a society characterised by disparities in resources and inequality of opportunities. The vindication of fundamental rights is inseparably linked to the transformative process the Constitution envisages. 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. On the other hand, the *Biowatch* principle also permits exceptions and does not go so far as to immunise all constitutional litigation from the risk of an adverse costs order. A worthy cause or worthy motive cannot immunise a litigant from an adverse costs order for abuse of process or engaging in frivolous or vexatious proceedings.

The case note addresses the application of the *Biowatch* principle in respect of cost orders where a public interest litigant has conducted the proceedings in an abusive, vexatious or frivolous manner, as well as in crossfire litigation. The first-tier question that arises is: can a court impose adverse costs awards on a constitutional litigant where a suit is

unmeritorious or there is impropriety in the manner in which the litigation has been undertaken? There is also the delicate issue of costs awards in crossfire disputes. In pith and substance, crossfire disputes involve litigation between a private party and the State, provoked by the latter's failure to perform its regulatory role but adversely affecting the interests of other private parties. In effect, the knotty question is: can adverse costs orders be made against interveners or parties who become involved in proceedings?

2 The problem of abuse of process, frivolous or vexatious litigation

The questions arising from abuse of process (*Beinash v Wixley* 1997 (3) SA 721 (SCA) 34F–G) and frivolous or vexatious litigation (*Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D) 608D; *Lawyers for Human Rights (LHR) v Minister in the Presidency* 2017 (1) SA 645 (CC) par 19; see also s 2(1)(b) of the Vexatious Proceedings Act 3 of 1956) are as inherently murky as malicious prosecution (Okpaluba “Proof of Malice in the Law of Malicious Prosecution: A Contextual Analysis of Commonwealth Decisions” 2012 37(2) *JJS* 65; Okpaluba “Reasonable and Probable Cause in the Law of Malicious Prosecution: A Review of South African and Commonwealth Decisions” 2013 16(1) *PER/PELJ* 241; Okpaluba “‘Prosecution’ in an Action for Malicious Prosecution: A Discussion of Recent Commonwealth Case Law” 2013 13 *TSAR* 236; Okpaluba “Quantification of Damages for Malicious Prosecution: A Comparative Analysis of Recent South African and Commonwealth Case Law (1) (2018) 31(2) *SACJ* 235, (2) (2018) 31(3) *SACJ* 410 and (3) (2019) 32(1) *SACJ* 28). The manner in which a suit is conducted is relevant to the question whether a litigant will be shielded from an adverse costs award and its relevance to constitutional litigation is borne out by the fact that the general approach to costs in proceedings between parties and the State is not unqualified (see *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) par 36). Sympathy for the public interest litigant, by itself, will not relieve the party from the normal obligation to pay costs if the application is frivolous or vexatious or is in any other way manifestly unmeritorious. That could encompass the unusual censure of granting a punitive costs order against a constitutional litigant. Adverse costs awards have been granted against a party whose proceedings are stayed or dismissed on the grounds of being vexatious or frivolous. (In *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) par 82, the Constitutional Court ordered the State to pay the full costs in respect of the SCA proceedings where the State refused to argue the terms of appeal before that court. Chaskalson CJ expressed disapproval of the stance adopted. He commented as follows: “[C]ourts are entitled to expect assistance and not obstruction from litigants in the discharge of their difficult duties. What happened in the present case not only failed to meet the requirement, but also evinced a deplorable lack of respect for the Supreme Court of Appeal.”) Similarly, punitive costs orders have been made against litigants who during the course of the proceedings acted constitutionally inappropriately. (In *Gauteng Gambling Board v MEC*

for *Economic Development* 2013 (5) SA 24 (SCA), the SCA expressed its disapproval for the cavalier conduct of the MEC by mulcting her with special costs – namely, on the attorney-and-client scale. The MEC had employed her statutory powers for an ulterior purpose – namely, to compel compliance with her instruction to accommodate another party. The MEC’s conduct following the launching of the application for interdictory relief – in particular her dismissal of the Board and the subsequent appointment of an administrator while the appeal was pending – merit censure).

While courts are ordinarily loath to grant a punitive costs order in constitutional litigation (*Moutshé Demarcation Forum v President of the RSA* 2011 (11) BCLR 1158 (CC) par 84), in exceptional circumstances, they will not hesitate to do so against a public interest litigant where proceedings have been conducted in an abusive, vexatious or frivolous manner. Such “exceptional circumstances” justifying an adverse costs order were found to exist in *Afri-Forum v Malema* (2011 (12) BCLR 1289 (EqC)). The respondent, a prominent political figure, failed to comply with the directions of the court, and persisted in singing a song knowing the impact it would have on the target group (*Afri-Forum v Malema supra* par 116). The hate speech litigation had its origin in the repeated conduct of Malema whose words in translation drew the target group’s attention to the song. The Equality Court found that the respondent’s moral culpability when measured in this fashion warranted an appropriate costs order against him (*Afri-Forum v Malema supra* par 117). Inasmuch as the ANC was misguided in trying to protect the singing of the song, the court found that it was entitled to express the views of its constituencies (*Afri-Forum v Malema supra* par 114). Because the ANC was not culpable in participating in the proceedings, it was not mulcted with costs.

Another example of an adverse costs order is found in *Kalil NO v Mangaung Municipality* (2014 (5) SA 123 (SCA)). In this case, the appellants unsuccessfully resisted the imposition of higher rates on business properties by the municipality. Relying on *SA Property Owners Association v Johannesburg Metropolitan Municipality* (2013 (1) SA 420 (SCA)), the appellants argued that the required community participation did not take place, a point that the respondent conceded on appeal. Although the appellant did not prevail on the community participation issue, punitive costs were granted against the municipality because of the obstructionist conduct of its officials.

In *Helen Suzman Foundation (HSF) v President of the RSA; Glenister v President of the RSA* (2015 (2) SA 1 (CC)), the Constitutional Court was faced with a situation in which each party had landed some good punches during rounds of High Court and appellate litigation, but neither party had scored a knockout. In the High Court, Glenister’s application was dismissed. In line with the Minister’s application, the High Court also struck out the additional evidence on which his case was predicated. Nonetheless, HSF achieved partial success in that some of the impugned sections were found to be constitutionally invalid, whereas several others were not. HSF was awarded costs. Despite aligning himself with a prevailing party, a punitive

costs order was made against Glenister in respect of the successful striking-out application.

One of the issues that fell to be decided by the Constitutional Court in *HSF v President of the RSA* was the consequential punitive costs order made against Glenister and the failure to award him costs for the successful HSF application. With respect to the conduct of the litigation before the High Court, the court found that Glenister had made scandalous allegations against the government, the ruling party and the SAPS, which were brought for collateral purposes. The High Court could not be faulted for “striking out material amounting to reckless and odious political posturing or generalisation which should find no accommodation or space in a proper court” (*HSF v President of the RSA supra* par 29). In the eyes of the court, “this stereotyping and political narrative is an abuse of court process. A determination of the constitutional validity of the DPCI legislation does not require a resort to this loose talk” (*HSF v President of the RSA supra* par 29).

In rejecting the appeal against punitive costs, the Chief Justice observed:

“Mr Glenister has always been represented by experienced Senior Counsel. And it ought to have been known that no good purpose would be served by the admission of the ‘troubling, alarming and discomfoting’ mass of additional evidence he sought to have the Court admit. This is a manifestly inappropriate and frivolous course to pursue also because, on his own version, it seeks to project the public perception about corruption that was stale news already when *Glenister II* (*Glenister v President of the RSA* 2011 (3) SA 347 (CC)). *Glenister v President of the RSA* 2009 (1) SA 287 (CC) (*Glenister I*) concerned the dissolution of the DSO) was decided. To seek to burden this Court with so many pages of hearsay, opinion, speculative, scandalous and vexatious evidence is conduct that must be discouraged.

In pursuit of an otherwise legitimate constitutional cause of ensuring that there is an adequately independent corruption-fighting agency in this country, Mr Glenister chose to be careless and to overburden the record with an ocean of irrelevancies. The worthiness of his cause should not be allowed to immunise him against an otherwise well-deserved adverse costs order. This Court has not made an order for costs against anyone litigating against the state for a long time and for good reason. If there would ever be a fitting case for a costs order, this is it. In the exercise of this Court’s discretion on costs for the application to strike out the huge volumes of unnecessary evidential material, Mr Glenister must bear ordinary costs in the High Court and in this Court.” (*HSF v President of the RSA supra* par 37–38)

The tricky question arising from *LHR v Minister in the Presidency (supra)* is whether *Biowatch* can shield a constitutional litigant from a punitive costs order where an urgent application was neither frivolous nor vexatious but the way in which the proceedings had been managed was manifestly inappropriate – largely on the grounds of the litigant’s extreme belatedness, and the fact that it targeted an operation that was done and dusted. Also surfacing was the consideration that the constitutional litigant seeking to overturn the adverse costs award had advanced no acceptable basis on which the Constitutional Court could conclude that the High Court exercised its discretion unjudicially. The importance of the third finding, however, overshadows the earlier ones – specifically, the fact that the costs order at issue was unlikely to have a “chilling effect” on future litigation.

The main features of the matrix of facts on the basis of which the High Court exercised its discretion judicially, and upon which there was no basis for the Constitutional Court to interfere, concerned Operation Fiela (Reclaim). (The genesis of the large-scale armed forces operations was the recurrence of attacks on non-South African nationals in 2015. Search and arrest operations were carried out in private homes in the early hours of the morning without warrants. Scores of people were arrested. See also *LHR v Minister in the Presidency supra* par 1.) Six weeks after the Operation had been completed, LHR approached the High Court seeking urgent relief. It was a pre-emptive challenge in the sense that it was directed not only at the constitutional validity of the main operation but at future raids as well. Even though the High Court found that the litigation was not frivolous or vexatious, it had misgivings about the conduct of LHR. It did not express hesitation or reluctance in striking off the application on the basis that bringing it as an urgent matter was gravely inappropriate. It awarded costs on a punitive scale. An appeal against the costs award to the Supreme Court of Appeal was unsuccessful. The appellate court dismissed the leave application with costs.

At the heart of LHR's appeal against the adverse costs award lay two submissions. First, it was submitted that, in determining costs, the court of first instance considered neither *Biowatch* nor *Phillips v SARB* (2013 (6) SA 40 (SCA)). The main plank in the applicant's argument was that the High Court elided *Biowatch* despite the constitutional dimensions of the application. Phrased differently, there was an adverse costs order against a litigant seeking to vindicate constitutional rights. By drawing a close analogy with *Phillips v SARB*, the applicant contended that the High Court exercised its discretion unjudicially or in a manner that warranted interference. *Phillips v SARB* is the authority for the proposition 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. Secondly, the applicant placed great weight on the fact that its constitutional challenge was genuine and non-frivolous. This all pointed distinctly to acceptance that "the application before the High Court may not have been fundamentally misdirected and so unreasonable that merely bringing it counted against LHR" (*LHR v Minister in the Presidency supra* par 22). It could not be ignored that the principal relief that LHR sought raised constitutional questions of overriding significance. Simply put, it was seeking to protect the dignity and privacy of those affected.

On the point of inappropriate conduct of the proceedings, the unanimous bench of the Constitutional Court was in total agreement with the observations of the court *a quo* that "although the issues LHR raised before the High Court may in other circumstances have protected them if they lost the litigation, bringing them six weeks after the Operation – and giving the government respondents barely a day in which to respond – was not just imprudent. It was not proper" (*LHR v Minister in the Presidency supra* par 25). Since LHR did not act frivolously or inappropriately in seeking leave to set aside the High Court costs order, the court held that sparing it a costs order was justified.

Perhaps the most telling example of “manifestly inappropriate” litigation that was “so unreasonable or out of line that it constituted an abuse of process of court” is provided by *Limpopo Legal Solutions v Eskom Holdings Soc Ltd* (2017 (12) BCLR 1497 (CC) (*LLS II*)). The facts in *LLS II* were that Eskom received a telephone call or complaint that there was a loose electricity cable hanging dangerously. It promptly dispatched a technician and later a team of workers to the site. What is noteworthy is that the applicants went ahead with the urgent application despite Eskom’s assurance to them – assurances supported by WhatsApp photographs – that the matter was receiving immediate attention. The question before the High Court was whether the applicants were justified at all in moving the application. Eskom insisted that the applicants had misled the court. It pointed out that the applicants were not candid about urgency. Aggravating their deceitfulness was that they deliberately withheld information from the court that Eskom had already fixed the cable. On any view, this was conduct of “utmost dishonesty” (*Limpopo Legal Solutions v Eskom Holdings* [2017] ZALMPPHC 1 par 23). What the applicants were seeking had in fact already been accomplished. The High Court held that their application was “irrational, ill-thought, capricious and/or superfluous” (*Limpopo Legal Solutions v Eskom Holdings supra* par 43). Another pointer to the extent of impropriety in the manner in which proceedings were conducted is that the applicants insisted on pursuing the litigation eight months down the line (*LLS II supra* par 15). The court at first instance could not be faulted for imposing costs on a punitive scale.

These were the facts that confronted the Constitutional Court on appeal against the High Court costs award. Relying on *Biowatch*, the applicants submitted that the High Court had overlooked that this was a constitutional litigation. It was further submitted that no order as to costs was appropriate because *LLS* was just an unsuccessful public interest litigant vindicating the fundamental right to a safe environment enshrined in section 24 of the Constitution. Eskom resisted the appeal on the grounds that the High Court order, including the costs award, was unassailable. The real gravamen of the submission by the respondent was that there was no constitutional issue at stake, and the costs order was anyhow warranted. Moreover, “the application was dead in the water by the time it was heard and the rule *nisi* discharged – dead, vexatious, and frivolous” (*LLS II supra* par 17). In sum, the court of first instance exercised its discretion judicially to protect its own processes.

With regard to awarding costs against constitutional litigants, the Constitutional Court noted that the High Court was justified in describing the first applicants’ conduct as “irrational, ill-thought, capricious and/or superfluous”. The context of the instant case was distinguishable from *Limpopo Legal Solutions v Vhembe District Municipality* (2017 (9) BCLR 1216 (CC) (*LLS I*)) and *Limpopo Legal Solutions v Vhembe District Municipality* (2018 (4) BCLR 430 (CC) (*LLS III*)). The basis for the Constitutional Court’s merciful intervention in setting aside the adverse costs order in *LLS I* was confusion, not impropriety. It will be recalled in that case that there was justifiable confusion as to whether Vhembe District Municipality or Thulamela Municipality bore the responsibility of fixing the

burst sewage pipe. In contrast, the Constitutional Court in *LLS III* overturned an adverse costs award by the High Court because the court below lumped the first applicant with costs without referring to *Biowatch* at all. In neither *LLS I* nor *LLS III* was there a suggestion that LLS had jumped the gun or behaved egregiously as in the instant case (*LLS II*) in misleading the High Court. The obverse is clear in *LLS II*. Suffice it to say, that the conduct of the applicants here fell without grip through the *Biowatch* safety net. Self-evidently, “the litigation was initiated without good cause. It served no serious purpose or value. And it was entirely unreasonable” (*LLS II supra* par 33).

Turning to the question of the scale of the costs award, the court in *LLS II* relied on *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* (1946 AD 597) and *President of the RSA v Quagliani* (2009 (8) BCLR 785 (CC)) in concluding that there was no basis for intervening in the High Court’s costs award. It is clear from the longstanding Appellate Court principle enunciated in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* that a court may consider it just to award a punitive costs order against the losing party, not just as punishment, but also to protect the successful party against being left “out of pocket”. In *President of the RSA v Quagliani*, Sachs J rebuked the applicant’s lawyer for bringing a last-minute application to postpone the court’s delivery of judgment. (The SCA in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner: Northern Province & Mpumalanga* 2003 (1) SA 373 (SCA) upheld a special punitive costs order against an attorney who conducted himself in a reprehensible manner. The attorney concerned prosecuted a case he had conceded). As a result of the lapse of professional judgement, attorney-and-client costs were awarded against the lawyer. If we go back to the present case, the first applicant actively misled the High Court to secure an interim order. Although it was asserting constitutional rights, its excess of zeal meant that it could obviously not invoke *Biowatch* to escape liability for costs.

It cannot be disputed that the applicant misled and abused the High Court processes. Further, the upshot, in the court’s own words is that

“[i]t 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 responsibly. 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.” (*LLS II supra* par 38)

The arguments that previously assisted the applicant in persuading the Constitutional Court to overturn an adverse or punitive costs order following the dismissal of its urgent application could not be countenanced in this instance. Put concisely, there was no basis to reverse the punitive costs award imposed by the High Court.

But what about costs in the Constitutional Court? The court addressed this by pointing out that, unlike in the court below where the manner in which the applicants conducted the proceedings warranted a punitive costs award, their application in the Constitutional Court was not frivolous or vexatious, or manifestly inappropriate (*LLS II supra* par 43). All these are ways of expressing a conclusion that the Constitutional Court application fell within the generous ambit of *Biowatch*. Consequently, each party was ordered to party its own costs in the apex court.

3 Curtailing Stalingrad defence strategy

Law reports are studded with cases dealing with Mr Zuma's criminal prosecution and related civil proceedings (see for example, the disclosure of transcripts of the conversations recorded in the spy tapes in *DA v Acting NDPP* 2016 (2) SACR 1 (GP); *Zuma v DA* [2014] 4 All SA 35 (SCA) and his opposition to the DA's review application in *Zuma v DA* 2018 (1) SA 200 (SCA); *DA v Acting NDPP* 2016 (2) SACR 1 (GP); *President of the RSA v Office of the Public Protector* [2018] 1 All SA 576 (GP). The seemingly unending litigation is nothing but a manifestation of the high points of Stalingrad tactics that have led to the derailment of the administration of justice. The term "Stalingrad defence", Wallis JA explained in *Moyo v Minister of Justice & Constitutional Development* [2018] ZASCA 100 par 169, "[h]as become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place" (see also *DA v President of the RSA* [2018] ZAGPPHC 836 par 11). In the latter case, the full bench of the North Gauteng High Courts was asked to decide whether the then-sitting President of the RSA, Mr Zuma, should personally bear the costs incurred in his abortive urgent application launched a day before the release of the State Capture Report. The President had belatedly sought injunctive relief to prevent the finalisation and release of the Public Protector Report until such time as he had been afforded a reasonable opportunity to provide input into the investigation conducted by the Public Protector (PP). The President's application provoked a frenzy of activity by way of intervening applications by the EFF, UDM, COPE, DA and Ms Mentoor. Much later, the Minister of Co-operative Governance and Traditional Affairs also joined the fray.

At the stage that the President's application was to be heard, to the consternation of all, he made sudden *volte face*. He abandoned the application and tendered costs on the attorney-and-client scale as well as costs occasioned by the employment of two counsel, where applicable (*President of the RSA v Office of the PP supra* par 3). The case advanced by the intervening parties that the President should personally be mulcted with costs proceeded on the footing that he conducted litigation in a manner unbecoming of a reasonable litigant. The charge of unreasonable conduct flowed from the fact the President continued with litigation when it was apparent to all parties that the Office of the PP had filed an affidavit on 14 October 2016 confirming that the investigation had been finalised and the report signed (*President of the RSA v Office of the PP supra* par 33). There

was no gainsaying that the proceedings ought to have been discontinued in light of the President's statement "in his answer to the DA's application, that if the investigation was finalised and the report signed, then the report had to be released" (*President of the RSA v Office of the PP supra* par 33). In brief, the foundational premise of the President when he launched his application was effectively obliterated as soon as the investigation was finalised and the report signed (*President of the RSA v Office of the PP supra* par 34 and 37).

The court brushed aside the President's reliance on a typing error or the possibility thereof. The record clearly established that the President's assertion of a typing error was an attempt to bolster his quest for amended relief (*President of the RSA v Office of the PP supra* par 43). Even so, the path to the amended relief was destined to fail. It seemed paradoxical that the amended relief the President sought was to review administrative action without following the mandatory Rule 53 or the Promotion of Administrative Justice Act 3 of 2000. The reason, as the court pointed out, was that "he sought to review and set aside the report without it being released" (*President of the RSA v Office of the PP supra* par 43). The requirement that a decision subject to review must be final is a familiar legal filter that serves to eliminate certain moot questions from being adjudicated (*MEC for Education: KZN v Pillay* 2008 (1) SA 474 (CC) par 30–35). In other words, "there can clearly be no review and setting aside of administrative action without the impugned decision being final and in the absence of the record underpinning that decision" (*President of the RSA v Office of the PP supra* par 43). Invoking *Gauteng Gambling Board v MEC for Economic Development*, Mlambo JP made the point that it was impermissible to award a simple punitive costs order because that would make the taxpayer carry the burden. The context of the litigation that the President had initiated called for a sterner reprimand. Not only had he no acceptable basis in law and in fact to have persisted with the litigation, "the President's conduct amounted to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector" (*President of the RSA v Office of the PP supra* par 47).

Undoubtedly, it must have occurred to the President that there was no basis whatsoever for continuing further with litigation – hence in vain the decision to withdraw the application at the eleventh hour and tender costs. The critical findings are elaborated as follows:

"The President's persistence with the litigation in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounts to objectionable conduct by a litigant and amounts to clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to mulct the culpable litigant with a punitive costs order." (*President of the RSA v Office of the PP supra* par 46)

It is hard to disagree with the ultimate conclusion that the former President was unreasonable and a reckless litigator:

“[t]he President persisted with litigation and forced the intervening parties to incur costs in circumstances when this should and could have been avoided as well as delaying the release of the report. In so doing he clearly acted in flagrant disregard for the constitutional duties of the Public Protector. What is also aggravating is the fact that the President’s application was based on self-created urgency. Simply put, the President had become aware some six (6) months before his abortive application that the Public Protector was in possession of complaints implicating him in serious misconduct and he did nothing when he was invited for comment.” (*President of the RSA v Office of the PP supra* par 49)

In the circumstances, the President’s cavalier attitude to litigation compelled a determination that he must personally bear the costs that were occasioned from 14 October 2016. Beyond the question of costs reinforcing the norm of accountability (Okpaluba “The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law” 2018 33 *SAPL* 1; Okpaluba “Delictual Liability of Public Authorities: Pitching the Constitutional Norm of Accountability Against the ‘Floodgate’ Arguments” 2006 20(2) *Speculum Juris* 248), *President of the RSA v Office of the PP* has broader implications for the administration of justice. The salient feature of litigation involving the former President has been inordinate delay, extending over a decade. The fact the President incurred personal liability for costs would, it is submitted with respect, provide a strong incentive to securing finality. The imposition of a punitive personal costs order curtails Stalingrad strategy. It is to be hoped that the prospects of excessive delays are thereby much reduced. But the history of the President’s proceedings (*NDPP v Zuma* 2009 (2) SA 277 (SCA) par 2; *Zuma v DA* 2018 (1) SA 200 (SCA) par 1), and their cumulative delay, persuades one of the need to provide an incentive, indeed something of a goad, to progress. In this regard, *President of the RSA v Office of the PP* represents a cautionary tale to public officials litigating in their representative capacity.

4 Costs awards in crossfire litigation

One is here concerned with cases where the State is required to perform a regulatory role, in the public interest, between competing private parties. The balancing of competing claims on the purse and the allocation of resources is guided by the applicable statutory or regulatory framework. The ranges of issues envisaged include, among others, competition law matters (*Competition Commission of SA v Senwes Ltd* 2012 (7) BCLR (CC); *Minister of Economic Development v Competition Tribunal* [2012] ZACAC 2), environmental law (*Earthlife Africa (Cape Town) v DG, Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C)), restitution of land rights claims (*Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth & Community Restoration Association* 2007 (2) SA 531 (CC)), and public procurement (*Minister of Finance v Gore* NO 2007 (1) SA 112 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)). A crossfire dispute in this context turns on matters involving litigation between a private party and the State, with radiating impact on other private parties (*Biowatch supra* par 28). In effect, matters challenging the constitutionality of government action or omission, presented for

adjudication by an aggrieved private party, will naturally implicate a number of private parties with vested interests in the outcome of the dispute. Regardless of the number of private litigants embroiled in the controversy, the proceedings cannot be characterised as between private litigants. The significant factor here is that it was primarily the failure of state functionaries to fulfil their constitutional and statutory responsibilities that spawned the litigation and forced both opposing private parties come to court.

Costs awards in crossfire disputes appropriately capture the intractable problem of location of risk of costs where opposing private parties are embroiled in a contest as a result of the State's failure to fulfil its statutory and constitutional obligations. The crisp question is: who should shoulder the costs incurred by a successful party where the State's conduct provoked the litigation in the first place? Broadly speaking, the determination of costs awards in crossfire constitutional proceedings underlines the constitutional tri-norms of accountability, responsiveness and openness that are foundational to constitutional democracy. Also surfacing on the horizon is the pervasive issue of governmental liability (Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (2010)).

Sachs J came face to face with the problem of costs awards in crossfire disputes where an organ of state was sued for its failure to perform regulatory functions regulating competing claims between private parties. The High Court had declined to accord preferential treatment to Biowatch notwithstanding that the latter was a predominantly prevailing party in a manifestly meritorious suit. Biowatch had obtained an order allowing it access to crucial information whose release Monsanto had vigorously resisted (*Biowatch supra* par 33 and 37). Biowatch's application also raised constitutional issues of enormous import, transcending the immediate interests of the parties involved – namely, the State, Monsanto and itself (*Biowatch supra* par 57). The High Court decision with respect to cost was anomalous in the sense that, on the one hand, it held that the State should not be saddled with costs incurred by the prevailing party while, on the other hand, it mulcted Biowatch with costs incurred by Monsanto. By the time the High Court judge disposed of costs in the case at bar, the guidelines set out in *Affordable Medicines Trust v Minister of Health* were already well entrenched. It bears repeating that in litigation between government and a private litigant seeking to vindicate fundamental rights, the accepted approach is that if government loses, it should pay the cost of the prevailing party, and conversely, if the government prevails, each party should bear its own costs.

The Constitutional Court found that the form of Biowatch's request for information, although lacking in precision, did not warrant decisions made by the High Court with regard to costs. The reasoning of the High Court judge displayed a lack of appreciation of the constitutional dimensions of the suit. Biowatch had raised an important and arguable constitutional issue. It also achieved a measure of success as it not only dealt with a number of preliminary objections aimed at keeping it out of court altogether, but prevailed with regard to the majority of information it sought (*Biowatch supra* par 37). In this regard, the learned judge's "failure to expressly locate costs

awards in constitutional setting must raise serious doubt as to the weight, if any, given to the constitutional context” (*Biowatch supra* par 41). Sachs J expressed the point as follows:

“The Constitutional issues were implicated in two ways. The applicant was pursuing information in terms of a right conferred by section 32 of the Constitution, and the information sought concerned environmental rights protected by section 24 of the Constitution. The government’s duty was to act as impartial steward, and not to align itself with parties seeking access to it. It was important that objectivity not only be present, but be seen to be present in circumstances where the information related to the question of general public interest and controversy, and there was no lawful ground to withhold it. This required objectivity and distance in respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution, as ultimately given effect to by PAIA ... In these circumstances rule of law considerations would require the government to be astute to act in a way which would encourage parties who have strong and diametrically opposed opinions to submit themselves to the regulated and rational balancing of interests provided for by the Constitution and PAIA.” (*Biowatch supra* par 45)

A costs review in favour of Monsanto entailed the *Biowatch* court having to address the threshold question of location of risk of costs in an extra-curial battle between opposing private litigants triggered by the State’s failure “to grasp the nettle and draw an appropriate line between information to be disclosed and information to be withheld” (*Biowatch supra* par 33 and 37). In the present case, neither *Biowatch* nor Monsanto acted badly. Monsanto as the intervening party was within its right to join the proceedings in order to protect information furnished by it that fell within the purview of confidential information. In intervening, Monsanto was prompted by the failure of the regulatory body to expeditiously and neatly deal with applicant’s requests for information. That the intervening party was vexed by *Biowatch*’s application for access to its information is to be expected, but that does not suggest that the application was conducted in a frivolous, vexatious, or constitutionally inappropriate manner (*Monsanto SA (Pty) Ltd v Bowman Gilfillan* [2011] ZACAC 5). The overriding consideration was protection of its interests. Considering that this was a mixed result case, no costs order should have been made between the private parties involved. The High Court’s order that *Biowatch* pay Monsanto’s costs is untenable and fell to be set aside. In a mixed result case, where neither party has acted badly, the determinative factor in resolving costs is to locate the risk at the correct door. Put differently, it starts with the recognition that it was the failure of the state functionaries to fulfil their constitutional and statutory responsibilities that triggered the litigation and obliged both parties to come to court.

The solution to the costs conundrum in crossfire litigation in which private parties in adversarial positions were engaged, not to settle a legal dispute between themselves, but in relation to determining whether the State had appropriately shouldered its constitutional and statutory responsibilities can be articulated as follows: the State should be saddled with costs incurred by the prevailing litigant, and ordinarily there should be no adverse costs orders against any private parties who were forced to enter the fray (*Biowatch supra* par 56. See also *Hamiltonians for Progressive Development v City of Hamilton* [2014] ONSC 420 par 8–10).

The case of *Walele v City of Cape Town* (2008 (6) SA 129 (CC)) is instructive of the sort of dispute between private parties that is compounded by the authorities' failure to fulfil their regulatory responsibilities. The applicant sought to review a decision of the municipality to approve building plans. The effect of the applicant's successful review was that the decision was set aside and referred back, adversely affecting the rights of the citizens that sought the approval of the building plans. The City Council as the body responsible for dealing with the proposed plans and objections made to them was mulcted with costs.

Also informative is the case of *Fuel Retailers Association of SA v DG Environmental Management* (2007 (6) SA 4 (CC)), in which the contest was essentially between the applicant and the authorities and the respondents. The case concerned the review and setting aside of the decision of the DG under section 22 of the Environment Conservation Act 73 of 1989 to grant the necessary authorisation for the construction of a filling station. The High Court and the Supreme Court of Appeal had dismissed the application. In setting aside the decision of the SCA, the majority held that the authorities had misconstrued the nature of their obligations and as a consequence had failed to comply with a compulsory and material condition prescribed by the law for granting authorisation to establish a filling station. With respect to costs, the Constitutional Court held that costs should follow the event. Therefore, the trust and its trustees must not be saddled with costs. They intervened and opposed the matter in order to safeguard their interests. It is these respondents who should pay the costs of the applicant while the remaining respondents who opposed the matter should look after their own costs.

5 Conclusion

The preferential treatment of costs in constitutional litigation is not a licence for litigants to institute frivolous or vexatious proceedings against the State. Even where litigation is aimed at asserting constitutional rights, if a litigant is guilty of unbecoming behaviour in relation to how proceedings are conducted, it may be mulcted with costs. The interplay between abuse of process, frivolous or vexatious proceedings and Stalingrad defence tactics demonstrate that, where an unsuccessful party has lowered its ethical and professional standards in pursuit of a constitutional cause, such a litigant would not be entitled to rely on *Biowatch* to escape liability for costs – not even a punitive costs order. The imposition of a punitive personal costs order may serve to inhibit a resort to Stalingrad defence strategy. In costs awards in crossfire litigation, triggered by a failure of state functionaries to fulfil their constitutional and statutory responsibilities, it follows that the State should be saddled with costs incurred by the prevailing litigant, and ordinarily there should be no adverse costs orders against any private parties who were entangled in litigation.

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