



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

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AfriForum NPC v Ngwathe Local Municipality and Others (778/24) [2026] ZASCA 28 (13 March 2026)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it upheld the appellant's appeal and ordered the first and second respondents to pay the costs of the appellant.

This matter concerned an appeal regarding the proper application of principles governing the award of costs in constitutional litigation. The dispute arose from litigation initiated by AfriForum on behalf of residents of the Ngwathe Local Municipality, who had been experiencing serious problems with unsafe drinking water supplied by the municipality. The matter required this Court to determine whether the full court of the Free State Division of the High Court had misdirected itself when it ordered that each party should bear its own costs, despite AfriForum having succeeded in its appeal.

The underlying dispute began when residents in the town of Parys and surrounding areas received bad-smelling and unsafe drinking water from the local municipality. Concerned about the health implications, AfriForum commissioned accredited laboratories to test samples of the municipal water supply. The results revealed unacceptably high levels of coliform and E. coli bacteria, in contravention of statutory standards governing potable water quality, including the South African National Standards (SANS) 241:2015. The tests confirmed that the water was unsafe for human consumption. AfriForum initially attempted to resolve the issue with the relevant authorities but these efforts proved unsuccessful. As a result, it launched an urgent application in the Free State Division of the High Court, Bloemfontein, in September 2022 seeking relief to compel the municipalities and the Minister of Water and Sanitation to fulfil their constitutional and statutory obligations to ensure a safe and sustainable supply of potable water.

When the urgent application was heard, the presiding judge, Loubser J, concluded that the matter did not meet the threshold for urgency. The case was therefore removed from the urgent roll and AfriForum was ordered to pay the wasted costs occasioned by the removal. AfriForum sought leave to appeal against the costs order only, arguing that the litigation involved the protection of constitutional rights and that the punitive costs order was inappropriate. Leave to appeal was granted, and the matter was heard by a full court of the Free State Division of the High Court.

The full court upheld AfriForum's appeal. It set aside the order requiring AfriForum to pay the wasted costs, and replaced it with an order for each party to pay their own costs. The full court recognised that the litigation implicated constitutional rights of access to clean and safe water.

It acknowledged that AfriForum had not acted in bad faith and that the application was neither frivolous nor vexatious. Despite these findings, the full court nevertheless ordered that each party pay its own costs in the appeal before it, reasoning that the respondents could not be faulted for opposing the application.

AfriForum subsequently appealed to this Court, contending that the full court had misapplied established principles relating to costs. The SCA, per Meyer JA, examined two key principles governing cost orders. The first was the traditional ‘result principle’, according to which costs generally follow the result and the unsuccessful party must pay the successful party’s costs. The second was the *Biowatch* principle, derived from the Constitutional Court matter *Biowatch Trust v Registrar, Genetic Resources and Others*, which holds that in litigation between a private party and the state involving the enforcement of constitutional rights, the state should ordinarily bear the costs of the other side if it loses, while each party should bear its own costs if the state succeeds.

The SCA emphasised that although courts retain a discretion to depart from the result principle where the circumstances so warrant, any such departure must, however, be exercised judicially and be supported by compelling and proper justification. Courts may deviate from the *Biowatch* principle where litigation is frivolous, vexatious, manifestly inappropriate, or conducted in bad faith. However, the record showed that AfriForum had acted in good faith to vindicate the constitutional rights of residents to safe drinking water. There was no evidence that the litigation was irresponsible or abusive of court processes. Accordingly, the exceptions to the *Biowatch* principle were not applicable in this case.

The SCA found that the full court’s reasoning for depriving AfriForum of its costs was flawed. The fact that the municipality could not be blamed for opposing the application was not a valid basis for departing from the applicable costs principles. The correct enquiry should have focused on the nature of the dispute, the bona fides of the litigant, and the manner in which the litigation was conducted. By failing to apply these considerations properly, the full court misdirected itself and did not exercise its discretion judicially. This misdirection entitled the SCA to interfere with the costs order.

The SCA therefore upheld the appeal and substituted the full court’s order. It ruled that the Ngwathe Local Municipality and its Acting Municipal Manager were required to pay AfriForum’s costs of the appeal before the full court. However, this Court declined AfriForum’s request that the costs of two counsel be awarded, reasoning that the matter was neither factually nor legally complex, that the engagement of two counsel was unnecessary, and that it therefore would be unfair and unjust to saddle the municipalities with the costs of two counsel.

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