THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 778/2024

In the matter between:

AFRIFORUM NPC	**Appellant**
and	
NGWATHE LOCAL MUNICIPALITY	**First Respondent**
ACTING MUNICIPAL MANAGER, NGWATHE LOCAL MUNICIPALITY	**Second Respondent**
FEIZILE DABI DISTRICT MUNICIPALITY	**Third Respondent**
MINISTER OF WATER AND SANITATION	**Fourth Respondent**

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

Coram: MEYER, MOLEFE and BAARTMAN JJA and MABESELE and NORMAN AJJA

Heard: 9 March 2026

Delivered: 13 March 2026

Summary: Costs – Award – General Principles – costs follow the result – if the government loses in litigation between the government and a private party seeking to assert a constitutional right it should pay the costs of the private party – Whether a full court misdirected itself in not applying these general principles in its award of costs.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mbhele AJP, Reinders ADJP and Chesiwe J, sitting as court of appeal):

1. The appeal is upheld, and the first and second respondents are to pay the appellant's costs of the appeal.
2. Paragraph 2 of the order of the full court is set aside and replaced with the following: 'The first and second respondents are to pay the appellant's costs of the appeal.'

JUDGMENT

Meyer JA (Molefe and Baartman JJA and Mabesele and Norman AJJA concurring):

[1] This appeal concerns two principles applicable to awards of costs: the general rule 'that costs follow the result and that the unsuccessful party must pay the costs of the successful party' (the result principle);[1] and the *Biowatch*[2] principle that-

'[i]n litigation between the government and a private party seeking to assert a constitutional right, *Affordable Medicines* established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.'[3]

[2] The appeal, with special leave of this Court, is against the costs award made by the Full Court of the Free State Division of the High Court, Bloemfontein (Chesiwe J with Mbhele AJP and Reinders ADJP concurring), made on 28 March 2024 (the full

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[1] *NU Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) para 149.

[2] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (10) BCLR 1014 (CC) 2009 (6) SA 232 (CC) para 22.

[3] The *Biowatch* principle was first established in *Affordable Medicine Trust and others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) and was given further content in *Biowatch*. Pertinent to this appeal is also the following passage in *Independent Candidate Association SA NPC v President of the Republic of South Africa and Others* [2023] ZACC 41; 2024 (3) BCLR 321 (CC); 2024 (2) SA 104 (CC) para 160:

'… the general rule for an award of costs in constitutional litigation between a private party and the state is that, if the private party is successful, then it should have its costs paid by the state'.

court), in an appeal against the costs award made by a single judge of that division, PJ Loubser J (the court of first instance), in an opposed application in which the appellant, AfriForum NPC (AfriForum),[4] sought to assert the constitutional rights of the residents of the first respondent, the Ngwathe Local Municipality (the local municipality), to, inter alia, safe drinking water,[5] and to an environment that is not harmful to their health and well-being.[6] The second, third, and fourth respondents are the Acting Municipal Manager of the local municipality (the municipal manager), the Feizile Dabi District Municipality (the district municipality), and the Minister of Water and Sanitation (the minister), respectively.

[3] The residents of the local municipality were plagued with a supply of unsafe bad smelling drinking water provided to them by the local municipality, which caused many residents to become ill. AfriForum, therefore, engaged the services of various accredited laboratories to obtain test samples of tap water in the town of Parys and surrounding areas, and to test the quality of those test samples. The test results showed unacceptably high levels of bacteria coliforms and E.coli bacteria present in the water, in contravention of various statutory and regulatory requirements, specifically those relating to the quality of potable water prescribed by the South African National Standards (SANS) 241:2015. The test results showed that the water was in an unsafe state and not fit for human consumption.

[4] AfriForum's attempts at resolving the water crisis with the local and district municipalities (the municipalities), failed. In the result, it initiated an urgent application on behalf of the residents of the local municipality in the high court against the municipalities and the minister on 22 September 2022. It sought an order aimed at compelling the municipalities-

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[4] AfriForum is a non-profit company acting as a civil organisation with its main purpose to promote and advocate for democracy, constitutional rights and human rights with an emphasis on socio-economic rights.

[5] Section 27(1)*(b)* of the Constitution provides that:
'Everyone has the right to have access to-
(b) sufficient food and water;'

[6] Section 24 of the Constitution provides thus:
'Everyone has the right-
(a) to an environment that is not harmful to their health or well-being.'

(a) ‘to comply with their constitutional and statutory obligations to provide a consistent, safe and sustainable supply of potable water, which complies with all the requisite legislative standards and which is fit for human consumption’;

and the district municipality and the minister-

(b) ‘by way of a structural supervisory interdict, to carry out their constitutionally and statutory mandated duties to oversee the Municipalities’ failures in service delivery proactively and to support them to ensure a consistent supply of potable water that is safe for human consumption. Applicant also seeks to compel [the district municipality] and the Minister to support and assist [the local municipality] in these endeavours, in line with the principles of cooperative governance and to intervene accordingly’.

[5] The local municipality opposed the application, primarily, on the basis that the report relied upon by AfriForum was not authenticated and that the water from the Parys Water Works Site was tested by the University of the Free State and shown to be compliant with the SANS 241 standard.

[6] The application was set down for hearing on the urgent roll on 30 September 2022, PJ Loubser J, the presiding judge, formed the view that the matter was not urgent. He, accordingly, made the following order:

‘1. The matter is removed from the roll for want of urgency.

2. The applicant shall pay the wasted costs occasioned by the removal.’

AfriForum launched an application for leave to appeal against the punitive costs award made in the urgent application. On 10 March 2023, PJ Loubser J made the following order:

‘1. The applicant is granted leave to appeal to the Full Court of the Free State High Court against the order of costs only.

2. Costs of the application for leave are costs in the appeal.’

[7] On 13 October 2023, the appeal was heard by the full court. On 28 March 2024, the full court delivered its judgment, and made the following order:

‘1. The appeal succeeds and paragraph [2] of the Court Order granted on 30 September 2022 is set aside and replaced with the following:

“2. Each party to pay its own costs.”

2. Each party to pay their own costs in the appeal.’

[8] The full court, in considering the issue of costs, held that the court of first instance ought to have applied the *Biowatch* principle, particularly given that the matter before it implicated the residents' constitutional right of access to clean and safe water. The full court underscored the importance of applying that principle in litigation of this nature, where constitutional rights are directly implicated. The full court was in agreement with AfriForum that the appropriate costs order was one aligned with the *Biowatch* principle and, further, that as the successful party, AfriForum was ordinarily entitled to its costs. Despite this finding, the full court ultimately departed from that position and ordered that each party bear its own costs.

[9] The full court reasoned thus:

'The respondents did not and could not argue that the appellants did not attempt to raise a constitutional issue in favour of the residents of the Ngwathe Municipality. They did not and could not convince us that the appellant was mala fide, frivolous or vexatious in bringing the application before the trial court. To the contrary, the matter was instituted on an urgent basis for the mere fact that the issue of non-supply of clean water was ongoing.'

However, the full court then concluded:

'Even though the Appellant is the successful party, the Respondent cannot be faulted for having opposed the application.'

[10] In *Independent Communications Authority of South Africa and Others v Open Heaven Community Radio and Others*,[7] this Court held that:

'An award of costs is a matter wholly within the discretion of the trial court. An appeal court will not generally interfere with a court of first instance's decision on costs. However, in *Sublime Technologies (Pty) Ltd v Jonker and Another* this Court held that an appeal court will only interfere with the discretionary orders granted by a lower court where it is shown that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[8]

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[7] *Independent Communications Authority of South Africa and Others v Open Heaven Community Radio and Others* [2025] ZASCA 117; [2025] 4 All SA 321 (SCA); 2026 (1) SA 70 (SCA).
[8] Ibid para 28.

[11] The crisp question in this appeal, therefore, is whether the full court exercised its discretion judicially and properly when it deviated from the result and *Biowatch* principles, and made the costs award for each party to pay their own costs, or whether it misdirected itself in doing so. AfriForum argues that the full court did not exercise its discretion on costs judicially. It seeks this Court to interfere with the full court's exercise of discretion and substitute its costs award with one awarding AfriForum its costs in respect of the successful appeal in the full court. The local municipality did not file heads of argument before this Court on the issue of costs. Its answering affidavit is confined to the merits of the dispute relating to the water issue within its area of jurisdiction. Before the full court, the municipality sought the dismissal of AfriForum's appeal with costs. The absence of heads of argument before this Court is unexplained, and there is likewise no indication that the respondents intended to abide the decision of this Court.

[12] The default position – that the successful party is awarded its costs – does not operate in an inflexible manner, binding courts to apply it in every case. 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. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[9] the Constitutional Court held:

'One of the general rules is that, although an award of costs is in the discretion of the Court, successful parties should usually be awarded their costs and that this rule should be departed from only where good grounds for doing so exist.'

[13] There are numerous examples of the circumstances in which a court may deprive a successful litigant of its costs. For example, vexatious litigants, although successful, may be deprived of their costs if the court considers that the litigation was 'so wholly unnecessary as to appear to have been merely vexatious, or for the sole purpose of creating costs'.[10] In appropriate circumstances the conduct of a litigant may be viewed to be vexatious within the 'extended meaning' where it results in

[9] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 155.
[10] *Lyons v Weir* 1916 CPD 226 at 229.

'unnecessary trouble and expense which the other side ought not to bear'.[11] Cases in which a successful party is ordered to pay the costs of the unsuccessful party are usually in which the court disapproves of the conduct of the successful party.[12]

[14] The *Biowatch* principle is also not cast in stone. Where appropriate, courts have the discretion to deviate from it. The Constitutional Court, in refusing to apply the *Biowatch* principle in *S S v V V S*,[13] said this:

'While it was submitted on behalf of the applicant that the Court should not make any order as to costs in the event of the application being dismissed, the principle in *Biowatch* should not apply. This is precisely the kind of case that should invoke the exception to *Biowatch* for litigation that is "frivolous or vexatious, or in any other way manifestly inappropriate". In light of the totality of circumstances at the two hearings before this Court, and the applicant's wanton conduct, my view is that the litigation was "manifestly inappropriate". Given the applicant's conduct compromising K's best interests and this Court's integrity, his continued application can be viewed as "so unreasonable or out of line that it constitutes an abuse of process". As this Court aptly stated in *Limpopo Legal Solutions*, "although *Biowatch* changed the costs landscape for constitutional litigants, it gives no free pass to cost-free, ill-considered, irresponsible litigation" and applicants "seeking to vindicate constitutional rights must respect court processes".'

[15] In *Free State Department of Social Development and Others*,[14] the following was said in relation to the exceptions to the *Biowatch* principle:

'The operation of the *Biowatch* principle is restricted to genuine constitutional challenges. It is not available to a litigant who is guilty of unacceptable behaviour in relation to how litigation is conducted. Such litigant may be ordered to pay costs. Over and above the rule being limited to constitutional challenges, it also excludes vexatious and frivolous litigation.'

[16] The urgent application was instituted by AfriForum to vindicate a fundamental constitutional right of the residents of the local municipality, namely the right of access to clean, safe, and adequate drinking water. A reading of the record of the proceedings

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[11] *City Council of Johannesburg v Television and Electrical Distribution (Pty) Ltd and Another* [1996] ZASCA 97; [1997] 1 All SA 455 (A); 1977 (1) SA 157 (A) at 177D-F.
[12] See, for example: *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 420-421; *Hamza v Bailen* 1949 (1) SA 993 (C) at 1003.
[13] *S S v V V S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC).
[14] *Mbuyisa v HOD: Free State Department of Social Development and Others* (3243/2024) [2025] ZAFSHC 79 (13 March 2025) para 4.

in the court of first instance supports the full court's finding that AfriForum was not mala fide in bringing the urgent application, nor was it frivolous or vexatious. To that I should add that nothing in the record shows that the litigation was manifestly inappropriate, ill-considered, or irresponsible, or that there was any misconduct or impropriety on the part of AfriForum or the residents of the local municipality, and there is also no suggestion to that effect.

[17] The only reason why the full court ordered each party to pay their own costs of the appeal, was because of its view that the local municipality could not be faulted for having opposed the application. However, the application of the *Biowatch* principle turns on the nature of the dispute, the bona fides of the litigant, and the way the litigation is conducted. It does not turn on whether the state could or could not be faulted for having opposed the proceedings.

[18] The full court's reasoning does not afford any lawful or principled basis upon which to justify a departure from the result principle or the *Biowatch* principle. The full court misdirected itself on the application of both principles and their exceptions. It reached a decision on the costs of the appeal which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. The full court, therefore, failed to exercise its discretion judicially. Accordingly, this Court is at large to interfere with the impugned costs award and to correct the misdirection.[15]

[19] AfriForum requests that the costs of two counsel be included in the costs award, on appeal before the high court and in this Court. However, this matter has no factual or legal complexities. It would, in my view, be unfair and unjust to saddle the municipalities with the costs of two counsel. It is AfriForum which elected to litigate on such a luxurious scale irrespective thereof that this is a matter where the services of one counsel would have been adequate.

[20] In the result, the following order is made:

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[15] Compare *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* [2015] ZACC 4; 2015 (4) BCLR 396 (CC) para 13.

1. The appeal is upheld, and the first and second respondents are to pay the appellant's costs of the appeal.
2. Paragraph 2 of the order of the full court is set aside and replaced with the following: 'The first and second respondents are to pay the appellant's costs of the appeal.'

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P A MEYER
JUDGE OF APPEAL

Appearances

For appellants:	A T Lamey with P Eilers
Instructed by:	Hurter Spies Inc., Pretoria
	JH Conradie Inc., Bloemfontein
For first and second respondents:	No appearance.