IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

27/02/2017
DATE

[redacted]
SIGNATURE

1/3/2017

CASE NO:70915/2015

In the matter between:

DEMOCRATIC ALLIANCE — APPLICANT

And

THE MUNICIPAL DEMARCATION BOARD — 1st RESPONDENT

THE MINISTER OF COOPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS — 2nd RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE, TRADITIONAL AFFAIRS & HUMAN SETTLEMENTS, EASTERN CAPE PROVINCE — 3rd RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS & HUMAN SETTLEMENTS,
FREE STATE PROVINCE 4th RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS & HUMAN SETTLEMENTS,
KWAZULU-NATAL PROVINCE 5thRESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS & HUMAN SETTLEMENTS,
LIMPOPO PROVINCE 6th RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS, MPUMALANGA PROVINCE 7th RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS & HUMAN SETTLEMENTS,
NORTHERN CAPE PROVINCE 8th RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR
LOCAL GOVERNMENT & HUMAN
SETTLEMENTS, NORTH WEST PROVINCE 9th RESPONDENT

SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION 10th RESPONDENT

INDEPENDENT ELECTORAL COMMISSION 11th RESPONDENT

THE AFFECTED MUNICIPALITIES
LISTEd in annexure "A" 12th to 46th RESPONDENT

JUDGMENT

MOLOPA-SETHOSA J

[1] On 02 September 2015 the applicant launched an urgent application against the respondents, for interim interdictory relief to stop the first respondent as well as the third to ninth respondents from taking some consequential actions to implement the decisions of the first respondent published in various Provincial Gazettes to determine or re-determine municipal boundaries (the impugned decisions) [**Part A],** pending the final determination of the relief sought in **Part B.**

[2] **Part A** was heard by my brother Kollapen J on 26 and 27 October2015. On 06 November 2015 the application **(Part A)** was dismissed and the applicant was ordered to pay the costs of the respondents, including the costs of two counsel in respect of the first to the ninth respondent.

[3] In **Part B** of the application, which was also brought on an urgent basis, the applicant sought to review and set aside:

[3.1] Decisions by the first respondent, taken between 29 January and 24 March 2015 to consider the second respondent's requests to change several municipal boundaries including the twelfth to the forty sixth respondent; and

[3.2] The first respondent's final decisions to change boundaries pursuant to many of the second respondent's requests, which were published in the Provincial Gazettes on 25 August 2015, and on 21 October 2015 in respect of the Camdeboo, Ikwezi and Baviaans municipalities.

[4] The first to ninth respondents opposed the application.

[5] In paragraphs 30 and 32 of its heads of argument, filed on 04 July 2016, the applicant stated that an effective and practicable remedy would be that:

[5.1] The Court must declare that the first respondent's decisions to consider the second respondent's requests, and its final decisions approving boundary changes to the affected municipalities, [i.e. several Municipalities including the 12th to the 46th respondents], to be unlawful.

[5.2] The results of the elections held on 3 August 2016 should stand, and the new Councils formed flowing from those elections should continue uninterrupted.

[5.3] That however, following on a finding that the first respondent's existing decisions were unlawful, the Court should

refer all cases in which boundary changes were approved, back to the first respondent for reconsideration.

[5.4] That the reconsideration must be conducted in accordance with a lawful, reasonable, rational and fair process, in accordance with sections 21 and 26 of the Act. In this process the first respondent must determine whether there is sufficient justification for it to consider the boundary changes requested by the second respondent, and if so, determine afresh whether the proposed boundary changes are desirable based on the factors in sections 24 and 25 of the Demarcation Act, Act 27 of 1998 ("The Demarcation Act").

[5.5] And if the first respondent decides that the proposed changes were not advisable, and did not accord with the statutory factors in sections 24 and 25 of the Demarcation Act, then it must consider whether the boundaries should be changed back to those which existed before the August 2016 elections. That the reversion could practically only take place at the next local government elections in 2021.

[6] Basically after new demarcated Municipalities were formed, the applicant was of the view that the practical effect of the amalgamation affected its representation, hence it sought to challenge this by way of review.

[7] The respondents, amongst others, contended that the relief sought by the applicant was moot and without merit, in that

[7.1] The application for the relief sought had not been brought within the time periods stipulated in section 7(1) of PAJA. That the applicant had provided no basis in its affidavit for condonation. That therefore the new relief should be dismissed with costs;

[7.2] The challenge of the Camdeboo amalgamation decision and the other impugned boundary redeterminations that were made by the first respondent was purely of academic interest.

[7.3] The boundaries brought about by the impugned decisions as well as their attendant consequences became effective after the local government elections that took place on 3 August 2016. The applicant accepted the fact that all of the steps to determine the number of councilors who would serve on certain councils and to delimit the inner boundaries of the wards of certain municipalities, as a direct consequence of the impugned decisions have already taken place.

[8] The applicant's primary focus remained, however, the lawfulness of the impugned decisions which it called the antecedent decisions of the first respondent/Board. The consequential actions such as those of the third to ninth respondents [MEC's] were only challenged to the extent that they flow from, and were dependent for their validity on the first respondent's antecedent decisions.

[9] By the time the matter was heard, the local government elections had come and gone. The applicant had persisted, however, with its application for the review of the impugned decisions. It stated in that

regard, as already set out above, that it neither sought to frustrate the holding of the elections nor to set aside the results thereof.

[10] The applicant contended, relying on such authorities as *Buthelezi v Minister of Home Affairs* 2013 (3) 325 (SCA) and *Pheko v Ekhuruleni Metropolitan Municipality* 2012 (2)SA 598 (CC) that the lawfulness of the first respondent's decisions remains a live issue in these proceeding, and as such its application is not moot.

[11] On 24 May 2016 all the parties, the applicant and the first to ninth respondents' legal teams, met with the Deputy Judge President ("the DJP") of this division, and preferential dates suitable to all parties, were agreed upon and were allocated for the hearing of **Part B** of the application. The date agreed upon was the 16th and 17th August 2016.

[12] The applicant filed its heads of arguments on 04 July 2016, still persisting with the application. All other parties/respondents also filed their heads of arguments in July 2016.

[13] One day prior to the hearing of the application, more specifically on 12 August 2016, [Friday prior to the Tuesday the matter was set down for], the applicant sent a letter to the DJP, and to the respondents indicating its intention to withdraw the application.

[14] In the letter aforesaid, dated 12 August 2016 from Minde Schapiro & Smith, the applicant's attorneys of record, the following was communicated to the respondents on behalf of the applicant:

"[1] We refer to the above matter, which is currently set down for hearing on 16 and 17 August 2016.

[2] Our client has, on a full consideration of the matter, decided to withdraw its application. The notice of withdrawal that we intend to file is attached.

[3] In accordance with rule 41 (1) (a) of the Uniform Rules, we seek your consent for the withdrawal – failing which we shall approach the court for its leave to withdraw the matter.

[4] You will note that our notice of withdrawal does not include a tender of costs. This is due to the fact that the matter is one which our client was challenging decisions made by public functionaries exercising statutory duties, and in such cases an unsuccessful party ought not to be mulcted with costs (Biowatch Trust v Registrar, Genetic Resources, and others 2009 (6) SA 232 (CC) at para 21 to 230.

[5] Should your clients dispute the issue of costs, they are of course free to set the issue of costs down in due course. The issue of costs does not, however, raise any urgent issue which requires resolution on the preferential dates allocated next week."

[15] In response to the applicant's letter aforesaid, the first respondent's attorneys, Cheadle Thompson & Haysom INC. Attorneys, responded by way of letter dated 12 August 2016 in which the following is stated:

[1] We refer to the above matter and to your earlier letter indicating your client's intention to withdraw its application.

[2] We have considered your letter, and confirm that we do not grant our consent to the withdrawal of the matter on the terms proposed, and have been instructed to seek costs against your client.

[3] Your client has not provided any explanation for the late withdrawal of its application in circumstances where:

[3.1] our client opposed the review application on various grounds, including the basis that your client could not obtain effective relief from the court, and that the application was simply too late in light of the then-upcoming local government elections which took place on 3 August 2016;

[3.2] despite opposition from the various other respondents on similar grounds, your client persisted with its application;

[3.3] at a meeting of the parties with the Deputy Judge President on 24 May 2016, your client agreed to the preferential set down of the matter on dates which clearly fell beyond the scheduled local government elections.

[4] The reason for your client's sudden change of heart, one court day before the matter is set to proceed is unclear to us.

[5] In addition to the costs incurred by our client in opposing and preparing for the matter, you are aware that the General Council of the Bar of South Africa's Uniform Rules of Professional Conduct ("The Uniform Rules") permit counsel to charge a reservation fee where a matter is withdrawn at this late stage. With one court day remaining before the dates allocated to the matter, counsel for the various parties are entitled to charge a full first day fee.

[6] The late notice of your client's intended withdrawal, and your client's conduct in pursuing this application after it became clear that no effective relief was possible, have consequences which justify a costs order against your client.

[7] In the circumstances, we cannot accede to your client's request. We confirm that Rule 41(1)(a) of the Uniform Rules of Court requires that your client applies for leave of the court to withdraw its application. We are of the view that the issue of costs can appropriately be argued as part of your client's application to withdraw.

[8] We will write to the Deputy Judge President to confirm our position.

[16] In response to the applicant's letter aforesaid, the State Attorney, on behalf of the second to the ninth respondents responded by way of a letter dated 12 August 2016 in which the following is stated:

> *"The above matter refers and your letter dated 12 August 2016 refers.*
>
> *We have considered your letter and confirm that it is our client's instructions not to grant or consent to the withdrawal of the matter on the proposed terms and that costs should be argued on Tuesday or on a day to be allocated by the DJP."*

[17] As the respondents had not consented to the withdrawal of the application, the applicant brought an application in terms of Rule 41 (1) (a) for leave to withdraw the application.

[18] Mr Borgstrom, counsel for the applicant submitted that events have overtaken the issues; in my view meaning that, as already stated above, the applicant has accepted that local government had come and gone; the boundaries brought about by the impugned decisions as well as their attendant consequences became effective after the local government elections that took place on 3 August 2016; and the applicant accepted the fact that all of the steps to determine the number of councilors who would serve on certain councils and to delimit the inner boundaries of the wards of certain municipalities, as a direct consequence of the impugned decisions have already taken place.

[19] He submitted that since the events have overtaken the issues, the applicant accepts that this is not the case to test the issues. That the applicant should not be punished for realizing just prior to the day of the hearing that this is not the right case to decide the issues, hence their withdrawal of the application.

[20] Counsel for the applicant further submitted that the applicant should not be ordered to pay the costs of the application since the matter involves an issue of constitutional litigation because the application was brought in the interests of the public. That the applicant was challenging decisions made by public functionaries exercising statutory duties; that in such cases an unsuccessful party ought not to be mulcted with costs. That on the principles set out in *Biowatch Trust v Registrar, Genetic Resources and other* 2009 (6) SA 232 (CC) ("Biowatch"), the court should not order the applicant to pay the costs, even where the applicant has not been successful in its application since the matter involves an issue of constitutional litigation.

[21] Counsel for the applicant submitted that the court should equate a situation where the applicant withdraws its application with a situation where a party that is challenging decisions made by public functionaries exercising statutory duties has not been successful.

[22] The respondents' respective counsel respectively submitted that the applicant was unreasonable in not withdrawing the application much earlier, waiting for the last minute, just one day before the date of the hearing. That its conduct was unreasonable and that the applicant surely had an opportunity to withdraw much earlier, e.g. once date of the elections was announced, and/or when the respondents filed their heads of arguments in July 2016 raising mootness, as amongst other things the applicant was not challenging results of the local government per se.

[23] All the respondents respectively submitted that the principles of Biowatch do not apply in this case where the applicant belatedly sought

to withdraw the application without tendering costs. That this is not an appropriate case to apply Biowatch; that even if it were to be accepted that Biowatch applied, the conduct of the applicant in seeking to withdraw the application just one day before the hearing, after the respondents had already briefed counsel and incurred massive costs, was unreasonable, and fell within the exceptions set out in Biowatch; and that the applicant should be ordered to pay the costs. The following was stated in Biowatch *supra*:

> "What the general approach should be in relation to suits between private parties and the State
>
> [21] In *Affordable Medicines* this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:
>
> > "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule.

There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* this Court articulated the rule as follows:

> '[O]ne should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly, where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interest of the administration of justice nor fair to those who are forced to oppose such attacks.'" **My underlining.**

[24] Counsel for the applicant submitted that the applicant's withdrawal should be equated/likened to a situation where a party in constitutional litigation has not been successful and not ordered to pay the costs.

[25] It cannot be correct that a situation where a party has not been successful [after the matter had been argued] can be equated/likened to a situation where a matter is withdrawn, at the very last minute for that matter, as in this case. In my considered view the Biowatch principles cannot be invoked in this situation. When the preferential dates were arranged and confirmed with the DJP, the applicant must have already known that the impugned decisions would have been implemented at the time the matter came before court. In the heads of argument, filed on 04 July 2016 the applicant stated that "the results of the elections held on 03 August 2016 should stand, and the new councils formed flowing from those elections should continue uninterrupted". It mentions that the order would not affect the outcome of the local government elections; that they would not seek to disturb the status quo.

[26] For the applicant to only decide at last minute, one day before the hearing that this is not the case to test the issues as the events had already been overtaken, and not even tender costs is unreasonable in my considered view. From the facts set out above there was opportunity to make a decision to withdraw much earlier before the other parties incurred massive costs in preparation for this application. It is in my view unreasonable of DA to expect not to pay costs in the circumstances herein.

[27] The parties [the applicant and the respondents' legal teams both somewhat agreed that the court does not need to deal with the merits in deciding the costs.

[28] In determining the issue of costs it is important to look at the chronology of events as submitted by the parties. On 24 May 2016 the date of the local government elections was announced. On the same date [24 May 2016] the parties met with the DJP and were given preferential dates as the matter had been brought on an urgent basis. The agreed dates for the hearing were 16 and 17 August 2016. At that stage it was already within the knowledge of the parties, including the applicant, that by the time the matter was heard the local government elections would have taken place.

[29] On 22 June the applicant filed its supplementary replying affidavit. It decided to continue with the application as a matter of principle.

[30] The local government elections were held on 03 August 2016, and the results thereof were announced on 05 August 2016. It was submitted on behalf of the respondents that the applicant was substantially successful in the elections aforesaid and yet still did not withdraw the application until a day prior to the hearing.

[31] Counsel for the 2nd-5th, 7th-9th went as far as submitting that the application was politically motivated. I must state that I am not even going to get into the arena of whether the applicant was politically motivated or not when it launched this application. My focus will be more on the chronology of events and the conduct of the applicant.

[32] As already stated, the respondents' counsel respectively submitted that the applicant should be ordered to pay the costs of the respective respondents, that the applicant has not furnished a reason why it only withdrew its application on the 11th hour, (1) court day prior to the hearing of the application, after the respondents had already incurred costs for the preparation and for the hearing of the application, and had already engaged and briefed counsel, including senior counsel to prepare and argue the matter.

[33] At the time the parties met with the DJP and agreed on the dates of hearing, it was agreed then that the application would not affect the then pending municipality elections; further that the outcome of the application would not affect the outcome of the local government election results. Despite this, the applicant persisted with the application.

[34] As already stated, only on 12 August 2016, (1) court day prior to the hearing of the application, did the applicant send communication [quoted above], to the respondents and to the DJP stating that it was no longer pursuing the application; that it was withdrawing the application. The applicant did not tender costs, and as a result the respondents replied as stated above that they were not consenting to the withdrawal of application; and that if the applicant wanted to withdraw the application it had to formally bring an application in terms or rule 41 (1) (a) for leave of the court to withdraw application. However, when the parties argued before court, especially the respondents, it transpired that the issue pertained more to the costs not tendered by the applicant.

[35] The respective counsel for the respondents submitted that the applicant did not furnish reasons for its withdrawal of the application; and

that the main reason the applicant wanted to withdraw its application was, amongst other things, because it knows [as has always been the contention of the respondents] that the relief sought is moot and will have no practical effect.

[36] It was the contention of the applicant that the fact that a court cannot give consequential relief also, does not make the matter moot.

[37] It is so that the applicant knew already when the date was arranged with the DJP that the purpose for which the application was launched would not serve any purpose since they knew and agreed that by the time the matter would be heard the local government elections would have taken place, and that whatever decision would come out of this application would not alter and/or affect the outcome of the elections. The respondents submitted thus, that at that stage it would have been reasonable for the applicant to have withdrawn its application, before the respondents incurred further unnecessary costs.

[38] The principles set out in Biowatch pertaining to costs are clear, and one understands that there is reason, set out in Biowatch, to the effect that where an applicant is challenging decisions made by public functionaries exercising statutory duties; that an unsuccessful party ought not to be mulcted/visited with costs. Refer para [21] of Biowatch *supra*; as well as para [22] in which the following was stated:

> "In *Affordable Medicines* the general rule was applied so as to overturn a costs award that had been given in the High Court against the applicants, the High Court having reasoned in part that the applicants had been largely unsuccessful and that they had

> appeared to be in a position to pay. Although Ngcobo J in substance rejected the appeal by the medical practitioners on the merits, he overturned the order on costs made by the High Court against them, and held that both in the High Court and in this Court each party should bear its own costs. In 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."

[39] The Biowatch principles cannot and should not, in my considered view, be invoked in cases where a litigant/applicant acts unreasonably, like the applicant in this case, that comes at the very last minute, just one (1) court day prior to the day of the hearing of the matter; after the respondents have also engaged/briefed counsel, including senior counsel, to prepare for the hearing of the matter, and merely informs the respondents that it intended withdrawing the application, and never tendering costs.

[40] It is understandable that under the circumstances, and correctly so, the respondents would have a gripe with the withdrawal of the application by the applicant, mainly because of the fact that the applicant had not tendered costs; and this is clearly reflected in the letters from the respondents' respecting attorneys in response to the applicant's letter of 12 August 2016.

[41] From the above and from submissions made in court it is clear that in principle the respondents were not opposed to the withdrawal of the

application *per se*, however, the main contentious issue pertains to costs. There is no reason why this court should not grant the order in favour of the withdrawal of the application. The respondents cannot be faulted for their approach in circumstances where DA, under the circumstances did not tender costs.

[40] Having considered all the facts and submissions made by the parties, and under the circumstances set out above, I am of a considered view that this is a case where the court should censure the applicant for approaching the matter so unreasonably, and should order the applicant to pay the costs.

[41] It has to be noted that the costs of all the respondents come out of the public purse/funds. We are here dealing with the taxpayer's money. It would be unreasonable and an injustice to the respondents for this court to, under such unreasonable circumstances, not order the applicant to pay costs.

[42] There is no merit in the submission by the applicant's counsel that the 6th respondent should not have briefed separate counsel, that therefore even if the court were to order the applicant to pay costs, such costs should not include the costs of the 6th respondent. Surely it is the prerogative of all the respective respondents, including the 6th respondent, through the state attorney, to brief counsel of their choice.

[43] On the whole I have come to the conclusion that costs should be decided in favour of the respondents.

In the result I make the following order:

1. The application for the withdrawal of the application is granted.

2. The applicant is ordered to pay the costs of the first to ninth respondents, which costs shall include the costs of two counsel in respect of the first to ninth respondents.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT