Article

Recent Developments Regarding Costs Awards in Constitutional and Public-interest Litigation

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Abstract

This contribution examines the contours of costs jurisprudence since the foundational trilogy of *Ferreira v Levin NO* 1996 (2) SA (CC), *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) and *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC). Given that the general rule is not to award costs against unsuccessful litigants when they are litigating against state parties, the first stage of enquiry asks whether the case raises a public interest matter of transcendental importance. The second stage of enquiry delves into the impact that adverse costs orders might have on litigants seeking to vindicate constitutional rights. The last stage of enquiry considers the knotty question concerning personal costs awards against public officer-holders for conduct at variance with the Constitution. The signposts that emerge from evolving case law is that if an unsuccessful party lowered its ethical and professional standards in pursuit of a constitutional cause, such party may be mulcted with costs. It is trite that courts will not hesitate to exercise discretion to impose adverse costs, and specifically hold public representatives personally liable for costs in order to reinforce the constitutional tri-norms of accountability, responsiveness and openness.

Keywords: costs awards; public-interest; constitutional litigation; personal costs orders; accountability, responsiveness and openness.

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Introduction

Costs awards are inherent in constitutional litigation. However, they are less studied and expositions of trends towards the development of coherent costs-awards jurisprudence are strangely neglected in the scholarly literature.[1] Costs hardly hold the allure that the decisions on the merits do. Decisions on the merits lie at the heart of the master narrative that shape constitutional adjudication; by way of contrast, costs orders describe the tail-end of judgments. In the usual case, the allocation of costs takes up a relatively insignificant portion of the court's judgment,[2] whereas the court's opinion on the merits may span hundreds of pages.[3] If public-interest litigation is the reigning queen at Constitution Hill, then costs awards embody the lesser majesty of the lower nobility at the Constitutional Court.[4] This article seeks to isolate some of the difficult and interesting questions concerning costs awards in constitutional and public-interest litigation. The first line of enquiry to be considered is the constitutional import of the dispute. The second line of enquiry focuses on the impact that adverse costs orders might have on litigants seeking to vindicate fundamental rights. The third line of enquiry entails asking whether and under what circumstances public officer-holders should be held personally liable for costs arising from conduct discordant with the requirements of the Constitution.

Genesis of the Revolutionary Trend in Costs Jurisprudence

In the well-known case of *Ferreira*, the Constitutional Court endorsed the long-standing High Court and Appellate Division principles on costs awards by stating that costs are in the discretion of the court.[5] In general, the unsuccessful party must bear the costs.

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1 For a contemporary exposition see Max du Plessis, Glen Penfold and Jason Brickhill, *Constitutional Litigation* (Juta 2013) chapter 'Costs'; Siyambonga Heleba, 'Mootness and the Approach to Cost Awards in Constitutional Litigation: A Review of *Christian Roberts v Minister of Social Development* Case No 32838/05 (2010) (TPD)' (2012)15(5) Potchefstroom Electronic LJ 62; Rosaan Kruger, 'The Buck Stops Here: Eastern Cape High Court and Cost Orders in Litigation Against Organs of State' (2011) 25(1) Speculum Juris 72.

2 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) (Biowatch) para 38; *Competition Commission of SA v Pioneer Hi-Bred International Inc* 2014 (2) SA 480 (CC) paras 47–48.

3 A tome of 500 pages: *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (*Doctors for Life*) judgment tests the intestinal fortitude of even the most avid reader.

4 The appellate courts have rarely grappled with the issue of costs in the more expansive manner of *Ferreira v Levin NO; Vryehoek v Powell* 1996 (2) SA 621 (CC) (*Ferreira*); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) (*Affordable Medicines*); *Biowatch*; *Glenister v President of the RSA* 2013 (11) BCLR 1246 (CC); *Justice Alliance of SA v Minister of Safety & Security* 2013 (7) BCLR 785 (CC) (*Justice Alliance of SA II*) and *Helen Suzman Foundation v President of the RSA* 2015 (2) SA (1) (CC) (*HSF*); *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing* 2015 (4) BCLR 396 (CC) (*Tebeila*).

5 *Trencon Construction (Pty) Ltd v IDC SA Ltd* 2015 (5) SA 245 (CC) paras 83–89 and *NDPP v Zuma* 2009 (2) SA 277 (SCA) para 82.

The case of *Affordable Medicines* represents a milestone in the developmental journey of coherent costs jurisprudence in public-interest litigation. *Affordable Medicines* held that, as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be mulcted with costs. In simple terms, *Affordable Medicines* established that in litigation between the state and a private party seeking to assert a constitutional right, if the government does not prevail, it should pay the costs of the other side, and if the government prevails, each party should bear their own costs.[6]

The consolidation of a progressive trend in costs allocation in constitutional litigation reached a high-water mark in *Biowatch*.[7] The *Biowatch* principle postulates that in litigation between the state and private parties seeking to secure a constitutional right, the state should ordinarily pay the costs if it loses.[8] That rule applies in every constitutional matter involving organs of state. The principle 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 awards might have on litigants seeking to vindicate fundamental rights. It is enough to note that there must be cogent reasons for a court not to award costs against the state in favour of a victorious litigant in constitutional litigation.[9]

However, the principle is not a licence for litigants to pursue unmeritorious, frivolous or vexatious proceedings against the state. A refusal to award costs in favour of a prevailing party may be justified. If litigation is frivolous or vexatious, or in any other way manifestly inappropriate, the constitutional litigant should not expect that the worthiness of its cause will insulate it against an adverse costs award. In essence, the *Biowatch* shield applies unless a litigant is guilty of unethical behaviour in the conduct of proceedings. In such cases, a litigant may be mulcted with costs. Put simply, there are exceptions to the rule which may justify a deviation from it.[10]

Constitutional Test Question

The proposition that in constitutional litigation a court can depart from the normal rule that costs follow the event by insulating an unsuccessful party from liability for costs depends on whether the case raises a matter of constitutional import.[11] The first-tier question can also be answered by stating that the dispute concerned an issue of public

6 *Affordable Medicines* (n 4) para 138.
7 *Biowatch* (n2).
8 Paragraph 23.
9 Paragraph 24.
10 *Affordable Medicines* (n 4) para 138.
11 See, for example, *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC); *Motsepe v CIR* 1997 (6) BCLR 692 (CC) para 30; *Chonco v Minister for Justice and Constitutional Development* 2010 (6) BCLR 511 (CC) para 47; D*epartment of Land Affairs v Goedelegen Tropical Fruits (Pty)* 2007 (6) SA 199 (CC); *Kwalindile Community v King Sabata Dalindyebo Municipality* 2013 (6) SA 193 (CC).

interest transcending the immediate interest of the named parties, and which have not been previously resolved.[12] This proposition has sometimes been expressed by saying that the applicant had urged the court in constitutional issues of great moment that go to the very heart of constitutional democracy.[13] It is furthermore, a matter of substantial complexity in uncharted terrain.[14] In cases where a litigant has raised a novel constitutional issue and prevailed, then costs will follow the event.[15]

The facts and ambit of *Harrielall* illustrate that the lower courts are yet to embrace the *Biowatch* principle.[16] In the aftermath of a second unsuccessful attempt at gaining admission into the medical programme, the applicant launched a review application in the High Court to set aside the decision of the university.[17] At the core of the applicant's case on review was that the university had failed to consider and apply its own admission policy in declining to admit her to the medical programme. The applicant lost at first instance with costs. Undeterred, she appealed to the Supreme Court of Appeal (SCA),[18] but her appeal was dismissed with costs. The central question before the Constitutional Court was whether, in determining the costs orders, the High Court and SCA should have followed *Biowatch*.

Turning to the merits, the Constitutional Court agreed with the court of first instance and endorsed the appeal court decision that the application must fail as it bore no prospects of success. It was clear that the relevant policy was invoked in determining the applicant's request for admission.[19] Her admission failed because she contested for a place against candidates with superior credentials. Accordingly, it was noted on the facts that those who were selected for the limited number of places had scored more points due to their better qualifications. In short, there was a proper and fair application of the admission policy, the validity of which was not contested in the proceedings.[20]

The reasoning of the High Court and the SCA in departing from the *Biowatch* principle did not commend itself to the Constitutional Court. In its judgment the High Court did not allude to *Biowatch*; rather, it applied the ordinary rule that costs must follow the

12 *Armbruster v Minister of Finance* 2007 (6) SA 550 (CC); *Mohamed v President of RSA* 2001 (3) SA 893 (CC); *Union of Refugee Women v Private Security Industry Regulatory Authority* (2007) 28 ILJ 537 (CC).

13 *Doctors for Life* (n 3) para 222.

14 *National Commissioner: SAPS v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC) para 30. See also *Afri-Forum v Malema* 2011 (12) BCLR 1289 (EqC) para 117.

15 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

16 *Harrielall v UKZN* 2018 (1) BCLR 12 (CC).

17 Paragraphs 5–6.

18 Paragraph 7.

19 Paragraph 9.

20 Paragraph 9.

result and the losing party must bear the costs of the successful party.[21] There were no exceptions justifying deviation from the *Biowatc*h rule. The university is a recognised public institution under the Higher Education Act 101 of 1997, through which the state discharges its constitutional obligations to make access to education. The High Court applied an incorrect principle in the exercise of a discretion. In the circumstances there were justifiable grounds for interfering with the costs order on appeal.

Despite the case implicating a review under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') of an administrative decision of the university, the SCA held that *Biowatch* was inapplicable because 'no constitutional issues were implicated'.[22] This was erroneous, because the review of the exercise of public power is now controlled by the Constitution and legislation enacted to give effect to it. Two constitutional issues were implicated. First, a review of administrative action under PAJA constitutes a constitutional issue. Besides, when the university considered and pronounced on the application for admission, it exercised a public power.[23] Second, in applying for admission, the applicant was exercising her constitutional right of access to further education. The fact that the applicant was admitted into another programme did not alter the fact that her access to the relevant institution was restricted.[24] The failure by the High Court and SCA warranted intervention by the Constitutional Court.[25] In the result the adverse cost awards were reversed. It is submitted, with respect, that justice required that the applicant should not be out of pocket as a result of recourse to legal proceedings.

Service Delivery Migraine

The case of *Limpopo Legal Solutions III*[26] illuminates 'a disturbingly dark side to the often-stated miracle of a constitutional democracy'.[27] In essence, *Limpopo Legal Solutions III* is a different side of the same degrading sanitation coin that culminated in the tragic loss of life in *Komape*.[28] LLS represented residents in remote rural areas who

21 Paragraph 10.

22 *Harrielall v UKZN* [2017] ZASCA 25 para 9. *Contra: Trustees of the Simcha Trust v Da Cruz* [2018] ZACC 8 para 19; *Giant Concerts 2CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) para 27.

23 *Harrielall* (n 22) para 17.

24 Paragraph 18.

25 Paragraph 30.

26 *Limpopo Legal Solutions v Vhembe District Municipality* 2018 (4) BCLR 430 (CC) (LLS III). See also *Limpopo Legal Solutions v Vhembe District Municipality* 2017 (9) BCLR 251 (CC) (LLS I) and *Limpopo Legal Solutions v Eskom Holdings Soc Ltd* 2017 (12) BCLR 1497 (CC) (LLS II).

27 Per Van der Westhuizen J in *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para 2.

28 *Komape v Minister of Education* [2018] ZALMPPHC 18, concerned the tragic demise of a young boy who fell into a pit toilet situated on the school premises.

are often lamentably under-served by local and provincial government.[29] There can be no disputing that the constitutional litigant was acting genuinely in the public interest when it approached the High Court seeking an order declaring the district and local municipalities' failure to take reasonable steps to provide sanitation to residents was unlawful, inconsistent with Constitution.[30] It also sought an order compelling the municipalities to take all reasonable steps to provide each affected resident with reasonable access to a toilet facility. Relying on *Lawyers for Human Rights*,[31] the High Court held that the applicant 'was not genuinely acting in the public interest, and that, therefore, it had no standing derived from section 38(*d*) of the Constitution'.[32] It also found that the application was not urgent because it could have been brought much earlier.[33]

Zondo J found that the court of first instance had no proper basis for its conclusion that the proceedings were not in the public interest as envisaged by section 38(*d*).[34] It was obvious from even the orders that the applicant sought in the court below that it was genuinely acting in the public interest.[35] On the aspect of costs, the High Court overlooked the *Biowatch* principles by simply adopting the conventional approach that costs follow suit. It should not have mulcted the applicant with costs. As a result, the decision with respect to costs was overturned.

Limpopo Legal Solutions I is an aberration not only in that adverse costs were awarded, but also that they were punitive – on an attorney-and-client scale. In pith and substance, *Limpopo Legal Solutions I* is a variation of the same service-delivery headache in a rural area 'plagued by violent service delivery protests in the recent past'.[36] In this matter, Limpopo Legal Solutions (LLS) had approached the High Court urgently and without prior warning to the responsible authorities, Vhembe District and Thulamela municipalities that sought a final interdict directing all or any of the public entities to dispatch a team of contractors immediately to fix burst sewage pipeline(s).[37]

Vhembe vigorously opposed the application. It insisted that the sewage spillage came to its attention for the very first time when the applicants served their urgent application

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29 *Tebeila* (n 4) para 15.
30 *LLS III* (n 26) para 3.
31 *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para 18.
32 *LLS III* (n 26) para 15.
33 Paragraph 16.
34 Paragraph 12. See also Chuks Okpaluba, 'Standing to Challenge Governmental Acts: Current Case Law Arising from South Africa's Constitutional Experiment' (2002) 1(2) Speculum Juris 208 and Chuks Okpaluba, 'Constitutionalisation of Standing in Public Adjudication: Some Sundry Issues' (2003) 17(1) Speculum Juris 31.
35 *LLS I* (n 35) para 12.
36 *Limpopo Legal Solutions v Vhembe District Municipality* [2016] ZALMPTHC 20 para 9.
37 *LLS I* (n 35) paras 4–5 and 7.

on it. Had the applicants alerted it to the foul-smelling mess afflicting the community through normal channels, the problem would have been attended to within 48 hours.[38] Put simply, to get the municipality to attend to the sewage leak required a simple telephone call – not urgent court proceedings. It followed that the applicants had no justification for rushing precipitately to litigation. Furthermore, the constitutional litigants did not meet the usual requirements for an interdict. There were alternative remedies at their disposal – reporting the leak to their ward councillor or to the local authority, for instance.

Vhembe conceded that the applicants could not be faulted for asserting the constitutional and statutory rights but maintained that they acted manifestly inappropriately by bringing the application without first alerting it to the problem.[39] This was an abuse of process that went beyond even what the Constitutional Court censured in *Lawyers for Human Rights*.[40] Vhembe built on these propositions by arguing that the punitive costs order was justified. The district municipality was entangled in a legal battle launched without prior notice: an abuse of process that warranted the censure the High Court imposed.[41]

In the face of the High Court's punitive costs award and Vhembe's spirited submissions in support of it, the applicants contended that they deserved a preferential costs treatment in accordance with *Biowatch* principles, because their application was neither frivolous nor vexatious. After all, LLS pointed out, the application concerned important health and environmental rights.[42] The repercussions of the dismissal of their application were negated by the fact that they were nevertheless successful. This was because, Vhembe conceded in its report filed with the High Court, 'there was a blockage of sewer system [that] could be unblocked fairly quickly'.[43] This squared with LLS's argument overall that *Biowatch* principles pointed to a different result – namely, that far from mulcting them with punitive costs, the High Court should have ordered Vhembe to pay their costs.[44] Differently put, it was unreasonable for the court of first instance to deviate from *Biowatch*.

So while the High Court was correct in dismissing the application, the Constitutional Court found that it misdirected itself by invoking the non-constitutional route to costs in a case entailing an assertion of fundamental rights.[45] Consequently, the court of last resort was entitled and obliged to reconsider the punitive costs award. Granted, the High

38 Paragraphs 14 and 24.
39 Paragraph 13.
40 Paragraph 13.
41 Paragraph 15.
42 Paragraph 11.
43 Paragraph 12.
44 Paragraph 12.
45 Paragraph 20.

Court was dealing with the burdensome exigencies of a crowded urgent roll, compounded by the unfocused manner in which the litigation was conducted; nonetheless, there was justifiable confusion as to which municipality was responsible for fixing the burst pipe.[46] Rather than Thulamela directing the applicants to Vhembe, where they should have reported the matter, they were given misleading assurances by the former that a team would be dispatched shortly to look into the problem.[47] Hence the problem remained unfixed. During that time, 'the individual applicants and their fellow residents continued to endure the noxious foul-smelling, health-threatening mess the sewage spillage inflicted on them'.[48]

Procedural mishaps and missteps aside, the applicants were deserving of a measure of leniency from the court below.[49] This rendered an adverse costs order inappropriate and more so one on a punitive order scale.[50] The High Court's punitive costs determination was also vulnerable to attack on another front. There was neither mention of 'clear and indubitably vexatious and reprehensible conduct'[51] nor an explanation of conduct that demands 'extreme opprobrium'.[52] On the contrary, everything pointed to the applicants' 'high anxiety to get the sewage spill fixed – an anxiety every one of us should be able to understand.' Once it is accepted that the dispute implicated fundamental rights, *Biowatch* unavoidably determines in practical ways judicial discretion on costs. In short, 'an adverse costs order should not have been imposed, still less a punitive costs order. The just and fair outcome is that each party must pay its own costs in the High Court.'[53]

Student Discontent and Campus Protest Movements

Hotz [54] and *Ferguson* [55] represent widespread student protests in higher-learning institutions of recent vintage. The former was a sequel to '*#Rhodes Must Fall'* and *'#Fees Must Fall*' student protests at the University of Cape Town in pursuit of the realisation of the supreme objective of free education.[56] In the latter, Rhodes University students' campaigned to highlight the issue of a rape culture and gender-based violence. While the movements addressed issues that were 'deeply emotional, relevant and

46 Paragraph 25.
47 Paragraph 26.
48 Paragraph 26.
49 Paragraph 27.
50 Paragraph 33.
51 Paragraph 31.
52 *Plastic Converters Association of SA v NUMSA* (2016) 37 ILJ 2815 (LAC) para 46.
53 *LLS I* (n 35) para 33.
54 *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC).
55 *Ferguson v Rhodes University* 2018 (1) BCLR 1 (CC).
56 Rebecca Davis, '#ANCdecides2017 Newsflash: President Zuma Announces Free Higher Education for Poor Students**'** **(***Daily Maverick* 16 December 2017) <https://www.dailymaverick.co.za/.../2017-12-16-ancdecides2017-newsflash-president> accessed 16 December 2017.

challenging',[57] they soon morphed into conduct that made serious encroachment on the rights and liberties of others.[58] Naturally, the university authorities were prompted to obtain urgent interim interdicts against those involved in campus protests. *Hotz* and *Ferguson* implicated the students' rights countrywide, especially the rights to education, freedom of expression, assembly, demonstration, picket and petition as well as the right to freedom of association. The common thread between the cases concerned the applicants' complaint about the High Court's failure to exercise judicial discretion when mulcting them with costs in spite of their partial success in limiting the relief sought against them. In short, the focal question confronting the Constitutional Court was whether the costs orders of the High Court and the SCA warranted interference?

The nub of the *Hotz* applicants' complaint was that while they were unsuccessful, the High Court should have considered the chilling effect the costs order would have on the litigants in the context of access to constitutional justice.[59] The Constitutional Court agreed. The narrowing of the High Court order signified not only that the applicants were not frivolous or vexatious but also the measure of success. Given that the court *a quo* did not exercise its discretion judicially, the adverse costs award had to be overturned.[60] Since the applicants achieved mixed success, each party was ordered to bear its own costs.[61]

In *Ferguson*, the High Court remarked that the applicants were fortunate to avoid being mulcted with costs on account of the shifting nature of their evidence.[62] Although the *Ferguson* High Court granted a costs order that is consonant with *Biowatch*, it invoked the criterion of fairness in making its determination on costs. According to Kollapen AJ, to the extent that it premised its order on the consideration of fairness alone this constituted an error on its part even though the result arrived at was the same.[63] The parties were content as to the costs determination. However, the quandary as to costs emerged in the application for leave to appeal.

Beyond the appropriateness of the High Court decision on costs in the application for leave to appeal, the crucial enquiry is how its findings in the main judgment can subsequently justify an adverse costs award. The crisp question is this: If those findings did not justify an adverse costs order in the main application, how could they now be invoked to justify an adverse costs award in the application for leave to appeal? As there was no suggestion that the leave application was frivolous, vexatious or brought in bad

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57 *Rhodes University v Students Representative Council of Rhodes University* [2017] 1 All SA 617 (ECG).

58 *Hotz* (n 54) paras 1, 5 and 31–32; *Ferguson* (n 55) paras 4–5.

59 *Hotz* (n 54) para 34.

60 Paragraph 37.

61 Paragraph 40.

62 *RU v SRC of RU* (n 57) para 157.

63 *Ferguson* (n 55) para 24.

faith, 'one is left speculating what those findings are and whether they justify a departure from the *Biowatch* principle.'[64] It followed that the discretion as to costs was not properly exercised. The parties were ordered to pay their own costs in both the application for leave to appeal in the High Court and in the SCA.

Reinforcing the Constitutional Tri-Norms of Accountability, Responsiveness and Openness

The *Black Sash/SASSA* litigation accentuates the importance of ensuring that organs of state and public officials observe fundamental rights and act both ethically and accountably.[65] It needs to be emphasised that the failure of the South African Social Security Agency (SASSA) and the former Minister of Social Development to ensure a seamless transition to a new payment system threatened the constitutional rights of a large number of vulnerable persons in 'an area of governmental responsibility closely related to human dignity'.[66] The lack of diligence on the part of the social grants agency in relation to its preparation for the transition on payment of social grants, since the tender awarded to Cash Paymaster was declared invalid in 2013,[67] turned into a perennial headache for the Constitutional Court. Illustrative are controversial 11th-hour urgent applications for the extension of an unlawful contract that was declared invalid.[68] The only irresistible inference was that SASSA wished to 'force' the Constitutional Court to grant it a further extension of suspension invalidity,[69] similar to what had transpired in 2017.[70]

The logic behind the establishment of SASSA[71] was primarily to eradicate the bureaucratic bungling in the processing of social grants following the creation of a new national and provincial system for administering and paying social grants after 27 April 1994. The administrative torpor in processing of social grants was pronounced in the

64 Paragraph 26.

65 In this regard the remarks of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 133, remains apposite.

66 *Mashavha v President of the RSA* 2005 (2) SA 476 (CC) para 51.

67 *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO: SASSA* 2014 (1) SA 604 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO: SASSA* 2014 (4) SA 179 (CC). See also Patrick Osode, 'Remedial Interventions in Public Procurement Process: An Appraisal of Recent Appellate Jurisprudence in Search of Principles' (Inaugural Lecture delivered at University of Fort Hare 2013) <http://tinyurl.com/jherbhq> accessed 20 December 2013; Meghan Finn, '*Allpay* Remedy: Dissecting the Constitutional Court's Approach to Organs of State' 2016 Constitutional Court Review 13.

68 *SASSA v Minister of Social Development* [2018] ZACC 26 (*SASSA*) para 18; *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) (*Black Sash I*) para 21; *Black Sash Trust v Minister of Social Development* [2017] ZACC 20 (*Black Sash II*) para 20.

69 *SASSA* (n 68) para 2.

70 *Black Sash I* (n 68).

71 Section 4 of the South African Social Security Act 9 of 2004.

Eastern Cape.[72] Needless to say, the malaise in the administration of social assistance resurfaced under the guise of SASSA's culpable failure to develop a 'contingency plan if a seamless transition on 1 April 2018' was not attainable, coupled with urgent applications for an extension of the suspension of invalidity of the CPS contract.[73] SASSA's bureaucratic inertia was also attributable to the insidious appointment of individuals to lead parallel works streams who reported directly to the minister.[74] The work-streams process played a pivotal role in stalling the implementation of the court order. For her part, the minister did not disclose the truth relating to her interference with governance in relation to the work streams, despite filing affidavits under oath with the Court.[75]

Unlike in the past cases, where the minister and SASSA were always in the same side, in *SASSA* the agency and its CEO cited the Minister of Social Development as the first respondent. The main question at issue in *SASSA* was whether the erstwhile Minister of Social Development, Ms Bathabile Dlamini, and SASSA's acting CEO should be held personally liable for the costs of proceedings.

It is trite that public officials acting in a representative capacity may be ordered to bear costs out of their own pockets under specified circumstances.[76] The enquiry into whether public officials should incur personal liability for cost seems simple enough in principle, albeit no doubt often difficult in application. The ultimate test is whether, in a particular case, a public official is guilty of bad faith or gross negligence in conducting proceedings. The test applies to conduct relating to litigation and the discharge of constitutional obligations.[77]

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72 Chuks Okpaluba, 'Bureaucratic Delays in Processing Social Grants: An Evaluation of the Contributions of the Eastern Cape Judiciary to Contemporary South African Public Law' (2011) 25(1) Speculum Juris 48. See also Clive Plasket, 'Standing, Welfare Rights and Administrative Justice: *Maluleke v MEC, Health & Welfare, Northern Province*' (2000) 117 South African LJ 647; Clive Plasket, 'Administrative Law and Social Assistance' (2003) 120 SALJ 494 and Clive Plasket, 'Enforcing Judgements Against the State' (2003) 17 Speculum Juris 1.

73 *SASSA* (n 68) para 8.

74 *Black Sash II* (n 68) paras 17–20.

75 *Black Sash Trust v Minister of Social Development* [2018] ZACC 36 (*Black Sash III)* para 6.

76 In *Gauteng Gambling Board v MEC for Economic Development* 2013 (5) SA 24 (SCA) the SCA expressed its disapproval of 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. See also *Swartbooi v Brink* 2006 (1) SA 203 (CC); *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) para 853H.

77 *Black Sash II* (n 68) para 9.

The main thrust of the minster's contention in opposing the imposition of an adverse personal costs award was that such order constituted an impermissible intrusion on the powers of other arms of government.[78] It was submitted that the Court lacked the authority to hold a minister to account by mulcting her with personal costs.[79] This brings to the fore the contentious issue of separation of powers, in particular the entry into the South African constitutional-law lexicon and public discourse of the expression 'judicial overreach'.[80] The contours of separation of powers raise forbiddingly complex questions which can be pursued further only by subject specialists.[81] The minister's submission about judicial intrusion into issues which are beyond its competence failed unequivocally. Jafta J pointed out that '*Black Sash II* affirms the principle that public officials may be ordered to pay costs out of their pockets if they are guilty of bad faith or gross negligence'.[82] The source of that power is the Constitution itself, which mandates courts to uphold and enforce the Constitution.[83] From *Black Sash II* there can be no doubt that the objective of a costs *de bonis propriis* order is to vindicate the Constitution. The proposition that 'courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations'[84] is so deeply entrenched to no longer require citation of authority.

While conceding that a personal costs order is competent in circumstances described in *Black Sash II*, the acting CEO contended that the facts did not support a finding of bad faith or gross negligence on her part.[85] She outlined the steps undertaken in an attempt to comply with the order issued in *Black Sash I* in March 2017. She was appointed to the position of acting CEO only in July 2017.[86] After the Treasury approved the appointment of SAPO as a service provider to replace Cash Paymaster, during the evaluation process, it emerged that the former lacked the capacity to provide the service for paying social grants.[87] Although the explanation furnished for the delay in

78 *SASSA* (n 68) para 38.
79 *SASSA* (n 68) para 38.
80 The remarks of Davis J in *Mazibuko v Sisulu – Speaker of the National Assembly* 2013 (4) SA 243 (WCC) para 246E–G and Mogoeng CJ in *EFF v Speaker of the National Assembly* 2018 (2) SA 571 (CC) (*EFF*) para 223. Contra: Jafta J in *EFF* para 219. See further Mtendeweka Mhango, 'Chief Justice Sandile Ngcobo's Separation of Powers Jurisprudence' (2017) 32 SAPL 33. https://doi.org/10.25159/2522-6800/3572
81 See (2017) 32 (1 and 2) SAPL 'Twenty-first Century Constitutional Jurisprudence of South Africa: The Contribution of Former Chief Justice S. Sandile Ncgobo.'; Chuks Okpaluba and Mtendeweka Mhango, 'Between Separation of Powers and Justiciability: Rationalising the Constitutional Court's Judgment in the Gauteng e-tolling Litigation in South Africa' [2017] 21 Law, Democracy and Development 1.
82 *Black Sash II* (n 68) paras 5–7; *SASSA* (n 68) para 37.
83 *SASSA* (n 68) para 38.
84 *Doctors for Life* (n 3) para 38.
85 *SASSA* (n 68) para 47.
86 Paragraph 42.
87 Paragraph 43.

approaching the court of last resort was unsatisfactory, nonetheless the unacceptable explanation fell short of gross negligence or bad faith which would justify a personal costs order.[88]

In the same way, the minister narrowly escaped personal costs liability in connection with the order of 17 March 2017 issued in *Black Sash II*. It was apparent from the record that she did not bring to bear an effective supervisory oversight, particularly after it had become apparent that SASSA had failed to comply with previous court orders.[89] She had deferred to the Inter-Ministerial Committee on Comprehensive Social Security (IMC) established by the president to ensure compliance.[90] Nonetheless, the IMC could not relieve the minister of her statutory duty. The obverse position is clearer: the committee could only support the minister in executing her statutory duties. The mere fact that the minister's deference to the IMC was patently inconsistent with her statutory obligations on its own was not enough to warrant a finding of bad faith or gross negligence, however.[91]

While the minister may well have been lucky to get off with a rap on the knuckles in *SASSA*, her luck ran out in *Black Sash III*.[92] The judgment in *Black Sash III* concerned the issue of costs left open in *Black Sash I*. In that judgment costs were reserved and the then Minister of Social Development was called upon to show cause on affidavit as to why she should not be joined to the proceedings in her personal capacity and why she should not pay the costs of the application out of her own pocket.[93] After affidavits were filed it became apparent that there were disputes of facts in relation to an alleged process of responsibility initiated by the minister. In the aftermath of *Black Sash II*, the Court ordered that Minister Dlamini be joined in her personal capacity and that the parties report to court on whether they agreed to a process in terms of section 38 of the Superior Courts Act 10 of 2013 to determine issues relating to the former minister's role and responsibility in establishing parallel decision-making and communication processes. The retired Judge President Ngoepe was appointed to conduct the fact-finding inquiry.

What emerged from the Ngoepe Commission of Inquiry was that Minister Dlamini had failed to make full disclosure to the Constitutional Court in relation to the parallel work-streams process.[94] The Inquiry Report made adverse findings against the minister. Once again, the submissions that were rejected in *SASSA* were resuscitated. The minister submitted that to hold her personally liable for the costs of suit would constitute a

88 Paragraph 44.
89 Paragraph 46.
90 Paragraph 47.
91 Paragraph 47.
92 *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* [2018] ZACC 36 (*Black Sash III*).
93 *Black Sash I* (n 68) para 76.
94 *Black Sash III* (n 92) para 6.

violation of the separation of powers principle.[95] She amplified her submission by contending that the court lacks the authority to hold a cabinet minister to account by ordering them to pay costs out of their pocket. The argument was similarly dismissed. Imperfect as it may be, the personal liability of public officials for costs is a necessary mechanism for reinforcing the constitutional tri-norms of accountability, responsiveness and openness.[96] Echoing the sentiments expressed in *Black Sash II*, Froneman J explained:

> When courts make costs orders they do not make judgments on the political accountability of public officials. They do so in relation to how the rights of people are affected by the conduct of a public official who is not open, transparent and accountable and how that impacts on the responsibility to a court by those involved in the litigation.[97]

The repercussions of the minister's failure to fulfil her constitutional obligations were beyond measure, especially in the context of the provision of social grants to the most needy in society. Even so, was there manifest bad faith, warranting the imposition personal costs? The Inquiry Report finding that the minister's lack of candour concerning the parallel work-stream process was driven by her fear of being joined in her personal capacity and being mulcted personally with costs was not challenged.[98] All this led to the inescapable inference that she did not act in good faith. Viewed from another angle, her conduct was reckless and grossly negligent, meaning that there was conclusive proof of bad faith and gross negligence meriting a personal costs order.

There is no question that it is a novel matter to hold a cabinet minister personally responsible for the costs of suit, but the social grant debacle made it proper that Minister Dlamini must, in her personal capacity, incur a portion of the costs. The minister had to pay 20 per cent of the taxed costs because of conduct inimical to the values underpinning the Constitution. According to Froneman J,

> it would account for her degree of culpability in misleading the court – conduct which is deserving of censure as a mark of displeasure – more so since she held a position of responsibility as a member of the Executive. [99]

The office she occupied demanded a greater commitment to ethical conduct and public service. In short, the minister disregarded the constitutional tri-norms of accountability, responsiveness and openness.

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95 Paragraph 7.

96 Chuks Okpaluba, 'The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law' (2018) 33 SAPL 1.

97 *Black Sash III* (n 92) para 10.

98 Paragraph 12.

99 Paragraph 14

Lifeboat Litigation

The *casus belli* for this litigation was a flawed remedial action by the incumbent Public Protector concerning her investigation into the so-called 'lifeboat' extended initially by the Reserve Bank to Bankorp before the advent of the constitutional dispensation in 1994.[100] The predominant purpose of the urgent application was the remedial action directed at parliament to initiate a process that will result in an amendment to section 224 of the Constitution.[101] The thrust of the remedial action was that the Reserve Bank's mandate was too narrow and deficient.[102] The Governor, ABSA and the Speaker of the National Assembly all challenged the constitutionality of the remedial action. They argued that the Public Protector's order encroached unconstitutionally and irrationally on parliament's exclusive authority. In blunt terms, the Public Protector did not have the authority to prescribe to parliament how to exercise its discretionary legislative powers.[103] Sections 43 and 44 of the Constitution vested legislative authority in parliament, including the power to amend the Constitution. Further, sections 55(1) and 68 vested the National Assembly and the National Council of Provinces respectively with the exclusive responsibility to initiate or prepare legislation and to consider, pass amend or reject legislation. It followed that the remedial action intruded upon the doctrine of the separation of powers guaranteed by section 1(*c*) of the Constitution. In sum, the impugned remedial action was susceptible to be reviewed and set aside under section 1(*c*) of the Constitution for violating the doctrine of separation of powers.[104]

From an early stage of the litigation the Public Protector conceded to the merits and consented to the remedial action's being set aside.[105] However, her attempt to pass off remedial action as a mere recommendation was found to be utterly inadequate:[106] it was neither candid nor complete. It is now engraved in stone that unless reviewed and set aside, the remedial action of the Public Protector is binding.[107] In the replying affidavit, the Governor of the Reserve Bank was equally unsparing in his criticism.[108] The explanation for the remedial action revealed the Public Protector's lack of appreciation of the ambit of the Reserve Bank's powers. The governor continued:

> The Public Protector's impugned remedial action had immediate and damaging consequences for the country. It is clear from her answering affidavit that she had no regard to the inevitable and serious impact of her report before releasing it. The Report was reckless. The Public Protector's explanation for it is based on a clear lack of

100 *SARB v Public Protector* [2017] 4 All SA 269 (GP) (*SARB*) paras 1 and 10.
101 Paragraph 5.
102 Paragraphs 18 and 37–38.
103 *SARB* (n 100) paras 43–45.
104 Paragraph 46.
105 Paragraph 9.
106 Paragraph 55.
107 *EFF v Speaker, National Assembly* 2016 (3) SA 580 (CC) para 76.
108 *SARB* (n 100) paras 47–52 and 56.

> understanding of the Constitution. It perpetuates a fundamental misunderstanding of the Bank's powers and functions.[109]

Leaving aside the issue of irrationality for the moment, remedial action did not bear up to scrutiny insofar as procedural fairness was concerned. In terms of section 3 of PAJA, the Public Protector is obliged to give a clear statement of any remedial action she proposed to take, adequate notice of its nature and purpose, and a reasonable opportunity to affected persons to make representations regarding it. On the contrary, Murphy J explained

> the Public Protector failed in her duty in this respect with consequences that were severely damaging not only to the economy but to the reputation of her own office. She furthermore failed to honour an agreement made with the Reserve Bank to make her final report available to the bank five days before its release.[110]

The legal consequences of not affording the Reserve Bank an opportunity to explain the importance of its mandate was that her remedial action was insufficiently informed.

More important for present purposes is the reasoning behind the determination that the Public Protector should personally be mulcted with the costs of the litigation. In finding that there were several grounds upon which the remedial action can and must be set aside, Murphy J concluded as follows:

> Suffice it to say, the Public Protector's explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness. It is disconcerting that she seems impervious to the criticism, or otherwise disinclined to address it. This court is not unsympathetic to the difficult task of the Public Protector. She is expected to deal with at times complex and challenging matters with limited resources and without the benefit of rigorous forensic techniques. It is easy to err in informal alternative dispute resolution processes. However, there is no getting away from the fact that the Public Protector is the constitutionally appointed custodian of legality and due process in the public administration. She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher standard than that to which she holds those subject to her writ. A dismissive and procedurally unfair approach by the Public Protector to important matters placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament. [111]

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109 Paragraph 55.
110 Paragraph 58.
111 Paragraph 59.

Overarchingly, the decision to order personal costs against the Public Protector taps into the simmering debate about her fitness to hold office.[112]

Conclusion

The principle that in constitutional litigation a court can depart from the normal rule that costs follow the event, by shielding an unsuccessful party from liability for costs depends on whether the case raises a public-interest matter of transcendental importance. That rule applies in every constitutional matter involving organs of state; it seeks to insulate unsuccessful litigants from the obligation of paying costs to the state.

The principal underlying approach to costs in constitutional litigation is to prevent the chilling effect that adverse costs orders might have on the litigants seeking to secure fundamental rights. The operation of the *Biowatch* shield is restricted to genuine constitutional matters. Although *Biowatch* was decided a decade ago, cases such as *Harrielall*, *Hotz*, *Ferguson* and *Limpopo Legal Solutions III* demonstrate that the other courts are yet to embrace its principle. The important message from the *Limpopo Legal Solutions I* and *III* cases is that *Biowatch* does not allow risk-free constitutional litigation. A central plank of *Biowatch* is that proceedings that are frivolous or vexatious, or in any other way manifestly inappropriate, get no shelter from adverse costs. *Black Sash/SASSA and SARB* demonstrate that courts will not hesitate to exercise discretion to impose adverse costs, and specifically hold public representatives personally liable for costs in order to reinforce accountability, responsiveness and openness. This because there is an overarching constitutional obligation on the organs of state and public officials who are acting in a representative capacity to observe the Bill of Rights and to act both ethically and accountably.

[112] Pierre de Vos, 'Let's Look at the Facts and Note the Legal Flaws in the Public Protector's Report' (*Daily Maverick* 8 July 2019) <https://www.dailymaverick.co.za/opionista/2019/07/08-lets-look-at-the-facts-and-note-the-legal-flaws-in-the-public-protectors-report> accessed 8 July 2019; Ferial Haffajee, 'Gordhan Seeks a Slew of Interdicts to Halt Enforcement of the Public Protector's Remedial Actions' (*Daily Maverick* 8 July 2019) <http://a.msn.com/01/en-za/AADZkDo?ocid=se> accessed 8 July 2019; Paul Hoffman, 'Fit for Office: Incompetence is Curable, Dishonesty Not' (*Daily Maverick* 21 May 2019) <https://www.dailymaverick.co.za/opinionista/2019-06-10-fit-for-office-incompetence-is-curable-dishonesty-is-not> accessed 6 June 2019.

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