

Chapter 6

Costs *

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RS2, 10-10, ch6-p1

6.1 Introduction

Costs orders do not, generally, excite the passions of constitutional academics — although they most certainly interest litigants and litigators! As the Constitutional Court has noted, costs awards ‘come at the tail-end of judgments as appendages to decisions on the merits.’¹ However, as the same Court has been at pains to explain, the way in which courts distribute the burden of costs in constitutional litigation is vital to the health of a constitutional democracy. If potential litigants are deterred from bringing cases by the cost of litigation, then constitutional violations will go unremedied and fewer constitutional disputes will be settled by the courts. An errant approach to costs in constitutional matters could leave important questions about the content of our basic law undecided. That is a real problem: In a constitution expressly committed to the rule of law, the absence of clearly articulated constitutional norms could put the rule of law itself in jeopardy. A constitutional democracy such as that contemplated by our Constitution only works when all actors know, in advance, what the law expects of them.

This chapter focuses primarily, though not exclusively, on the costs jurisprudence of the Constitutional Court in constitutional matters. It begins by laying out the basic principles that guide courts in awarding costs in constitutional cases. The next section considers the factors that might persuade a court to depart from the default rules. Thereafter, the third section considers a number of specific situations that might warrant a somewhat different approach to costs. Section Four considers two situations where costs can legitimately be used to limit access to courts. The fifth section looks at the relationship between higher and lower courts on the issue of costs: when can an appeal court interfere with a lower court’s award? When can a

1 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 (*‘Biowatch’*) at para 1.

litigant appeal solely on the issue of costs? The penultimate section considers the nitty-gritty of taxing costs, while the final section discusses the clarification of costs orders.

6.2 Basic principles

(a) Traditional approach

South African courts have historically treated costs as a matter of largely unfettered discretion.² Notwithstanding this 'free hand', a coherent set of principles on cost orders has emerged from the case law.

In civil litigation, the ordinary approach is that costs orders should indemnify a party against expenses that were incurred as a result of litigation that she should not have been required to initiate or to defend.³ The rationale behind the rule in civil litigation is that if a private person is brought to court to defend a claim with insufficient merit, then it could hardly be fair to expect her to pay legal costs to defend an action that, objectively, ought not to have been brought in the first place.

* The original version of this chapter was authored by Adrian Friedman. I am grateful that he has allowed me to draw liberally from his work in preparing the updated version. However, the views expressed in this chapter reflect my opinion alone.

Although the Constitutional Court has departed significantly from this principle, it still remains the foundation of all costs awards. The different rules for costs in constitutional cases do not exist because the 'loser pays' principle doesn't apply. The Constitutional Court has departed from this basic principle in constitutional matters because the 'loser pays' principle is often outweighed by other, competing rationales.

The existence of competing rationales for departure from the civil law norm was recognised early on in the Constitutional Court's existence. Ackermann J, in *Ferreira v Levin NO (2)*, highlighted the two principles established by the superior courts to deal with costs orders.⁴ First, the award of costs is, unless otherwise enacted, within the discretion of the judicial officer. Second, a successful litigant should ordinarily receive his costs.⁵ Ackermann J was of the view that these principles were sufficiently flexible to apply to constitutional litigation and, to the extent required, adaptation could occur on a case-by-case basis.⁶ Ackermann J then pointed out that (a) the second principle yields to the first principle and (b) this lexical ordering will

2 See A Cilliers *The Law of Costs* (2006) at § 14.04, citing *Neugebauer & Co Ltd v Hermann* 1923 AD 564, 575; *Penny v Walker* 1936 AD 241, 260; *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963, 976 (a); *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808, 815-816 (a).

3 See *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 at para 15.

4 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 (CC), [1996] ZACC 27 ('*Ferreira (2)*') at para 3.

5 *Ibid* at para 3.

6 *Ibid*. See also *Rudolph & Another v Commissioner for Inland Revenue & Others* 1996 (4) SA 552 (CC), 1996 (7) BCLR 889 (CC) at para 21.

be subject to various exceptions.⁷ While not wishing to provide a comprehensive list of the exceptions that might apply, Ackermann J identified the following factors that would have a bearing on whether a successful litigant would be entitled to costs in constitutional matters: (a) the conduct of the parties; (b) the conduct of the legal representatives; (c) whether a party has had only a technical success; (d) the nature of the litigants; and (e) the nature of the proceedings.⁸

These principles, Justice Ackermann held,

are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. [However] if the need arises the rules may have to be substantially adapted... . [T]his should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.⁹

For 12 years, that is how matters proceeded: the Constitutional Court applied the above-mentioned factors to various situations as they arose. Eventually, the case-by-case application crystallised into a relatively clear, if not comprehensive, set of principles for different types of cases. Those principles were finally expressly set out in a fairly full and comprehensive manner by the Court in *Biowatch Trust v Registrar Genetic Resources & Others*.¹⁰

RS2, 10-10, ch6-p3

(b) General Approach: The *Biowatch* Framework

Biowatch not only provides the clearest and most recent statement on costs in constitutional matters, it also provides the appropriate framework through which to analyse the rest of the Court's jurisprudence on costs. *Biowatch* concerned an access to information dispute between an environmental NGO — Biowatch — and the Registrar for Genetic Resources. Biowatch had requested a range of information relating to Genetically Modified Organisms ('GMO'). The Registrar refused to provide the information, forcing Biowatch to sue. Monsanto (Pty) Ltd — a company involved in GMO production — intervened in the litigation in an attempt to prevent the disclosure of confidential information held by the Registrar. Biowatch was largely successful in its information request. It won access to eight of eleven categories of information that it had sought.¹¹ However, the High Court held that Biowatch's request had been framed vaguely and ineptly and therefore refused to grant a costs order against the Registrar. Instead it required each party to pay its own costs.

7 *Ferreira (2)* (supra) at para 3.

8 *Ibid.*

9 *Ibid.*

10 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 ('*Biowatch*'). For commentary on *Biowatch*, see T Humber 'The *Biowatch* Case: Major Advance in South African Law of Costs and Access to Environmental Justice' (2010) 22 *Journal of Environmental Law* 125, 132 ('In the *Biowatch* decision, the Constitutional Court has made a remarkable effort to establish clarity on the question of costs in constitutional litigation.').

11 Trustees for the timebeing of the *Biowatch Trust v Registrar Genetic Resources & Others* [2005] ZAGPHC 135.

Moreover, it ordered Biowatch to pay Monsanto's costs because the ostensibly poor quality of Biowatch's request had forced Monsanto to intervene to protect its interests. The decision on costs was confirmed by a unanimous full bench of the High Court.¹² Biowatch appealed to the Constitutional Court.

The High Court's decision sent a 'shockwave' that 'swept through the public interest law community'.¹³ NGOs conducting public interest litigation — many of which relied entirely on donor funding — worried that adverse costs orders would render them unable to bring future constitutional challenges. Lawyers for Human Rights, the Centre for Child Law and the Centre for Applied Legal Studies all joined the matter as *amici curiae* in the Constitutional Court to seek a reversal of the High Court's decision.

In a unanimous judgment penned by Justice Sachs, the Court clearly set out its approach to costs in all constitutional matters. These principles convinced the Court to reverse the High Court's costs orders. It ordered the Registrar to pay Biowatch's costs and Monsanto to bear its own costs. These principles were, generally, not new; they had been developed and applied in countless cases over the previous 12 years. The value of *Biowatch* is that it brought the principles that had been developed — and the rationales supporting those principles — in the Court's existing jurisprudence together into a (largely) coherent statement on the law of costs in constitutional cases. The Court divided constitutional cases into three categories, with different rules for costs in each case. As we shall see, there are two further categories that the *Biowatch* Court did not explicitly address, but that fit neatly into the principles that the *Biowatch* Court adopted.

RS2, 10-10, ch6-p4

(i) Disputes between a private party and the state

The first category is direct litigation between the state and private parties. Summarising its earlier jurisprudence, the *Biowatch* Court stated the principle in these cases as follows: '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.'¹⁴ Sachs J set out three reasons for this departure from the traditional principle:

In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is

12 Trustees for the time being of *The Biowatch Trust v Registrar Genetic Resources & Others* [2007] ZAGPHC 270

13 *Biowatch* (supra) at para 5.

not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.¹⁵

Although *Biowatch* mentions these rationales primarily in relation to the first category, they appear throughout its jurisprudence on costs and undergird the Court's approach to most classes of cases. The primary reason for almost all the deviations from the traditional 'loser pays' rule — whether the litigation directly involves the state or not — is the desire not to discourage litigants from raising legitimate constitutional claims.

RS2, 10-10, ch6-p5

The application of the principle is not unqualified. An application that is 'frivolous or vexatious, or in any other way manifestly inappropriate' will be treated as an ordinary civil case.¹⁶ Moreover, '[m]erely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke' the special costs rule.¹⁷ I discuss these factors in more detail below.¹⁸

(ii) Disputes where the state plays a regulatory role

The Court defined the second category of cases as 'constitutional litigation where the state is sued for a failure to fulfil its responsibilities for regulating competing claims between private parties'.¹⁹ As Sachs J explained:

Usually, there will be statutes or regulations which delineate the manner in which the governmental agencies involved must fulfil their responsibilities. In matters such as

14 *Biowatch* (supra) at para 22. The Court quoted the following cases in support: *Affordable Medicines Trust & Others v Minister of Health & Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 ('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 circumstances of the case'); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC), [2005] ZACC 9 at para 55 ('Although the respondent had asked for a costs order, the applicant has brought an important issue to this Court regarding the application and interpretation of the relevant provisions of the Act. I therefore make no order as to costs'); *Volks NO v Robinson & Others* 2004 (6) SA 288 (CC), 2005 (5) BCLR 446 (CC), [2005] ZACC 2; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC), [1998] ZACC 18; and *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC), [2006] ZACC 16.

15 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 at para 23.

16 *Biowatch* (supra) at para 24.

17 *Ibid* at para 25.

18 See § 6.3 below.

19 *Biowatch* (supra) at para 26.

these a number of private parties might have opposite interests in the outcome of a dispute where a private party challenges the constitutionality of government action. The fact that more than one private party is involved in the proceedings does not mean, however, that the litigation should be characterised as being between the private parties. In essence the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities. Essentially, therefore, these matters involve litigation between a private party and the state, with radiating impact on other private parties.²⁰

The dispute between Monsanto and Biowatch fits this description. Monsanto had been pulled into the litigation because of the Registrar's failure to fulfil its constitutional and statutory duty to provide the information to Biowatch. As the Court put it:

[T]his case did not truly involve litigation between private parties. It was litigation in which private parties with competing interests were involved, not to settle a legal dispute between themselves, but in relation to determining whether the state had appropriately shouldered its constitutional and statutory responsibilities.²¹

Other examples that come readily to mind are applications for licenses and tenders.²²

The rule in this category of cases is: 'the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders

RS2, 10-10, ch6-p6

against any private litigants who have become involved.'²³ In *Biowatch*, the rule resulted in a finding that while the state must pay Biowatch's costs, Monsanto must bear its own costs.²⁴

20 Ibid at para 28.

21 Ibid at para 54.

22 The Court used two earlier cases as examples: *Fuel Retailers Association of South Africa (Pty) Ltd v Director General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 at para 107 (A dispute about whether environmental approval to permit a fuel station had been properly granted. The proprietors of the station argued that it had, an association of fuel retailers contended that it had not.); *Walele v City of Cape Town & Others* 2008 (6) SA 129 (CC), 2008 (11) BCLR 1067 (CC), [2008] ZACC 11 (Dispute between private parties over a municipality's decision to grant approval for building.) See also, for example, *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), 2007 (10) BCLR 1027 (CC), [2007] ZACC 12 at para 89 (In a land restitution dispute, the Court held that the dispute was really between the claimants and the state and that, although the current landowner had resisted the claim, it should only pay its own costs); *MEC for Education: Kwazulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC), [2007] ZACC 21 at para 118 (Court upheld a challenge by a pupil to a decision of her school not to permit her to wear a nose stud. In dealing with costs, Langa CJ, held that the pupil should receive her costs and that the School should not have to pay costs as it had found itself 'at the centre of a difficult constitutional issue' and had 'played an important role in ventilating' that dispute. The provincial Department of Education therefore paid all the pupil's costs.)

23 *Biowatch* (supra) at para 56.

24 Ibid at paras 58-59.

Biowatch does not tell us what the appropriate principle is when the challenge is unsuccessful. In *Omar v Government, RSA & Others*, the Constitutional Court found that although the applicant's challenge to the Domestic Violence Act²⁵ was 'to a considerable extent ill-conceived', no costs order should be made in favour of the governmental entities defending the Act.²⁶ At the same time, however, the Court ordered the applicant to pay the costs of the third respondent.²⁷ The third respondent, the applicant's ex-wife under Islamic law, had been obliged to acquire various protection orders against the applicant in terms of the Domestic Violence Act. The *Omar* Court viewed that matter as one in which the state regulated a private dispute between husband and wife. Stated as a general principle: unsuccessful private parties will not pay the costs of the state, but will pay the costs of other private parties. Fair enough. Moreover, it squares with the rationales articulated in *Biowatch*. As a matter of practice, however, the actual outcome is likely to depend on the nature of the issue, the parties involved and how compelling a constitutional point was raised.

(iii) True private disputes

The third class of cases is true private disputes. Contractual disputes, arguments over intellectual property, private delictual disputes and defamation claims readily fall into this category. Here, the *Biowatch* Court failed to provide clear guidance. It began by endorsing the earlier decision in *Barkhuizen v Napier*,²⁸ a case in which the applicant had unsuccessfully raised a constitutional challenge to a contractual provision. The *Barkhuizen* Court had made no order as to costs on the grounds that the determination of these contractual 'issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships.'²⁹ The general principle in *Barkhuizen* — that Sachs J in *Biowatch* appeared to tentatively

RS2, 10-10, ch6-p7

endorse — seems to be that private parties engaged in a *bona fide* private constitutional dispute should bear their own costs.

However, the *Biowatch* Court noted (in a footnote) that there were several similar cases where the Court *had* ordered costs against the unsuccessful private party. In *Laugh it Off*,³⁰ *Khumalo*³¹ and *NM*³² — all cases involving clashes between freedom of expression and other constitutional rights — the Court ordered costs to follow the

25 Act 116 of 1998.

26 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC), [2005] ZACC 17 ('Omar').

27 *Ibid* at para 64.

28 *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC), [2007] ZACC 5.

29 *Ibid* at para 90 quoted in *Biowatch* (supra) at para 26. The Court followed a similar approach in *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd & Another* 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC), [2006] ZACC 5 at para 28 (although dismissing leave to appeal, the Court held that the applicant had 'sought to raise important constitutional issues in this Court' and therefore made no order as to costs.)

30 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC), [2005] ZACC 7.

result. Thus, the *Biowatch* Court was confronted with two lines of cases and two different principles: one line of cases awarded costs to successful private litigants; the other line of cases required each party to bear its own costs.

The Court avoided dealing with this inconsistency. It wrote: 'The present matter does not ... require us to consider whether the award of costs in those matters is consistent with the decision in *Barkhuizen* or with the general principles outlined in this judgment.'³³ The *Biowatch* Court declined to decide whether different rules obtain for different private disputes or different kinds of claims, or if its earlier decisions were wrong.

Fortunately, the Court provided some clarity — at the expense of back-tracking on the principles announced in *Biowatch* — in *Bothma v Els*.³⁴ The *Bothma* Court concluded: 'The general principle as far as private litigation is concerned is that costs will ordinarily follow the result' however, there would be 'exceptional cases' which would justify a departure from this rule.³⁵ The primary factor 'justifying this departure from the general rule has been the extent to which the pursuit of public interest litigation could be unduly chilled by an adverse costs order.'³⁶

Bothma provides a clear statement of principle and (more-or-less) reconciles the two lines of cases. Private litigants that raise constitutional claims solely to achieve commercial or private ends should be treated like litigants in ordinary, non-constitutional disputes.³⁷ However, private litigants that raise constitutional claims for non-commercial reasons — those who litigate in the 'public interest',

31 *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC), [2002] ZACC 12.

32 *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC), [2007] ZACC 6.

33 *Biowatch* (supra) at fn 31.

34 *Bothma v Els & Others* 2010 (2) SA 622 (CC), 2010 (1) SACR 184 (CC), 2010 (1) BCLR 1 (CC), [2009] ZACC 27 ('*Bothma*').

35 *Ibid* at paras 91-93.

36 *Ibid* at para 93.

37 See, for example, *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 ('*Fedsure*') at para 116 (Although the Court did not, in *Fedsure*, explain the basis for awarding costs against the appellants, it has subsequently explained that an unsuccessful applicant will be required to pay costs when pursuing a private commercial interest); *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC), [2000] ZACC 10 at para 52 ('In this Court, the general principle has been established that parties should not be discouraged from asserting and vindicating their fundamental constitutional rights and freedoms as against the state. This principle does not apply to all private litigants unsuccessfully asserting constitutional claims against the state. This Court has for instance ordered such litigants to pay costs in the absence of good faith, or where the litigant mulcted in costs was apparently pursuing private commercial interests.' (footnotes omitted)).

as the *Bothma* Court puts it — should not be mulcted in costs for raising constitutional claims.

I discuss the reliance on a litigant's motive — which I believe is mistaken — in more detail below.³⁸ Suffice it to say that I believe the basic *Bothma* position to be undesirable (even as it tidies up the obvious incongruity in the law.) The Court had it right in *Barkhuizen* and *Biowatch*. As *Bothma* itself notes,³⁹ two of the three *Biowatch* rationales that justify a departure from the traditional approach to costs in litigation between citizens and the state apply to constitutional litigation between private parties: (a) the high costs of constitutional litigation will deter private parties from raising constitutional claims; and (b) constitutional decisions — even in private litigation — redound to the benefit of other members of the commonweal. In my view, the third *Biowatch* rationale — that it is the state that is ultimately responsible for unconstitutional laws — will usually apply to litigation between private parties. Most private constitutional litigation involves a claim that the existing law should be developed (in the case of the common law), or interpreted (in the case of legislation) to bring it in line with the Constitution. It is ultimately the state that is responsible for allowing those unconstitutional laws to remain in effect.⁴⁰ If all three rationales apply equally, then it makes little sense to apply a different default rule. It may be that departures from the rule will more often be justified in pure private disputes. But that fact is not reason enough to change the default position.

Applying the *Bothma* rule will not only contradict the *Biowatch* rationales, it will also, in some cases, be unfair on a more basic level. *Bothma* seems to assume that parties rely on the Constitution in private disputes either for narrow, selfish personal gain, or in the public interest. That is false. Litigants can also rely on constitutional rights simply because they want their rights protected. They can do this without expecting any additional, commercial gain and without consciously doing so in the public interest. They should not be penalised for doing so.

Bothma is a perfect example of this type of motivation and of the unfairness of the rule. *Bothma*, who alleged that Els had repeatedly raped her thirty-nine years earlier, instituted a private prosecution against him. Els went to the High Court to seek a permanent stay of that prosecution. He argued that his right to a fair trial would be impaired by a trial so long after the alleged crime. The High Court granted the stay. The Constitutional Court reversed and allowed the private prosecution to proceed. However, it acknowledged that Els's reliance on the right to a fair trial was genuine, not frivolous. However, in deciding to order Els to pay *Bothma*'s costs, Sachs J wrote: 'The proceedings in effect sought to deny Mrs *Bothma* the opportunity to establish at the trial a factual explanation for her long delay in laying a complaint.'⁴¹ The Court characterized Els' opposition as mere obstructionism. But Els' concerns about the fairness of his trial raised legitimate constitutional issues: if

38 See § 6.3(a) below.

39 *Bothma* (supra) at para 95.

40 On this view, the line between the second and third category largely evaporates. The difference is not in the nature of the state's involvement, but the more practical difference that the state is not a party to the case. If the state were a party in *Laugh it Off*, *Khumalo, NM* or *Bothma*, then I have little doubt the Court would have found a way to make them bear a large portion of the costs.

41 *Bothma* (supra) at para 98.

having a trial after such a long delay would render the trial unfair, then a permanent stay of prosecution might be warranted. It seems harsh in the extreme to require Els to pay Bothma's costs for trying to enforce his right to a fair trial without knowing (which the Court did not) whether Bothma's allegations are true or not.⁴²

(iv) Inter-governmental disputes

Biowatch only addresses the three aforementioned categories. A fourth category of cases exists: inter-governmental disputes. Although the Constitution — and the Inter-governmental Relations Framework Act⁴³ — asks that government entities exhaust all possible avenues of non-judicial dispute resolution,⁴⁴ inter-governmental litigation does occur. The Court has not been explicit on this issue, but it seems that the general principle is that each government entity should bear its own costs. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* — a dispute between local and provincial governments — Jafta J wrote of the question of costs:

Wisely so, none of the parties have asked for costs. Excluding the *amici curiae*, all parties that took part in the hearing of this matter are organs of state. In addition the matter raises constitutional issues of some considerable importance. Therefore, there should be no order as to costs.⁴⁵

While Jafta J articulates the preferred approach, it should not — as is the case with all costs orders — be a hard and fast rule. The conduct of the parties, or the nature of the issue involved, may require a different result. The role of the parties in failing to find a non-judicial solution to the dispute will, quite likely, be particularly relevant. For example, should costs be equally born when one party attempted to find a non-litigious solution, while the other ignored all efforts to arrive at a mutually agreeable outcome? (Of course, one must ask 'who pays' — inevitably, the taxpayer — and how uncooperative state parties can be made held to account for their lack of institutional comity. The latter question is not easily answered.)

(v) Criminal litigation

Criminal cases constitute the fifth and final category. At common law, costs orders are generally not made in criminal cases. As the Court held in *Sanderson*, in 'criminal

42 The Court was perhaps influenced by the unusual character of the dispute — an application to prevent a private prosecution. The award of costs in private prosecutions is specifically addressed by the Criminal Procedure Act 51 of 1977 ss 14-17. But the Court does not refer to these sections and explicitly treats the case as a pure private dispute — despite the inevitable impact of the state's decision not to prosecute. Despite its mixed character, *Bothma* can properly be treated as reflecting the Court's attitude to costs in private disputes.

43 Act 13 of 2005.

44 See, generally, S Woolman & T Roux 'Co-operative Government & Intergovernmental Relations' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 14.

45 [2010] ZACC 11 at para 94.

proceedings, which are instituted by the state ... costs orders are not competent'.⁴⁶ This conclusion rather easily aligns with the general principle when the applicant is unsuccessful. Criminal accused should be entitled to raise all constitutional claims without fear of an adverse costs order. Of course, this rule, like all costs rules, is not inflexible. In *Thint Holdings (Southern Africa) (Pty) Ltd & Another v National Director of Public Prosecutions*, the Court required the unsuccessful applicants to pay the state's costs.⁴⁷ The applicants had persisted in challenging the validity of a letter to Mauritian officials requesting evidence, despite the fact that it became increasingly clear during the litigation that they would be able to challenge the admissibility of the evidence at the trial.⁴⁸

However, the rule — that there should be no costs orders in criminal cases — also seems to apply when the applicant is *successful*. A litigant who successfully argues that a statute that led (or may lead) to his conviction is unconstitutional, or that his trial was unfairly conducted, is not entitled to his costs, but a litigant who successfully argues that he has a right to make funny t-shirts is.⁴⁹ This principle is so deeply embedded that the Court often does not even mention the question of costs when the criminal litigant has been successful. Moreover, while it has been crystal clear about what the rule is, it has never provided a rationale for the rule.

At first, this rule may appear strange. Why should a criminal accused who successfully argues that his constitutional right to a fair trial (or some other right) was violated by the state be treated differently from a civil litigant? The facts of *Weare* indicate the degree of absurdity at work.⁵⁰ *Weare* pre-emptively challenged the constitutionality of a provincial law that prevented juristic persons from holding a bookmaker's license. He lost, but the Court did not award costs against him — despite his commercial motivation — because

the litigation is a challenge to a law which it is alleged the applicants have contravened. Any person contravening the Ordinance is guilty of an offence and subject to a fine of up to R5000 or two years' imprisonment or both. In my view, this Court should be careful not to dissuade litigants from challenging the constitutionality of laws of the state under which they face statutory penalties.⁵¹

46 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC), [1997] ZACC 18 at para 44. See also *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC), [2000] ZACC 12 ('Hyundai') at para 59; *Harksen v President of the Republic of South Africa & Others* 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC), [2000] ZACC 29 at para 30; *S & Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC), [2002] ZACC 8 at para 270; *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), [2004] ZACC 13 at para 78.

47 2009 (1) SA 141 (CC), 2008 (2) SACR 557 (CC), 2009 (3) BCLR 309 (CC), [2008] ZACC 14.

48 *Ibid* at para 68.

49 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC), [2005] ZACC 7.

50 *Weare & Another v Ndebele NO & Others* 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC), [2008] ZACC 20.

51 *Ibid* at para 79.

That conclusion dovetails with the Court's general approach to costs. Yet, if Mr Weare had waited until he was actually accused before challenging the legislation,

he would not have been entitled to his costs because it would be a criminal case. Can this distinction be justified?

On reflection, there are three plausible (but ultimately unconvincing) reasons for this approach. First, we would not want to discourage the state from bringing *bona fide* prosecutions because of the fear of costs. There is always some unpredictability in prosecuting a case: a prosecutor never knows how witnesses will perform on the stand, what evidence the judge will admit and so forth. If the state risked an adverse costs order every time it lost, then it might be inclined to prosecute fewer cases. This rationale is also supported by various sections of the Criminal Procedure Act⁵² that temper the general rule by permitting courts to make awards of costs where, for example, the state unsuccessfully appeals against a High Court order.⁵³ In addition, accused who believe their prosecution was *mala fide* can sue for malicious prosecution. These provisions indicate that, as long as the state acts in good faith, it should not pay defendants' costs.

While a powerful rationale in ordinary criminal cases, I am not convinced that it ought to apply to allegations of rights violations. In such cases the state has manifestly not acted properly because it has either given the specific accused an unfair trial, or has allowed a law that violates the accused person's rights to remain on the books. The state can legitimately be mulcted in costs because it has failed to fulfil its constitutional duty to provide fair trials, and not violate other rights. The Court has not hesitated to apply different rules to constitutional civil matters than are applied in ordinary civil matters. No compelling reason exists to fail to make such a distinction in criminal cases.

The second rationale is that the vast majority of criminal defendants do not in fact pay for their defence team. They are either represented by the Legal Aid Board or some other form of pro bono representation. In those cases it makes no sense to shift funds between the NPA and the Legal Aid Board. Although that may be a powerful rationale in the majority of cases, it does not provide a sufficient explanation in cases where the accused does indeed pay for her own defence.

Third, it could be argued that the primary rationale for a different attitude to costs in constitutional cases — that costs would chill constitutional litigation — does not apply to criminal cases. Those persons charged with crimes are likely to raise whatever issues they can to avoid conviction — including constitutional claims. The threat of punishment renders the issue of costs a less important factor because

52 Act 51 of 1977 ('CPA').

53 See CPA s 65A(2)(c)(If the state unsuccessfully appeals against the granting of bail, then the court may order the state to pay the accused's costs); CPA s 306(3)(If the accused takes a Magistrates' Court decision on review, then the state cannot be ordered to pay costs, whatever the outcome); CPA s 310A(6)(If the state appeals against the sentence of lower court, the appeal court may order the state to pay the accused's costs); CPA s 311(2)(If the state appeals against a High Court conviction to the Supreme Court of Appeal and the appeal is dismissed, then the appeal court may order costs against the state); CPA s 316B(3)(If the state appeals to the Supreme Court of Appeal against the sentence of a High Court, then the appeal court may order the state to pay the accused's costs); CPA s 342A(3)(e)(If proceedings are being delayed unreasonably, then each party must pay the cost it caused).

issues of cost are unlikely to deter the accused from raising constitutional issues that may lead to their acquittal. However, the rule does not fit with the other

two *Biowatch* rationales. Constitutional claims in criminal cases redound to the benefit of the greater society just as much as civil constitutional complaints. They ensure that 'everyone' receives fair trials and, in some cases, that the state strikes unconstitutional laws from the books. In addition, the state, in criminal matters, will always be responsible either for the unconstitutional law on the books, or the unconstitutional conduct.

I can discern no compelling rationale for the unique treatment of costs in constitutional criminal cases. The Court has squarely confronted the issue of costs in civil cases. It should apply its mind with equal force to the underlying principles of costs in criminal cases.

It is possible that a more basic, unmentionable explanation exists: Criminals — and even innocent persons charged with a crime — are viewed as dangers to the realm and treated as outcasts. So while fellow citizens pressing constitutional civil claims enjoy our sympathy to some degree, alleged criminals do not. 'They' are the problem. 'They' are what ill the land. Surely these lepers amongst us ought not to enjoy the benefits of cost orders even when they ensure that the law on the books is 'fair' and 'just' for anyone charged in a criminal matter. The Constitutional Court has never endorsed this reasoning, and it does not square with its jurisprudence on the rights of criminals. Nonetheless, until the Court explains its position, there will be a suspicion that this rather natural bias tacitly informs their decisions.

(vi) Conclusion

To recap, the following general principles apply in the five categories:

- (a) Litigation between private party and the state — if private party wins, then the state pays costs; if the state wins, then each party pays their own costs;
- (b) Litigation between private parties as a result of state failure — state should pay the successful party's costs; no costs against any additional private parties involved in litigation; unsuccessful private party pays other private parties' costs;
- (c) Litigation between private parties — the successful party gets its costs, unless there are exceptional circumstances, which most often concern whether the litigation is in the public interest;
- (d) Inter-governmental litigation — each party bears its own costs;
- (e) Criminal proceedings — no costs order.

While these principles provide clear starting points for each class of cases, reasons will often exist to deviate from them. In the next section I discuss those reasons that might justify departing from the default position.

6.3 Factors justifying a departure from the default approach

Various factors, particularly the conduct of litigants, are likely to have a bearing on the award of costs. However there is no closed list; a court will consider virtually any

feature of a case that may be germane to a cost order. That said, the most commonly considered factors are: (a) the motivation for the litigation; (b) the conduct of the parties; and (c) whether the parties achieved full or partial success.

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(a) The reason for litigation

The reason a party chooses to litigate is, on the Court's current approach, a relevant factor in deciding on a costs award. However, this rationale requires more reflection than might be commonly expected. For while the *Biowatch* Court unambiguously held that motivation was not relevant to a costs order, only four months later the *Bothma* Court later re-entrenched the relevance of purpose. How should one treat this disjunction? I break the discussion down into three parts. First, I consider, again, the tension between *Biowatch* and *Bothma*. Second, I attempt to reconcile these two apparently opposing positions. Third, I contend that motivation should not be relevant to determining costs.

Before going further, I should note that purpose is primarily relevant in true private disputes. It is unlikely that the purpose of litigation alone will be sufficient to convince a court to depart from the default position in other disputes.

(i) *Bothma v Biowatch*

The reason for the litigation is, on the authority of *Bothma v Els*, a relevant consideration. Those who litigate for commercial gain are more likely to pay the other side's costs if they are unsuccessful and less likely to receive their costs if they are successful, than litigants who go to court for the public good. As the *Bothma* Court puts it, '[a] factor that has loomed large in justifying this departure from the general rule [that the successful party should receive its costs] has been the extent to which the pursuit of *public interest litigation* could be unduly chilled by an adverse costs order.'⁵⁴ Although the *Bothma* Court does not define 'public interest litigation', it clearly does not embrace litigation motivated by pure economic interest. This principle has guided the Court in earlier cases as well. The Court has even held that 'when the litigation is pursued for private commercial gain' an unsuccessful litigant should pay the costs of the other party — even when the other party is the state.⁵⁵

At first glance, this conclusion seems quite reasonable. Unfortunately, it runs counter to a powerful argument made by the same court in *Biowatch*.⁵⁶ One of the

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arguments advanced by the NGO *amici* was that courts should promote public-interest litigation by being slow to make costs orders against entities litigating in the public interest. The Constitutional Court strongly rejected this argument. While Sachs J acknowledged the important role that public interest litigators play in maintaining the vitality of a constitutional democracy, he held that the focus when

54 *Bothma v Els & Others* 2010 (2) SA 622 (CC), 2010 (1) SACR 184 (CC), 2010 (1) BCLR 1 (CC), [2009] ZACC 27 ('*Bothma*') at para 93 (my emphasis).

55 *Weare & Another v Ndebele NO & Others* 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC), [2008] ZACC 20 at para 78 citing *South African Commercial Catering and Allied Workers Union (SACCAWU) & Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC), [2000] ZACC 10 at para 51, with reference to *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 at para 116.

determining an appropriate costs order should not be on the characterisation of the parties, but on the issues. It should not matter whether the litigant in respect of whom a costs order may be made is acting in its own name or in the public interest, is possessed of funds, is indigent or is reliant on external funding. 'The primary consideration in constitutional litigation', the *Biowatch* Court found, 'must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'⁵⁷ The Court held, further, that the principle of equal protection before the law envisaged in s 9(1) of the Constitution required courts to focus on whether litigants sought to assert rights protected by the Constitution and not on whether a litigant was rich and litigating for commercial gain or was externally funded and acting in the public interest:

Courts are obligated to be impartial with regard to litigants who appear before them. Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.⁵⁸

It is difficult to square the statements in *Biowatch* with *Bothma*. If litigants should not 'be looked upon with favour because they are fighting for the poor', why should we consider whether they are litigating in the public interest rather than for commercial gain?

It is possible to read the cases together if we construe the finding in *Biowatch* very narrowly. The argument rejected in *Biowatch* was that the *status* of the litigant should be relevant — that merely because they were an NGO, they should not be mulcted in costs. That is different from the *reason* a litigant raises a constitutional claim. An NGO can, conceivably, litigate for its own commercial advantage, just as a large corporation could litigate for non-commercial reasons. Although some of the language in *Biowatch* slips between status and reason, the core of the argument is that the nature of the institution is irrelevant. The central point in *Bothma* turns on the motivation for litigation, not the nature of the party. This distinction does not perfectly align all of the costs orders in existing case law. Instances certainly exist in which the Court has explicitly deemed a commercial motivation relevant. But it seems the best way to uphold the forceful point made in *Biowatch* with the decision

56 See T Humber 'The *Biowatch* Case: Major Advance in South African Law of Costs and Access to Environmental Justice' (2010) 22 *Journal of Environmental Law* 125, 133 ('At first blush, the Court's rejection of an approach that would take the nature of the parties or the causes they advance into account is a point of criticism: By failing to acknowledge that parties do not come to court with an equality of arms — especially in the environmental sphere — the Court in fact perpetuates the systemic unfairness that bedevils access to justice in South Africa. But this avoidance is in fact a carefully considered and brilliant move because it effectively circumvents difficult questions as to which parties are acting 'in the public interest' and which are not, or what the threshold might be if the capacity of the 'war chest' with which litigants come to court should be taken into account. Unlike the test formulated with regard to protective costs orders in the UK, or attempts to formulate a special approach to costs in public interest litigation in other jurisdictions, the Constitutional Court's approach in the *Biowatch* matter leaves very little room for a subsequent restrictive interpretation of the principles it lays forth. All that matters is whether the litigation has been undertaken to assert constitutional rights and whether there has been any impropriety in the manner in which it has been conducted.') (Footnotes omitted)

57 *Biowatch* (supra) at para 16.

58 *Ibid* at para 17 (my emphasis).

in *Bothma* and the Court's longstanding and ongoing practice of relying on motivation.

However, the Court is still wrong to consider motivation. The Constitution does not exist only to protect the poor and the vulnerable, it exists to protect all

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members of society, including the rich and powerful. As Justice Sachs wrote in *Biowatch*:

It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a court of law.⁵⁹

Some constitutional rights — the right to property, freedom of trade — are *intended* to protect commercial interests. Other rights — expression,⁶⁰ dignity⁶¹ and equality⁶² — can also be raised for commercial reasons. Assuming a constitutional point was legitimately raised, to scrutinise the motive for relying on a right creates a hierarchy of rights: those that protect the poor and vulnerable are more important than those that protect the rich and powerful. The Court has, correctly, explicitly rejected the notion of a hierarchy of rights. It should not allow that notion to creep into its jurisprudence through the backdoor of costs.

Perhaps the biggest danger is the uncertainty that still reigns in this area. While the status/motivation distinction makes sense of the Court's jurisprudence, the Court has not clearly endorsed it. The result is that private parties thinking about raising constitutional claims will be uncertain about how costs will be determined in their case. That uncertainty *will chill constitutional litigation* as parties are less likely to take the risk of litigating without certainty about how costs are likely to be distributed. The Court would do well to take the next opportunity to provide a clear answer to this question.

(ii) Motivation in practice

Despite the contested terrain discussed above, in numerous instances the Court has considered the commercial motivations of parties in making a costs award. Here are but a few examples.

In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the applicants had challenged the anti-dumping recommendation of the International Trade Administration Commission as it related to its trade in steel wire.⁶³ Their application failed, and the Court found no reason why — in what was

59 *Biowatch* (supra) at para 17.

60 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC), [2005] ZACC 7.

61 *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC), [2007] ZACC 5.

62 *Weare & Another v Ndebele NO & Others* 2009 (1) SA 600 (CC), 2009 (4) BCLR 370 (CC), [2008] ZACC 20 ('Weare').

essentially a commercial matter that raised some constitutional questions — costs should not follow the result.⁶⁴

The Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* also relied on the applicant's commercial motivation.⁶⁵ The applicant argued that an arbitration it had been involved in had not been fairly conducted and had, as a

RS2, 10-10, ch6-p16

result, violated its FC s 34 right of access to court. A slim majority of the Court found that FC s 34 does not apply directly to private arbitrations.⁶⁶ On the issue of costs, O'Regan ADCJ concluded:

Mphaphuli has raised a constitutional issue in this Court. The respondents were brought to this Court to answer that argument. They did not rely on any constitutional right of their own but disputed the constitutional argument made by the applicant. Properly construed, therefore, this is private litigation relating to a commercial matter and the applicant has lost. In my view, it should pay the costs, including those consequent upon the employment of two counsel.⁶⁷

However, in *Weare* the Court overlooked the applicant's commercial motivation because 'this Court should be careful not to dissuade litigants from challenging the constitutionality of laws of the state under which they face statutory penalties.'⁶⁸ And in *Giddey*, despite holding that, in commercial matters, to force a litigant to provide security for costs did not violate the right of access to courts, O'Regan J made no costs order because 'the applicant has raised a constitutional issue of some importance'.⁶⁹

The Court does not seem to adopt a principled position here. In some cases a commercial motivation is relevant, while in others it is trumped by the importance of the constitutional issue, or the Court's analysis of the fairness of the issue. Successful litigants will always be able to raise the commercial motivations of their opponents, but there is no guarantee that they will receive their costs.

(b) Partial success

When a litigant is only partial successful — or only successful on a technical, rather than a substantive point — this outcome may affect the court's determination of

63 2010 (5) BCLR 457 (CC), [2010] ZACC 6.

64 *Ibid* at para 113.

65 2009 (4) SA 529 (CC), 2009 (6) BCLR 527 (CC), [2009] ZACC 6 ('*Mphaphuli*').

66 For a discussion on the right of access to courts, although not of *Mphaphuli*, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

67 *Mphaphuli* (*supra*) at para 279.

68 *Weare* (*supra*) at para 79.

69 *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC), [2006] ZACC 13 at para 35.

costs. The Court's first substantive decision on costs — *Ferreira v Levin NO (2)* — recognized this tenet. In *Ferreira v Levin NO (1)*,⁷⁰ the applicants had challenged the constitutionality of section 417 of the Companies Act.⁷¹ Section 417 provided for enquiries to be held in respect of companies being wound up for failure to pay their debts. The gist of the applicants' complaint was that they were required, in terms of the provision, to give evidence in such an enquiry and evidence they gave could later be used against them in a criminal trial. The Court declared the section unconstitutional to the extent that the evidence could be used in a subsequent criminal trial. In *Ferreira v Levin NO (2)*, the Court dealt with the question of costs. The applicants had been only partially successful. The order of the Constitutional Court in *Ferreira (1)* still permitted the enquiry to take place and only barred the use of evidence in a subsequent criminal trial. In *Ferreira (2)*,

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therefore, the Court held that the applicants had not been successful as against the respondents. The respondents wanted evidence from the applicants and, notwithstanding the order in *Ferreira (1)*, were still able to secure it.⁷² The applicants were, therefore, not entitled to their costs.⁷³ The Court has adopted a similar approach where a litigant claiming the return of foreign currency was successful with regard to some, but not all of the money,⁷⁴ in a dispute over a third party's rights to frozen assets,⁷⁵ and in a disagreement between provincial and national governments over local government legislation.⁷⁶

70 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1995] ZACC 13 ('*Ferreira (1)*').

71 Act 61 of 1973.

72 See *Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO & Others* 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 (CC), [1996] ZACC 27 ('*Ferreira (2)*') at para 5.

73 *Ferreira (2)* (supra) at para 7. See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 at para 76 (Partially successful applicants bear their own costs.)

74 *Van der Merwe & Another v Taylor NO & Others* [2007] ZACC 16, 2007 (11) BCLR 1167 (CC), 2008 (1) SA 1 (CC).

75 *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC), [2006] ZACC 24 (The applicant's assets had been frozen, except for what he needed for legal fees. ABSA, who had obtained default judgment against the applicant, applied to prevent the applicant from spending his unfrozen assets on legal fees as that would deplete the money available to satisfy its debt. The applicant succeeded in preventing the money that would be used for his legal fees from being frozen. But ABSA succeeded in being permitted to intervene in proceedings that would determine the extent of the assets the applicant would be able to use. The Court accordingly made no costs order.)

76 *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC), [1999] ZACC 13 at para 138 (The Western Cape and KwaZulu-Natal challenged the constitutionality of the whole Local Government: Municipal Structures Act. They succeeded only with regard to some sections. One of the reasons Ngcobo J supplied for making no costs award was that the applicants had only been partially successful.)

The rule — or rather standard — is by no means firm. There are instances where an applicant does not achieve full success, but still receives its costs. If the claim — or the defence — is substantially (but not completely) successful, then the costs award will probably not be affected. *Biowatch* is perhaps the best example. Biowatch was only partially successful in the sense that it obtained only eight out of the eleven categories of information it had sought. Yet it still received its costs.⁷⁷ Similarly, in *Dawood*, the applicants succeeded in the substance of their appeal, but lost in their appeal against the suspension of the order of invalidity that had been granted by the High Court.⁷⁸ They still received their costs.

(c) Conduct of the litigation

One of the primary factors that will always affect a court's award of costs is the way that the litigants have conducted the litigation. If they have litigated vexatiously (including if the constitutional issue they raise has no firm basis in the Constitution) or abused the Court's process, the Court is likely to punish them by denying them costs to which they would otherwise be entitled or to order costs

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against them when they would otherwise have escaped without paying costs. In particularly severe cases, the court can make a punitive costs award.⁷⁹

In this section I discuss the general issue of conduct under three subheadings. One, raising frivolous constitutional claims. Two, vexatious litigation. Three, other inappropriate conduct.

(i) Frivolous constitutional claims

In *Biowatch*, the Court held that a person raising a constitutional matter vexatiously would not be entitled to his costs. Sachs J wrote:

Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication.⁸⁰

It is difficult to find examples of such cases. The Constitutional Court will ordinarily dismiss frivolous constitutional claims without a judgment. If it hears the case, then there will almost always be a plausible constitutional claim. However, in the High Court, litigants should not expect that throwing in random references to the Constitution will protect them from costs orders.

(ii) Vexatious litigation

Occasionally an unsuccessful applicant raises an important constitutional matter, but does so in the context of vexatious and unmeritorious litigation. The

77 *Biowatch* (supra).

78 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8.

79 See §6.5 below.

80 *Biowatch* (supra) at para 25.

Constitutional Court has held that it would be unfair to expect the respondents in such matters to bear their own costs and has awarded costs to them. The classic example must be *Beinash & Another v Ernst & Young & Others*.⁸¹ The respondents obtained an order against the applicants — who had instituted 45 different claims against the respondents — in terms of the Vexatious Proceedings Act.⁸² They thereby prevented the applicants from instituting any litigation without the permission of the High Court. The applicants appealed to the Constitutional Court, arguing that the Act violated their right of access to court. Mokgoro J disagreed and held that ‘by litigating as persistently and vexatiously as they did, the applicants placed respondents in the untenable position where they had to respond to such unmeritorious litigation, resulting in unnecessary costs. ... In the circumstances, costs should follow the result.’⁸³

(iii) General inappropriate conduct

There is no closed list of the type of conduct that might affect a court’s decision on costs. What follows are merely some examples from the Constitutional Court’s

RS2, 10-10, ch6-p19

history of conduct that influenced the Court’s decision on costs — but was not so objectionable as to justify a punitive order.

In *Motsepe v Commissioner for Inland Revenue*,⁸⁴ the applicant sought and was granted an order referring to the Constitutional Court questions regarding the constitutionality of certain provisions of the Income Tax Act.⁸⁵ The Constitutional Court held that the referral was not competent because not only was the constitutionality of the Act not germane with respect to the matter before the Supreme Court, but the applicant had failed to pursue potential non-constitutional remedies.⁸⁶ The Constitutional Court held that, although its general approach was not to award costs against unsuccessful applicants, this approach would not be followed to the extent that litigants would be ‘induced into believing that they are free to challenge the constitutionality of statutory provisions ... no matter how spurious the grounds for doing so may be or how remote the possibility that [the Constitutional Court] will grant them access.’⁸⁷ Such a state of affairs would undermine the administration of justice and be unfair to those opposing this kind of

81 *Beinash & Another v Ernst & Young & Others* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC), [1998] ZACC 13 (*‘Beinash’*).

82 Act 3 of 1956.

83 *Beinash* (supra) at para 30.

84 *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC), [1997] ZACC 3 (*‘Motsepe’*).

85 Act 58 of 1962.

86 *Motsepe* (supra) at paras 20, 22-23.

87 *Ibid* at para 30.

application.⁸⁸ Given that the applicant had not explained her failure to use the non-constitutional remedies available in the Act and had revealed a general lack of candour in her papers before the Constitutional Court, the Court in *Motsepe* concluded that her application constituted a delaying tactic that justified an award of costs against her.⁸⁹

In *Minister of Health & Another v New Clicks & Others*, the Constitutional Court was confronted with a government respondent that, in the Supreme Court of Appeal, had refused to address the merits of the case.⁹⁰ The circumstances that led to this decision were as follows: Various pharmacies challenged medicine pricing regulations. They were unsuccessful in the High Court, and sought an appeal to the Supreme Court of Appeal. Despite the urgency of the matter, the High Court delayed for several months in handing down its judgment on leave to appeal. The pharmacies approached the Supreme Court of Appeal for leave to appeal before the High Court's judgment was handed down and the matter was set down in the Supreme Court of Appeal with the application for leave to appeal to be argued together with the merits (which would be determined should leave be granted). The Minister's counsel refused to address the Supreme Court of Appeal on the merits, arguing that the Supreme Court of Appeal had no jurisdiction to hear argument on the merits until the question of leave to appeal was determined by the High Court.

RS2, 10-10, ch6-p20

The Constitutional Court condemned the Minister's refusal to address the merits.⁹¹ To underscore its disapproval, the Court in *New Clicks* ordered the Minister to pay half of the pharmacies' costs in the Constitutional Court and the High Court and full costs in the Supreme Court of Appeal.⁹²

A far worse example of abusing court process occurred in *President of the Republic of South Africa & Others v Quagliani*.⁹³ In an earlier decision, the Court had decided complex issues relating to the validity of South Africa's extradition agreements with various other countries.⁹⁴ On the morning that judgment was to be handed down, the applicants brought an application to postpone judgment and join the Speaker of the National Assembly and the Chairperson of the National Council of

88 Ibid.

89 Ibid at para 31.

90 *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC), [2005] ZACC 14 ('*New Clicks*').

91 *New Clicks* (supra) at para 82. Although this discussion forms part of the judgment of Chaskalson CJ, which did not represent the majority on all issues, a majority of the Court concurred in this part of Chaskalson CJ's judgment. In addition, there is nothing to suggest that the dissenting members of the Court disagreed with this aspect of Chaskalson CJ's judgment.

92 Ibid at para 21.

93 2009 (8) BCLR 785 (CC), [2009] ZACC 9 ('*Quagliani II*').

94 *President of the Republic of South Africa & Others v Quagliani* 2009 (4) BCLR 345 (CC), [2009] ZACC 1 ('*Quagliani I*').

Provinces. The Court postponed judgment in order to allow the parties to address the issue. When it delivered the judgment approximately a month later, it observed: ‘To say that the application for postponement of delivery of this judgment is remarkable would be a gross understatement.’⁹⁵ It severely criticised the applicants for bringing the application so late and required the parties to make submissions on who should bear the costs of the abortive application, including whether a punitive order should be made.

In *Quagliani II*, the Court granted costs against the applicant despite the applicant’s attorneys contention that they were merely trying to act in the best interests of their client. Justice Sachs explained the *Quagliani II* Court’s rejection of the applicant’s argument as follows:

[T]he only explanation for the extraordinary lateness of the application boiled down to a fear by the legal representatives that they might have paid insufficient attention during the four years of the litigation to the need to comply with certain procedural requirements. If the advantages of hindsight were allowed to prevail, litigants anticipating defeat would have second, third, and even fourth or fifth bites of the cherry. The litigation would be endless, court planning would be impossible and legal representatives would be rewarded for inadequate preparation.⁹⁶

Although a lawyer should do all in her power for her client, ‘it is quite unacceptable for a legal representative to clutch at each and every straw, giving false hope to a client, even if the motive is to do one’s best on behalf of the client.’⁹⁷ However, the Court did not find the attorneys’ conduct so unacceptable as to warrant a punitive order against them. Instead, it held that the applicant himself should bear the risk of instructing his attorneys to lodge the application and ordered costs to be imposed on an attorney and client scale.⁹⁸

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While in *Quagliani* the litigant was penalised for acting too late, in *Chonco II*, the Court ordered costs against the applicants for acting too hastily.⁹⁹ In *Chonco I*,¹⁰⁰ the Court held that the applicants — who sought to have their applications for political pardons decided — had incorrectly sued the Minister for Justice and Constitutional Development, when they should have sued the President. The applicants took the Court’s advice and sued the President nine days later. Too quick, the Court held. As it turned out, on the day of the hearing the President largely conceded to all of the applicants’ demands and indicated that he had considered most of the 384 applications. The applicants — despite the long history of presidential disinterest in

95 *Quagliani I* (supra) at para 70.

96 *Quagliani II* (supra) at para 7.

97 *Ibid* at para 9.

98 *Ibid* at para 10.

99 *Chonco & Others v President of the Republic of South Africa* 2010 (6) BCLR 511 (CC), [2010] ZACC 7 (*‘Chonco II’*).

100 *Minister for Justice and Constitutional Development v Chonco & Others* [2009] 2010 (4) SA 82 (CC), 2010 (1) SACR 325 (CC), 2010 (2) BCLR 140 (CC), ZACC 25 (*‘Chonco I’*).

the matter — should, the Court held, have first given the President an opportunity to respond to *Chonco I* before litigating anew. Khampepe J wrote as follows:

I am mindful that the applicants, in the context of this case, would wish to vindicate their rights with greater urgency and use these proceedings as a ‘bargaining chip’. This Court would not wish to deprive the litigants of a necessary weapon to use in order to vindicate their rights. But in the circumstances it is difficult not to conclude that the institution of these proceedings was hasty. At the very least, it behoved the applicants to put the Presidency on terms before resorting to litigation. A simple letter to the President putting him on terms or making inquiries in regard to the processing of their applications for pardon, given the decision in *Chonco I*, would have sufficed.¹⁰¹

Similarly, in *Koyabe*, the Court criticised the applicants for failing to exhaust available internal remedies, before resorting to litigation.¹⁰² Had the state not also acted inappropriately, they might have been forced to pay the state’s costs.¹⁰³

The Court has, finally, departed from the default positions when litigants failed (a) to initiate urgent challenges at the appropriate time;¹⁰⁴ (b) to properly identify the issues;¹⁰⁵ and (c) to use the proper procedure when raising an important constitutional matter.¹⁰⁶

RS2, 10-10, ch6-p22

(iv) State’s duty to the Court

In addition to the ordinary rules that govern all litigants’ conduct, constitutional litigation imposes special duties upon the state.¹⁰⁷ The state’s ability to discharge those duties will affect the nature of any cost order that might be levied against them.

101 *Chonco II* (supra) at para 13.

102 *Koyabe & Others v Minister for Home Affairs & Others* [2009] 2010 (4) SA 327 (CC), 2009 (12) BCLR 1192 (CC), ZACC 23 (*‘Koyabe’*) at para 86.

103 *Ibid* at para 87.

104 *A Party & Another v The Minister for Home Affairs & Others, Moloko & Others v The Minister for Home Affairs & Another* [2009] 2009 (3) SA 649 (CC), 2009 (6) BCLR 611 (CC), ZACC 4 at para 82 (The applicant successfully challenged legislation prohibiting citizens from voting overseas. The challenge had been brought only months before the 2009 national election. This would have influenced the Court to deny the applicant its costs, had the government not also acted inappropriately.)

105 *Chagi & Others v Special Investigating Unit* 2009 (2) SA 1 (CC), 2009 (3) BCLR 227 (CC), 2009 (1) SACR 339 (CC), [2008] ZACC 22 at para 49 (Court made no order on costs as both parties had been responsible for confusing the issue in the SCA.)

106 *Transvaal Agricultural Union v Minister of Land Affairs & Another* 1997 (2) SA 621 (CC), 1996 (12) BCLR 1573 (CC), [1996] ZACC 22 at para 47.

107 See M Chaskalson, G Marcus & M Bishop ‘Constitutional Litigation’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) § 3.7.

*Gory v Kolver NO & Others*¹⁰⁸ concerned a challenge to s 1(1) of the Intestate Succession Act.¹⁰⁹ This section of the Act conferred rights of intestate succession on heterosexual spouses but not on homosexual life partners. The applicant for confirmation had successfully challenged the constitutionality of s 1(1) in the High Court. In the High Court, the Minister of Justice and Constitutional Development did not formally oppose the application and filed an answering affidavit only on the issue of the potential retrospectivity of the declaration of invalidity.¹¹⁰ The High Court did not limit the retrospectivity of its order in the manner suggested by the Minister. When the applicant applied for confirmation to the Constitutional Court, he sought a costs order against the Minister. The Minister opposed confirmation, not on the basis of the failure of the High Court to limit the retrospectivity of its order, but simply because the applicant sought a costs order against her.¹¹¹

The Court ordered that the Minister bear the applicant's costs, not only in the Constitutional Court, but in the High Court as well. In oral argument, counsel for the Minister explained that she did not abandon her concerns about retrospectivity and opposed confirmation of that part of the order of the High Court dealing with retrospectivity despite the fact that she had not, in her papers before the Constitutional Court, done so formally. This argument was, in the *Gory* Court's view, inadequate. The Court held that something more substantive is required from a state official responsible for the administration of a statute declared unconstitutional when the question of appropriate remedy comes before the Court.¹¹² The Minister ought to have formally opposed confirmation in the Constitutional Court on the question of remedy and filed heads of argument dealing with the matter. Moreover, Van Heerden AJ pointed out that the state is under a constitutional duty to respect and promote the rights in the Bill of Rights — that duty encompasses the creation of an appropriate remedy for unconstitutional provisions in statutes. Despite this duty, no comprehensive legislation on same-sex partnerships had been enacted and same-sex couples had repeatedly been obliged to approach the courts for piece-meal relief. On the Court's view, since the State had created the circumstances that led to the constitutional challenge, justice required that the state bear the ill resourced applicant's

RS2, 10-10, ch6-p23

costs in what it deemed to be an important constitutional challenge.¹¹³ This line of argument is largely a variation on the reasoning that justifies the default position

108 *Gory v Kolver NO & Others (Starke & Others intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC), [2006] ZACC 20 ('Gory').

109 Act 81 of 1987.

110 *Gory* (supra) at para 62.

111 *Ibid* at para 64.

112 *Ibid*.

113 *Gory* (supra) at para 65. This finding does not suggest that the relevant Minister will always be obliged to oppose confirmation when a High Court has declared legislation unconstitutional. Rather, where the relevant Minister can render substantive assistance to the Court in crafting the appropriate remedy — which will almost always be the case when a statute under her administration is declared unconstitutional — she should do so.

in cases where the state plays a regulatory role. However, the *Gory* court, in addition also relies on the specific litigation choices of the Minister.

In a somewhat more extraordinary state of affairs, the Court has relied on this line of reasoning in ordering the state to pay costs even though the state was ultimately successful. In *Minister for Justice and Constitutional Development v Chonco & Others*, the respondents challenged the failure of the Minister to decide on their applications for pardons.¹¹⁴ The High Court found in their favour. However, the Constitutional Court overturned the High Court's decision. It held that the respondents should have sued the President, not the Minister. Despite the respondent's procedural error, the Court found that the Minister's failure to discharge her responsibilities justified awarding costs against the state. Government intransigence with respect to such a significant issue, in the Court's view, far outweighed any mistake the respondent's counsel might have made. Langa CJ wrote:

Six years have passed since Mr Chonco posted his application for pardon to the Minister. Yet, despite public undertakings made by the President and the Minister to expedite a response to the applications, the respondents have waited in vain. This is unacceptable. The Constitution requires that all constitutional obligations, wherever they lie, 'must be performed diligently and without delay.'¹¹⁵

(d) Miscellaneous

In addition to the major factors discussed above — motivation, the extent of success, conduct and the state's special duties — an endless variety of other factors could be deemed relevant to the determination of a costs order. A few, discussed below, give one a taste of the diverse range of concerns that can influence such determinations.

(i) Role of Attorney

Where an attorney initiates an action in his own name, on behalf of others, and in order to secure an order that does not affect him personally, courts must carefully scrutinize the litigation for abuse.¹¹⁶ Even so, the Constitutional Court has applied

RS2, 10-10, ch6-p24

its pro-applicant costs order principles in relation to unsuccessful litigation initiated by an attorney seeking to challenge regulations affecting his clients.¹¹⁷

(ii) Who funds the litigation

114 2010 (4) SA 82 (CC), 2010 (2) BCLR 140 (CC), 2010 (1) SACR 325 (CC), [2009] ZACC 25 ('*Chonco I*').

115 *Ibid* at para 47.

116 *Minister of Home Affairs v Eisenberg & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC), [2003] ZACC 10 ('*Eisenberg*') at para 72.

117 *Eisenberg* (supra). See also, *Kruger v President of the Republic of South Africa & Others* 2009 (1) SA 417 (CC), 2009 (3) BCLR 268 (CC), [2008] ZACC 17 (Attorney challenged an unintentional error of the President to bring amendments to the Road Accident Fund Act into effect on the wrong dates. He acted both in his own interest and that of his clients. The fact that it was an attorney acting did not affect the award of costs.)

The funder of the litigation may be relevant to a costs order. In *Mohamed & Another v President of the RSA & Others*, the applicant was handed over to the United States authorities, on their request, to stand trial in the US for his alleged part in the 1998 bombings of US embassies in Kenya and Tanzania.¹¹⁸ Mohamed succeeded in his challenge to the lawfulness of this exchange because the South African authorities had failed to secure an assurance from US authorities that the applicant would not face the death penalty if convicted.¹¹⁹ However, the Court declined to make a costs order in favour of the applicant. Although the applicant had successfully prosecuted an important constitutional claim, the United States government had paid his legal fees.¹²⁰ Making a costs order in his favour would 'effectively oblige the South African government to reimburse the United States government, for whose benefit and at whose instance' the applicant had been deported.¹²¹ Unlike costs orders that turn on the status of the parties themselves, the costs order in *Mohamed* reflect the intervention of a non-party, 'external' funder of the litigation.

6.4 Specific Cases

The preceding sections have laid out the general rules for costs and the factors that might motivate a court to depart from those rules. This section considers a few specific situations that, although they may still fit the general pattern, warrant separate consideration.

(a) Interlocutory applications

In *SARFU III*,¹²² the Constitutional Court endorsed the following dictum from *Fripp v Gibbon and Co* in respect of interlocutory orders:

I agree that as a rule it is fair and just that the costs should follow the event, whether of claim or counterclaim. But I cannot agree with the view that the unsuccessful party should bear the burden of all the costs simply on the ground that in the final result he is the unsuccessful party. To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, prove

RS2, 10-10, ch6-p25

to have been unnecessarily or ineffectively incurred should, as a rule, be borne by the party responsible for such costs.¹²³

So, in cases in which it is appropriate for the respondent to bear the costs and in which there have been interlocutory orders made by the Court, the Court will not

118 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), [2001] ZACC 18 at para 7.

119 Ibid at para 73.

120 Ibid at para 72.

121 Ibid.

122 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 ('*SARFU III*').

123 1913 AD 354, 361 cited in *SARFU III* (supra) at para 247.

simply award all costs to the applicant. When it comes to costs orders for the interlocutory applications, it will assess each individually.¹²⁴ The party who succeeds with an interlocutory order will receive its costs.¹²⁵ Again, the Court has emphasized the discretionary nature of such costs orders and the reluctance of appellate courts to interfere with existing costs orders by the High Courts. However, the Court's ruling in *SARFU III* suggests that the Court will overturn costs orders of the High Court with respect to successful interlocutory applications where appropriate.¹²⁶

Despite endorsing the separation of interlocutory claims, the Court does not always follow its own advice. In *Independent Newspapers*, the Court considered a newspaper group's claim to open to the public, sealed portions of the Court's record in a case involving the dismissal of the head of the National Intelligence Agency.¹²⁷ In an interlocutory application, the newspaper group argued that its directors and lawyers should have access to the sealed part of the record in order to prepare argument on whether they should ultimately be made public. The Court found against *Independent Newspapers* in the interlocutory application, but they were partially successful in having some of the sealed parts of the record released. Moseneke DCJ made no costs order in the main application and then held:

The [interlocutory] application was merely interim and must be disposed of as part of the main application. Another relevant consideration is that the arguments which were advanced in relation to the interlocutory application were in great part repeated in relation to the main application. I would follow the course I have taken in relation to the main application and that is to make no order as to costs in the interlocutory application as well.¹²⁸

Perhaps *Independent Newspapers* is a special case as the substantive issues in the main and interlocutory applications were largely the same. But the case does indicate that costs in interim applications can not be completely divorced from the outcome and conduct of the main case.

(b) Matters Disposed of on the Papers

The Constitutional Court has held that it will not ordinarily make a costs order when an application is dealt with summarily — and thus without written or oral argument — on the basis of information contained in the affidavits.¹²⁹ Although

124 *SARFU III* (supra) at para 247.

125 *Ibid* at paras 248-249.

126 *Ibid* at paras 246-250.

127 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 ('*Independent Newspapers*').

128 *Ibid* at para 78.

129 See, for example, *Brummer v Gorfil Brothers Investments (Pty) Ltd & Others* 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC) at para 7.

the Court has not announced it, the same rule seems to apply in cases that are dismissed without any judgment.

(c) Hague Convention on Civil Aspects of International Child Abduction (1980)

The Hague Convention on Civil Aspects of International Child Abduction protects children from the harmful effects of their wrongful removal or retention from the state of their habitual residence.¹³⁰ The Convention also provides for their prompt return to the place of origin. It has been incorporated into South African law by the Civil Aspects of International Child Abduction Act.¹³¹

States parties are obliged to designate a 'Central Authority' to discharge the duties that the Convention imposes.¹³² In South Africa, the Family Advocate is designated as the Central Authority.¹³³ Since the Family Advocate must ensure the return of children wrongfully removed from their state of habitual residence, the Family Advocate must sometimes adopt an adversarial role with respect to a parent who resists the return of the child.¹³⁴

In *LS v AT*, the parents of a young girl were divorced in Canada. A court order allowed the mother to leave Canada for one month with the girl on the condition that she return with the child. When the mother did not return and the father instituted proceedings for the return of the girl, the Family Advocate intervened to ensure that the girl was indeed returned. Despite ordering that the mother return the child to Canada, the Constitutional Court overturned the order of the High Court that the mother was to pay the costs of the Family Advocate. The Convention provides that the Central Authorities of states parties must bear their own costs and it was not appropriate, therefore, for the mother to bear the Family Advocate's costs.¹³⁵

(d) Costs in Applications in Terms of FC s 80

In terms of the Interim Constitution,¹³⁶ the Constitutional Court had exclusive jurisdiction in cases involving 'any dispute over the constitutionality of any Bill before Parliament or a provincial legislature'.¹³⁷ This jurisdiction would only be exercised 'at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who [was required to] make

130 See *LS v AT & Another* 2001 (2) BCLR 152 (CC) ('*LS*') at para 10.

131 Act 72 of 1996.

132 *LS* (supra) at para 13.

133 *Ibid*.

134 *Ibid* at para 14.

135 *Ibid* at para 55.

136 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

137 IC s 98(2)(d).

such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so.¹³⁸ The Constitutional Court re-inforced the principle, in light of the content of IC s 98, that an unsuccessful

applicant who raises an important constitutional issue should not be penalized with a costs order.¹³⁹

FC s 80 contains similar, if somewhat more detailed, language regarding costs orders:

- (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
- (2) An application:
 - (a) must be supported by at least one third of the members of the National Assembly; and
 - (b) must be made within 30 days of the date on which the President assented to and signed the Act.
- (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if:
 - (a) the interests of justice require this; and
 - (b) the application has a reasonable prospect of success.
- (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

FC s 80 sketches out the contours of a test to determine the question of costs in such matters: if an application does not have a reasonable prospect of success, the court may make a costs order against the applicants. However, since the provision leaves the matter in the discretion of the Court, the Constitutional Court need not depart from its general approach to costs: if the applicant raises an important constitutional issue, then it will ordinarily not be penalized in costs if it loses.

In the context of the equivalent provision in the Interim Constitution, the Court pointed out the kinds of exceptions that might exist to this principle:

This [principle that losing applicants are not mulcted in costs], of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.¹⁴⁰

138 IC s 98(9).

139 See *In re: National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC), [1996] ZACC 3 at para 36; *In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*; *In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 49.

Again: the text of FC s 80 accommodates the existing approach of the Constitutional Court. A bona fide applicant will not be forced to pay costs. However, where an application has been launched in terms of FC s 80 and there are no reasonable prospects of success, this abuse of process will often, but not always, amount to conduct justifying a costs order against the applicants.

(e) Counsel appearing at the request of the Court and *Amicus Curiae*

Where counsel appears at the request of the Constitutional Court, it is not customary for the court to make a costs order against the losing party¹⁴¹ or in favour of a partially successful applicant.¹⁴² In the case of a successful applicant, no costs are awarded because the applicant has incurred no costs.¹⁴³ The same rule applies to *amicus curiae*. The Court has held that, whatever the outcome, an *amicus* 'is neither a loser nor a winner and is generally not entitled to be awarded costs.'¹⁴⁴ The issue is discussed in detail in Geoff Budlender's chapter on *amicus curiae*.¹⁴⁵

6.5 Using Costs to Prevent Litigation: Settlement and Security

This section addresses two seemingly disparate issues: (a) the effect of a rejected settlement offer on costs; and (b) the ability of a court to demand that an applicant provide security for the other party's costs before initiating litigation. What these subjects have in common is that they are both legitimate ways to use the threat of costs to keep potential litigants out of court. Both tactics have been, weakly, endorsed by the Constitutional Court.

(a) Settlement Offers

Rule 34 of the Uniform Rules of Court regulates offers of settlement. Rule 34(11) states: 'The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.' The role of rule 34(11) was considered by the Constitutional Court in *NM v Smith*.¹⁴⁶ The plaintiffs had sued the defendants — the author, publisher and subject of an authorised biography of the politician Patricia De Lille — for revealing their HIV status without their consent. The plaintiffs had

140 *In re: The School Education Bill of 1995* (supra) at para 36.

141 See *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC), [1997] ZACC 7 at para 43.

142 See *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC), [2005] ZACC 6 ('Sibiya') at para 63.

143 *Ibid.*

144 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1235 (CC), [2000] ZA 17 at para 63.

145 Geoff Budlender 'Amicus Curiae' in Stu Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 8.5.

participated in a controversial HIV study conducted by the University of Pretoria. De Lille was involved in subsequent investigations of the study, an episode which was related in her biography. On the morning of the trial, the defendants offered the plaintiffs R35 000 each and a private apology as a settlement. The offer did not include an admission of liability. The plaintiffs refused the offer. The plaintiffs were only partially successful in the High Court and received R15 000 in damages. After the trial, the rejected settlement offer was revealed to the judge. Subsequent to the revelation, the judge ordered the plaintiffs to pay the defendants' costs from three days after the offer was made until judgment was handed down.

RS2, 10-10, ch6-p29

The majority of the Constitutional Court overruled the High Court. The *NM* Court held the defendants liable for *iniuria*. It also awarded the respondents R35 000 in damages. The Court then overturned the High Court's award of costs and required each party to bear its own costs in both the High Court and the Constitutional Court. Although both parties specifically addressed the role of Rule 34 in the constitutional scheme the Court had created for considering costs, the majority avoided any engagement with the legitimacy or the effects of the rule. Instead, the *NM* Court focused on the timing and nature of the settlement offer. In the *NM* Court's view it had been made too hastily, without any attempt at negotiation.

The truly interesting statements on Rule 34 come from the partially dissenting judgment of Chief Justice Langa. The Chief Justice tackled the rule head-on. He held that the discretion to award costs in light of a settlement offer had to be exercised differently when the case concerned constitutional rights. He offered two reasons for this conclusion. First, money alone is not (always) enough to vindicate constitutional rights.¹⁴⁷ Second, Langa CJ noted that constitutional litigation — even between private parties — often demands a systemic and wide-reaching change in the existing law. The threat of an adverse costs order for failing to take a settlement offer could permit rich, powerful litigants to prevent changes to the law by making generous offers to keep the issue from being decided by a court. (Indeed, insurance companies are notorious for using settlement offers to avoid litigation that might establish an adverse precedent.) In the Chief Justice's words:

There is a danger that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who cannot afford to take that chance. It already takes immense courage for ordinary people to take large powerful defendants to court and the additional peril of an adverse costs order will mean even fewer plaintiffs get their day in court. That could easily have happened in this case and the liability of media defendants for disclosing private medical facts would have remained unquestioned. The achievement of our constitutional vision should not be obstructed by the vested interests of those who have the money to protect them.¹⁴⁸

The Chief Justice does not mean that costs can never be granted against plaintiffs who refuse settlement offers in constitutional cases. Rather, as this entire chapter has made patently clear, the litigation of constitutional rights dramatically 'alters the

146 *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC), [2007] ZACC 6 ('*NM*').

147 *NM* (supra) at para 119 ('No matter the value of the offer, it does not give the acknowledgement of wrong-doing that is often far more valuable than any money could be.')

148 *Ibid* at para 120.

framework within which [a court's] discretion [with respect to costs] must be exercised'.¹⁴⁹ Langa CJ would have ordered the respondents to pay all of the applicants costs in both courts. While the Chief Justice's views on Rule 34 are beyond reproach, they attracted neither the attention nor the support of the majority. Post-*NM*, Rule 34 should be applied identically in constitutional and non-constitutional matters.

(b) Security for Costs

Section 13 of the Companies Act¹⁵⁰ permits a court to order a plaintiff company to provide security for the defendant's costs if there is reason to believe that it will not be able to afford an adverse costs order. If the company cannot provide security, then it will be prevented from litigating. The application of this provision was fully canvassed by the Constitutional Court in *Giddey NO v JC Barnard and Partners*.¹⁵¹ The liquidator of a company had sued its previous accountants for failing to hold R100 million in trust. The accountants then made a s 13 application for costs to avoid defending the issue. The High Court granted the order and the applicant appealed to the Constitutional Court. Importantly, the applicant did not challenge the constitutionality of s 13; he merely argued that it should be applied in light of the right of access to court.¹⁵²

O'Regan J lucidly explained the purpose of s 13:

A salutary effect of the ordinary rule of costs — that unsuccessful litigants must pay the costs of their opponents — is to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of section 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense.¹⁵³

A court has a discretion whether to grant the application for security. In exercising its discretion, a court should 'balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation.'¹⁵⁴ In performing this balancing act, a court should also consider: 'the likelihood that the effect of an order to furnish security will be to terminate the plaintiff's action; the

149 Ibid at para 121.

150 Act 61 of 1973.

151 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC), [2006] ZACC 13 ('*Giddey*').

152 Ibid at para 18.

153 Ibid at para 7.

154 Ibid at para 8.

attempts the plaintiff has made to find financial assistance from its shareholders or creditors; ... whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff's action.'¹⁵⁵ Section 13 was not capable, Justice O'Regan held, of being read to prohibit an award for security for costs where the award would prevent the plaintiff company from bringing the litigation. Absent a future constitutional challenge, bankrupt companies can be prevented from initiating litigation through s 13.

6.6 Costs Orders of Lower Courts

This section considers, first, when an appellate court can alter lower court's costs

RS2, 10-10, ch6-p31

award (when it reaches the same outcome on the merits) and, second, when it is permissible to appeal only the question of costs.

(a) Cost Orders of Lower Courts¹⁵⁶

The award of costs is a discretionary matter and an appellate court will be slow to interfere with a costs order made by a lower court. The Constitutional Court, adopting the approach of Corbett JA in *Attorney-General, Eastern Cape v Blom & Others*,¹⁵⁷ has held that the circumstances in which such interference will be justified are limited 'to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question.'¹⁵⁸

However, in *Sanderson v Attorney-General, Eastern Cape*,¹⁵⁹ the Constitutional Court set aside what appears, on its face, to be a perfectly reasonable costs order by the High Court. The appellant (applicant in the High Court) had unsuccessfully sought various relief based on his right to a fair trial. The High Court had applied the ordinary approach to costs and awarded the costs to the respondents. Although the appellant was unsuccessful in the Constitutional Court, the court set aside the costs order of the High Court on the basis that the principle that an unsuccessful litigant who raises a substantial constitutional issue should not be mulcted in costs applies equally to the other courts.¹⁶⁰ The fact that the constitutional issues were raised during the course of a criminal trial, in which costs orders are generally not competent, shaped the Court's decision in *Sanderson*.¹⁶¹ The Court has followed the same approach in at least one non-criminal matter. In *ANC v Minister of Local*

155 Ibid at para 30.

156 The term 'lower court' is often used to refer to the 'inferior courts' such as the magistrates' courts. I use the term here to refer to all courts beneath the Constitutional Court.

157 1988 (4) SA 645, 670D-F (a).

158 *Premier, Province of Mpumalanga & Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC), [1998] ZACC 20 at para 53. See also *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), [2004] ZACC 20 at para 110 (Court refused to find that the High Court had exercised its discretion improperly.) See *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 at paras 29-31.

159 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC), [1997] ZACC 18 ('*Sanderson*').

Government and Housing, KwaZulu-Natal,¹⁶² the Court overturned the costs order of the court a quo against unsuccessful appellants who had raised an important constitutional issue.¹⁶³

In *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another*, the appellants had initially applied to the High Court for an order compelling the respondents to provide information.¹⁶⁴ The appellants received the information just prior to the hearing. They then sought to amend their prayers, in light of this information, and mounted a substantive challenge to various aspects of the province's education policy. The High Court issued a costs order against the appellants

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with respect to the application for information. In the Constitutional Court, the appellants sought an order overturning this costs order.¹⁶⁵ Chaskalson CJ refused to interfere with the costs order of the High Court on the grounds that the Constitutional Court 'should not be required to determine questions of law that have no relevance other than the responsibility for costs of aborted litigation, particularly where those costs are but a small fraction of the costs that have been incurred.'¹⁶⁶

In *Van der Merwe v Road Accident Fund & Another*,¹⁶⁷ the applicant for confirmation successfully challenged certain provisions of the Matrimonial Property Act that prevented her from claiming damages for her husband's intentional assault with a motor vehicle.¹⁶⁸ The court a quo made no order as to costs.¹⁶⁹ In weighing up the position of the parties as part of its determination of costs, the Constitutional Court pointed out that the applicant 'is an immediate beneficiary of the outcome of the case; but it is also true that there are similarly situated people who are not before us. The outcome of this litigation has a wide reach and is clearly in the public

160 Ibid at para 44. See also *Mohamed & Another v President of the RSA & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), [2001] ZACC 18 at para 72 (The same approach was followed.)

161 *Sanderson* (supra) at para 44.

162 1998 (3) SA 1 (CC), 1998 (4) BCLR 399 (CC), [1998] ZACC 2.

163 Ibid at para 34.

164 *Bel Porto School Governing Body & Others v Premier of the Western Cape Province & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC), [2002] ZACC 2 ('*Bel Porto*').

165 *Bel Porto Governing Body* (supra) at para 130.

166 Ibid at para 131.

167 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC), [2006] ZACC 4 ('*Van der Merwe*').

168 Act 88 of 1984.

169 *Van der Merwe* (supra) at para 78.

interest.¹⁷⁰ On the other hand, the respondent was a juristic person created and funded by the State. Furthermore, it had persisted in defending the challenged law despite the view of another Minister that the law was unconstitutional.¹⁷¹ In those circumstances, the Court in *Van der Merwe* could see no reason why 'a private citizen in the position of [the applicant] should forfeit the opportunity to recover onerous costs [incurred] in two courts' from an organ of state that sought to uphold a facially unconstitutional law.¹⁷²

This approach introduces novel considerations into the question of whether a successful applicant should receive her costs. It does not, however, constitute a radical departure to the approach on costs orders of lower courts. The court *a quo* in *Van der Merwe* does not seem to have applied its mind to the question of costs. Thus, technically, the Constitutional Court's award does not constitute an example of interference with a lower court's discretion.

However, *Swartbooi & Others v Brink & Another (2)* offers a window on to another kind of case in which the Constitutional Court may set aside a decision of a lower court on costs.¹⁷³ The appellants were members of a municipal council. They had taken certain decisions, as members of the municipal council, adverse to the first and second respondents, also members of the municipal council. The first and second respondents had these decisions reversed by the High Court. The High Court ordered costs *de bonis propriis* against the appellants in their personal capacity.

In making its costs order, the High Court failed to take account of legislation providing immunity to councillors from civil proceedings in certain circumstances

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and, as a result, had materially misdirected itself. It was open to the Constitutional Court, therefore, to consider afresh the High Court's costs order.¹⁷⁴

In rejecting the approach of the High Court to costs, the Court pointed out that the High Court appeared to be motivated, at least in part, by a desire to teach the councillors a lesson and to discourage them from making a similar decision in the future. The Constitutional Court held that

[t]his is an improper approach and reflects an improper purpose. It trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the Legislative and Executive branches of Government. Courts have the power to set aside executive and legislative decisions that are inconsistent with the Constitution. They cannot attempt, by their orders, to punish municipal councillors and, in so doing, influence what members of these bodies might or might not do. This motive of the High Court constitutes a dangerous intrusion into the legislative and executive domain.¹⁷⁵

170 *Ibid.*

171 *Ibid.*

172 *Ibid.*

173 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC), [2003] ZACC 25 ('*Swartbooi*').

174 *Swartbooi* (supra) at para 23.

If taken as a broad statement rather than a reaction to the specific facts of the case, this statement in *Swartboo*i is probably overbroad. Courts can and should use the threat of adverse and punitive costs awards to influence government conduct. The Court has specifically endorsed the use of costs to, for example, encourage the state to properly defend legislation it believes is constitutional,¹⁷⁶ prompt government to remove unconstitutional laws from the books before they are litigated,¹⁷⁷ and dissuade the state from raising cynical defences to avoid their constitutional responsibilities.¹⁷⁸ *Swartboo*i should, therefore, be read narrowly to discourage costs orders that attempt to influence government actors in the exercise of their political discretion in a way not required by the Constitution or some other law. Costs are a legitimate and effective mechanism to encourage government actors to comply with their legal obligations.

(b) Appeals against Costs Orders

A topic closely related to the question of when it will be appropriate to interfere with decisions of lower courts on the question of costs is the question: When it will be appropriate for appellate courts, and in particular the Constitutional Court, to permit a party to appeal solely against a costs order? Section 21A of the Supreme Court Act¹⁷⁹ states, in a somewhat convoluted fashion, that courts of appeal should permit an appeal on the issue of costs only in exceptional circumstances. Although that section does not bind (and does not refer to) the Constitutional Court, the Court in *Biowatch* held that principle underlying the section is 'manifestly meritorious'.¹⁸⁰ The Court held that although the standard applicable to the question as to whether leave to appeal to the Constitutional Court on the question of costs alone

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is not, as in the case of other appellate courts, whether 'exceptional circumstances' exist, it will rarely be 'in the interests of justice' for leave to appeal to be granted solely on the question of costs.¹⁸¹

In *Biowatch*, leave to appeal on the question of costs alone was granted on the basis that the case raised the question as to whether the general principles established by courts in relation to costs orders require modification to meet the

175 Ibid at para 25.

176 *Gory v Kolver NO & others (Starke & Others intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC), [2006] ZACC 20.

177 Ibid.

178 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), 2008 (4) SA 237 (CC), [2008] ZACC 4.

179 Act 59 of 1959.

180 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014 (CC), [2009] ZACC 14 ('*Biowatch*') at para 11.

181 *Biowatch* (supra) at para 11. The rationale of the Constitutional Court's finding in this regard is that appeals on costs orders alone have the effect of piling costs upon costs, favouring litigants with deep pockets and resulting in the unnecessary ventilation of side issues.

needs of constitutional litigation.¹⁸² The case therefore sends the message that, in the ordinary course, leave to appeal to the Constitutional Court will not be granted on the issue of costs alone, unless there is some important issue of principle, transcending the parties to the matter, which requires resolution in the interests of justice.

Although *Biowatch* provides the most comprehensive treatment of the principles applicable to costs orders in constitutional litigation (in all courts) to date, it cannot be read as having covered the field on all issues of principle. There may, therefore, be scope in the future for leave to appeal to be sought from the Constitutional Court on an issue (or issues) relating only to a costs order made by a lower court. However, given the range of issues that *Biowatch* addressed, it will be rare for a case to arrive in which it would be in the interests of justice for leave to appeal to the Constitutional Court on the issue of costs alone.

In so far as other courts are concerned, section 21A continues to apply. However, it would not require too much imagination to interpret the phrase 'exceptional circumstances' as embracing the types of cases which the Constitutional Court in *Biowatch* held would appropriately ground an application for leave to appeal to that court. This is especially so, given the now-trite principle that all legislation must be read in the light of the Bill of Rights. So, the reference in section 21A of the Supreme Court Act to 'exceptional circumstances', read in the light of the Bill of Rights, must mean that where a question of principle relating to costs in constitutional litigation arises in a case in the High Court it may constitute 'exceptional circumstances' justifying the granting of leave to appeal to the Supreme Court of Appeal on the issue.¹⁸³

6.7 Punitive Costs Awards

Ordinary costs awards are, well, ordinary cost awards. However, there are situations — where the conduct of the litigants has been particularly deplorable — that justify a punitive costs award. I discuss: (a) costs on an attorney and client scale; and (b) costs *de bonis propriis*.

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(a) Costs on an attorney and client scale

The Constitutional Court has adopted the approach of the Supreme Court of Appeal to the question of costs on an attorney and client scale: Because the Court does not wish to inhibit the right of appeal,¹⁸⁴ it will rarely award punitive costs.¹⁸⁵ The Court has also endorsed the traditional rationale for attorney and client costs:

182 *Biowatch* (supra) at para 12.

183 Section 21A of the Supreme Court Act deals with appeals either to the Supreme Court of Appeal or to full benches of the High Court. Since, however, it is already well-accepted that appeals on issues of general application and wide-reaching principles should be heard by the Supreme Court of Appeal and not a full-bench of the appropriate High Court, it will be very rare indeed when it will be appropriate for leave to appeal to a full bench of the High Court to be granted on an issue relating to costs in constitutional litigation.

184 *Premier, Province of Mpumalanga & Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC), [1998] ZACC 20 at para 55.

The true explanation of awards of attorney and client costs ... seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.¹⁸⁶

Swartbooi neatly demonstrates the Court's attitude toward punitive costs.¹⁸⁷ Two members of a local council went to the High Court to have decisions of the Council negatively affecting their rights set aside. They succeeded and the High Court granted costs on an attorney and client scale. The respondents appealed to the Constitutional Court. Yacoob J agreed that the Council's decisions were so obviously invalid that the members should not have had to go to court to have them declared so.¹⁸⁸ It was therefore an appropriate case to award attorney and client costs in the High Court. But the Court did not agree with the High Court that those costs should be paid *de bonis propriis* by the parties themselves. Puzzlingly, without explanation, it gave an ordinary costs award in the appeal. Despite the outcome in *Swartbooi*, the Court is generally willing to uphold punitive awards made in the lower courts.¹⁸⁹

However, the Court has been reluctant to award costs on an attorney and client scale against parties appearing before it. In *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*, the applicants had challenged the constitutionality of immigration legislation limiting the ability of foreigners to join their South African same-sex partners.¹⁹⁰ The respondents had filed no answering affidavit in the High Court during the seven months after the application had been launched. They then decided, 24 hours before the hearing in the High Court, to seek a postponement in order to file an answer.¹⁹¹ The High Court refused the application. In the Constitutional Court, the respondents filed two applications. They sought an

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order condoning their failure to file an answering affidavit in the High Court and allowing them to file one. In the alternative, they sought to amend their notice of appeal to include a new basis for appeal: namely, that the High Court, in exercising its

185 *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), [1999] ZACC 17 ('NCGLE') at para 93.

186 *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597, 607 quoted in *Swartbooi & Others v Brink & Another* (2) 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC), [2003] ZACC 25 at para 27 and *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 at para 48.

187 *Swartbooi & Others v Brink & Another* 2006 (1) SA 203 (CC), 2003 (3) BCLR 502 (CC), [2003] ZACC 25,.

188 *Ibid* at para 27.

189 See, for example, *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), [2004] ZACC 20 at para 110.

190 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), [1999] ZACC 17 ('NCGLE').

191 *Ibid* at para 5.

discretion, erred in refusing the postponement.¹⁹² The Constitutional Court held that the first application was wholly misconceived: 'Short of setting aside on appeal an order made by another court and substituting a different order, [the Constitutional Court] has no jurisdiction to make an order on behalf of another court properly seized of a matter or to condone, on behalf of such court, non-compliance with the rules of procedure to which such court is subject.'¹⁹³ The second application was dismissed on the basis that, given the exercise of discretion by courts a quo, the High Court could not be said to have misdirected itself.¹⁹⁴

The applicants argued that the costs in respect to the respondent's applications should be awarded on an attorney and client scale because they constituted an abuse of process and were manifestly without merit.¹⁹⁵ The Court acknowledged the application's lack of substance. 'If the argument ... concerning the merits of the appeal had revealed the same lack of substance and apparent disregard for the rights of the applicants', Ackermann J hypothesized, 'I would have had no hesitation in ordering them to pay costs as between attorney and client'.¹⁹⁶ But the costs occasioned by the two applications were slight and the respondents had raised issues of substance in the main application. So, although the respondents' conduct in bringing the applications was ill-conceived, it was not 'such a serious abuse of the process of the Court' as to warrant the imposition of costs on an attorney and client scale.¹⁹⁷

If the Court was ever going to award costs on an attorney and client scale, one would have expected them to do so in *President of the RSA & Others v SARFU & Others*.¹⁹⁸ The case concerned a challenge by the former head of South African rugby, Louis Luyt, to the appointment of a commission of enquiry into the administration of rugby. The matter was, to put it mildly, acrimonious. The most contentious element was a recusal application that alleged that a majority of the members of the Constitutional Court had close links to the ANC government and could not be trusted to render an impartial judgment. The recusal request failed. Three grounds were then raised in favour of a costs order on an attorney and client scale against the unsuccessful Dr Luyt. First, the recusal challenge had impugned the integrity of the Court in circumstances that could be described as 'extraordinary and contemptuous'.¹⁹⁹ Second, during the course of the proceedings, the respondent

192 *NCGLE* (supra) at paras 8-9.

193 *Ibid* at para 10.

194 *Ibid* at paras 10-11.

195 *bid* at para 90.

196 *bid* at para 93.

197 *bid* at paras 93-96.

198 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 ('*SARFU III*').

199 *Ibid* at para 251.

had essentially accused the President of South Africa of deliberately misleading the Court.²⁰⁰ Third, during oral argument in the Constitutional

Court, the mandate of the respondent's advocates was summarily withdrawn without explanation.²⁰¹

Despite these factors, the Constitutional Court declined to order costs on an attorney and client scale. The Court in *SARFU III* noted that the respondent's tactics bore

the hallmark of spin-doctoring by a respondent who, knowing that the appeal might succeed, lays the ground to discredit the court with the object of undermining a decision which might go against him. The appellants might succeed, but it would be a pyrrhic victory, secured by a dishonest President from a compliant Court.²⁰²

However, the Court held that the harm done by the recusal application was to the Court and not to the appellants.²⁰³ Furthermore, the respondent was attempting to confirm the judgment of the court a quo. So although that judgment turned out to be wrong, the respondent was entitled to defend it.²⁰⁴ The Court observed:

If we were satisfied that there was indeed a calculated policy to prosecute the appeal in a manner designed to discredit the judgment of this Court and to undermine a decision it might give in favour of the appellants, we would have ordered costs to be paid on the attorney and client scale. We have concluded, however, though not without some hesitation, that there is insufficient evidence to permit us to draw such an inference with the certainty required for the making of such an order.²⁰⁵

SARFU indicates both that the conduct will have to be particularly egregious and that compelling evidence must indicate the nefarious motives of the transgressor.

The Constitutional Court's general reluctance to award costs on an attorney and client scale is further reflected in *New Clicks*.²⁰⁶ In *New Clicks*, counsel for the Minister refused to address the Supreme Court of Appeal on the merits of the appeal, even though the Supreme Court of Appeal had specifically directed them to do so. The Constitutional Court awarded the pharmacies their full costs in the Supreme Court of Appeal. However, the Court in *New Clicks* Court did not award costs on an attorney and client scale. That fact is, perhaps, surprising given that the Court described the Minister's conduct as 'deplorable'.

200 Ibid at para 252.

201 *SARFU III* (supra) at para 253.

202 Ibid at para 255.

203 Ibid at para 155.

204 Ibid.

205 Ibid at para 256.

206 See *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC), [2005] ZACC 14 ('*New Clicks*') at para 82.

However, occasions exist in which the court has found costs on the attorney and client scale appropriate. In *Quagliani II*,²⁰⁷ which is discussed in full above,²⁰⁸ the applicants brought an application for postponement and joinder on the morning the judgment was delivered. The Court was particularly critical of the attorneys' conduct and justifiably decided that the applicant himself should bear the risk of his agents' actions.

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The Court awarded costs on an attorney and client scale in *Alexkor*,²⁰⁹ for a late decision by the government to appeal, and, government's dilatory conduct in *Njongi*.²¹⁰ The *Alexkor* Court was motivated by the inconvenience the late application had caused for the other litigants and the Court. The cost order in *Njongi* was motivated by the Court's moral outrage that the government chose to raise a defence of prescription to avoid the obligation to provide a social grant to a disabled woman.

(b) Costs de bonis propriis

Costs *de bonis propriis* — literally, 'of his own goods' — are orders that require either the members/representative of an institutional defendant, or an attorney to personally pay the costs of an application, normally on a punitive scale. They are employed to express the court's displeasure at the conduct of the litigation. The standard for both attorneys and representatives is similar. The Constitutional Court held that an attorney will be required to pay costs *de bonis propriis* 'where a court is satisfied that there has been negligence in a serious degree.'²¹¹ The traditional test, for litigants, as stated by Innes CJ, is: 'his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable'.²¹² In fleshing out the meaning of costs *de bonis propriis*, we look at (a) the conduct of attorneys; and (b) the actions of government officials.

*South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others*²¹³ concerned the constitutionality of the definition of the word 'shebeen' in the Gauteng Liquor Act.²¹⁴ The applicants challenged the definition in

207 *President of the Republic of South Africa and Others v Quagliani* 2009 (8) BCLR 785 (CC), [2009] ZACC 9 ('*Quagliani II*').

208 § 6.3(c) above.

209 *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC), [2003] ZACC 18 at para 17.

210 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), 2008 (4) SA 237 (CC), [2008] ZACC 4 ('*Njongi*').

211 *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board & Others* 2009 (1) SA 565 (CC), 2006 (8) BCLR 901 (CC), [2006] ZACC 7 ('*SALTA*') at para 54.

212 *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679, 691 quoted with approval in *Visser v Cryopreservation Technologies CC* 2003 (6) SA 607 (T) at para 6.

213 *SALTA* (supra).

the High Court and no answering affidavits were filed on behalf of the respondents.²¹⁵ On the day of the hearing, the State Attorney, on behalf of the respondents, indicated that the respondents did not oppose the application and consented to the relief sought. As a consequence, the High Court entered an order by consent declaring the definition unconstitutional.²¹⁶

Once the application for confirmation was lodged in the Constitutional Court, the Chief Justice issued directions enrolling the matter for hearing and calling for written submissions. The applicants duly lodged their submissions but the respondents did not.²¹⁷ The Chief Justice issued further directions requesting the third respondent, the MEC, Finance and Economic Affairs, Gauteng, to file an affidavit speaking to the constitutionality of the challenged definition and to file written submissions by a particular date. A week before the written submissions were due, the State Attorney wrote a letter to the Constitutional Court saying

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that the respondents continued not to oppose the relief sought and did not feel it necessary to file the affidavit or written submissions requested by the Chief Justice.²¹⁸ The Chief Justice then issued additional directions calling on the parties to address argument on the question as to whether the Chief Justice should issue directions compelling the third respondent to file the requested affidavit and written submissions. Once again, there was no response from the respondents.²¹⁹

The day before the hearing, the registrar's office of the Constitutional Court contacted the attorney of record at the State Attorney's office and requested that she be present in court for the hearing. There was, however, no appearance at all for the respondents at the hearing.²²⁰ After submissions were made by the applicants' counsel at the hearing, the matter was postponed to a later date and the Court made an order directing the third respondent to file an affidavit addressing, amongst other things, the constitutionality of the section. Shortly after the order was made, the State Attorney withdrew as attorney of record for the third respondent, and the affidavit and written submissions were, finally, submitted.²²¹

In dealing with the costs order in this matter, O'Regan J pointed out that the attorney in the office of the State Attorney had not read the request for the affidavit

214 Act 2 of 2003.

215 *SALTA* (supra) at para 13.

216 *Ibid* at paras 13-14.

217 *Ibid* at paras 15-16.

218 *SALTA* (supra) at para 18.

219 *Ibid* at para 19.

220 *Ibid* at paras 19-20.

221 *Ibid* at paras 20-21.

and the submissions issued by the Chief Justice and had simply placed the order of the Chief Justice in the case file.²²² It was clear that the attorney in question was recently qualified and inexperienced in constitutional litigation. However, there was no indication that she had sought the assistance of her supervisors and there was no evidence from her supervisors of any system to supervise junior attorneys in important matters.²²³

The result is both unfortunate and serious. It is unfortunate because the effect in this case was to give the impression that the MEC, a senior member of the executive in provincial government, was not interested in assisting this Court in resolving important constitutional litigation. ... It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.²²⁴

In *SALTA*, the state attorney ought to have placed the matter in the hands of a senior member of the office.²²⁵ The failure of the state attorney to provide sufficient guidance to a younger member of staff justified the award of costs *de bonis propriis* against the state attorney.²²⁶

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If the misconduct in *SALTA* was related to professional judgment and issues of legal administration, in *Njongi*,²²⁷ the potential for an award *de bonis propriis* arose from the moral or political decisions of the state and its attorneys. Mrs Njongi had been receiving a disability grant from the Eastern Cape Provincial Government. Her grant — along with tens of thousands of other — was inexplicably cancelled in 1997. She re-applied, and received her grant again in 2000, together with R1 100 in back pay. Believing she was owed significantly more in back pay — and receiving no joy from her requests to the Provincial Government — Mrs Njongi went, in 2004, to the High Court to overturn the administrative act that had cancelled her disability grant. In the High Court, the Provincial Government argued that her claim had prescribed because more than three years had elapsed since her grant was cancelled. Ms Njongi won in the High Court, lost before a Full Bench, was denied a hearing by the Supreme Court of Appeal and eventually made it to the Constitutional Court.

At the hearing, the Court raised the question whether the respondent (the MEC for Welfare) should be ordered to pay costs *de bonis propriis* for even raising the issue of prescription. The next day the Court issued directions requiring the MEC to 'show cause by affidavit why, irrespective of the outcome of the application, he should not be ordered to pay the Applicant's costs in the application on the scale as

222 Ibid at para 50.

223 Ibid at para 51.

224 Ibid at para 52.

225 Ibid at para 53.

226 Ibid at para 54.

227 *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), 2008 (4) SA 237 (CC), [2008] ZACC 4 ('Njongi').

between Attorney and Client *de bonis propriis*.²²⁸ Moreover, if the MEC indicated that other people were responsible for the decision, 'each person identified in the [MEC]'s affidavit must also show cause by affidavit why, irrespective of the outcome of the application, they should not be ordered to pay the Applicant's costs on the scale as between Attorney and Client *de bonis propriis*.²²⁹

The Court, in a unanimous judgment of Yacoob J, ultimately rejected the MEC's prescription claim. It then considered the question of costs. Yacoob J stressed that the government had a decision whether to raise prescription or not that had to be properly exercised in light of constitutional values, particularly the right to social security:

There is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription particularly when the debt is due and owing. The Legislature has wisely left that choice to the debtor. For it is the debtor who would face the commercial, community and other consequences of that choice.

A decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution. It follows that the Provincial Government too, must take a decision whether to plead prescription to defeat a claim for arrear disability grant payments. This is not a decision for the State Attorney to make. It is an important decision and must not be made lightly. It must be made after appropriate processes have been followed and by a sufficiently responsible person in the Provincial Government who must take into account all the relevant circumstances. It is the duty of the State to facilitate

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rather than obstruct access to social security. This will be a fundamental consideration in making the assessment.²³⁰

Yacoob J described the provincial government's decision to raise prescription to avoid paying Mrs Njongi the grants she was owed as a 'cynical position devoid of all humanity'.²³¹ For reasons he does not explain,²³² however, he concluded that there was not sufficient evidence to justify an award *de bonis propriis*. All was not lost. The state's heartless attitude toward Mrs Njongi prompted Yacoob J to order the state to pay Mrs Njongi's costs in all courts on an attorney and client scale. Although the Court does not say so, it seems likely that the reason they could not make a *de bonis propriis* order was because the lines of authority were so muddled that no individual or group of individuals could be identified as responsible for this particularly egregious behaviour. The state officials did an excellent job of obscuring the facts of the matter — thereby masking their own culpability and that of other parties to the malfeasance.

6.8 Taxation of Costs

228 Ibid at para 61.

229 Ibid.

230 *Njongi* (supra) at paras 78-79.

231 Ibid at para 90.

232 Ibid at para 63.

Up to now, this chapter has outlined the principles that govern what costs order a court should make. In this penultimate section, I look at the more technical part of costs orders: how they will be taxed. 'Taxing' is the process parties engage in to determine the precise amount that is owing based on the Court's costs decision.

Rule 22 of the Constitutional Court Rules, 2003 provides that:

- (1) Rules 17 and 18 of the Supreme Court of Appeal Rules regarding taxation and attorneys' fees shall apply, with such modifications as may be necessary.
- (2) In the event of oral and written argument, a fee for written argument may in appropriate circumstances be allowed as a separate item.

Rule 22 is functionally equivalent to Rule 21 in the 1998 Rules.

The power of the Constitutional Court in a review proceeding of the taxing master's exercise of her powers is identical to the power of the Supreme Court of Appeal acting under its Rule 17.²³³ Although the Constitutional Court's approach to the award of costs might differ to the approach of other courts, the Court — in *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* — pointed out that 'there is nothing inherent in the distinction between the respective areas of competence of the two courts to indicate that there should be any difference between their respective powers and duties to control their functionaries in the performance of their official duties.'²³⁴ The Court further concluded that no reason exists to depart from the approach of the Supreme Court of Appeal 'on the actual details of costs or their taxation' and, in particular, 'with regard to the taxation of bills of costs by its taxing master.'²³⁵

RS2, 10-10, ch6-p42

The primary questions for a court facing a challenge to the taxing master's award are: (a) what principles should the taxing master follow? and (b) under what circumstances is the court entitled to interfere? The *Gauteng Lions* Court, drawing from the experience of the Supreme Court of Appeal (and the approach of its taxing master),²³⁶ set out the principles it would follow. These principles were succinctly summarised in *Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC & Another*:

- (a) Costs are awarded to a successful party to indemnify it for the expense to which it has been put through having been unjustly compelled either to initiate or defend litigation.
- (b) A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.
- (c) The Taxing Master must strike this equitable balance correctly in the light of all the circumstances of the case.

233 *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 ('*Gauteng Lions*') at para 10.

234 *Ibid.*

235 *Ibid* at para 11.

236 *Gauteng Lions* (supra) at para 12.

- (d) An overall balance between the interests of the parties should be maintained.
- (e) The Taxing Master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work properly done.
- (f) And the Court will not interfere with a ruling made by the Taxing Master merely because its view differs from his or hers, but only when it is satisfied that the Taxing Master's view differs so materially from its own that it should be held to vitiate the ruling.²³⁷

This summary provides a clear explication of the Court's approach to costs orders involving the taxing master. However, some of these points require amplification.

First, where members of the Court are better equipped to deal with matters having a bearing on costs, they are more likely to review the decision of the taxing master. For example, whereas determinations as to the quantum of fees fall within the area of expertise of the taxing master, other areas, such as 'where a point as to admissibility of a segment of evidence is determined by the court and subsequently bears materially on costs items in dispute', may best be determined by the Court.²³⁸

Second, the practice of advocates to 'book the time actually spent in the preparation of a case and charge an hourly or daily rate for such time' is only one consideration in the overall assessment of reasonable costs. Indeed, the practice of billing on a 'rate-per-time' basis may encourage slow and inefficient work and

RS2, 10-10, ch6-p43

conduce to 'the charging of fees that are wholly out of proportion to the value of the services rendered'.²³⁹ Moreover, allowing counsel to charge on a rate-per-time basis also encourages over-lengthy written submissions. The Court in *Gauteng Lions* wrote that a rate-per-time basis is not only unfair to the litigants saddled with the costs, but 'places an additional burden on all who have to study the resultant verbosity'.²⁴⁰ In *Hennie De Beer*, for example, respondent's counsel had charged 61 hours for preparing an affidavit opposing leave to appeal from the Supreme Court of Appeal. The taxing master approved the request. The applicant objected that, considering the same counsel had been involved in the High Court and the Supreme Court of Appeal, 61 hours was excessive. The Constitutional Court agreed. 'It is difficult to

237 [2010] ZACC 1 ('*Hennie De Beer*') at para 8, summarising *Gauteng Lions* (supra) at paras 15-16 and 45. This approach to review was established, albeit in a different context, by Innes CJ in *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111. It was first applied to review of decisions of the taxing master in *Ocean Commodities Inc & Others v Standard Bank of SA Ltd & Others* 1984 (3) SA 15 (a) 18. See also *JD van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (a).

238 *Gauteng Lions* (supra) at para 14. See also *Hennie De Beer* (supra) at para 10 ('The Supreme Court of Appeal has taken note of "the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related". The principle flowing from this is that time charged is not decisive. An objective assessment of the features of the case is primary, and time actually spent in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work. The reason is that time alone would put a premium on slow and inefficient work and would conduce to the charging of fees wholly out of proportion to the value of services rendered.')

239 *Gauteng Lions* (supra) at paras 27-28 and 46.

240 *Ibid* at para 46.

conceive', the Court wrote, 'how a competent professional acquainted with the issues, as counsel would have been in this case, could require more [than 20 hours] for this task.'²⁴¹

Third, on a related note, although the details of the determination of costs is left to the taxing master, the one role the court generally plays is determining how many counsel were appropriate. Constitutional Court matters are generally complex and will ordinarily require the services of two counsel. However, there is a limit to the number of counsel a litigant may engage. In *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others*, the applicants engaged six counsel.²⁴² Considering the complexity of the issues, the Court awarded them the costs of three counsel. However, the Court interfered with the High Court's decision to award them the costs of five counsel. '[I]t is hard to conceive', Ngcobo CJ held 'of any basis on which a more generous award could have been justified in the High Court. It seems to me that awarding the costs of five counsel was excessive and unjustified.'²⁴³ Although acknowledging the discretion that should be afforded to trial judges to craft appropriate costs orders, the Chief Justice felt that, in this matter, 'the High Court gave markedly over-generous weight to the complexity of the issues in the case, and to the research the case required. The award therefore failed to reflect fairly the position as between the parties, and consequently imposed an undue burden on the respondents.'²⁴⁴

Fourth, the primary consideration is not the hours spent, but always whether the fees charged are 'reasonable'. More generally, the *Gauteng Lions* Court stated that when it comes to party and party costs

[o]ne is not primarily determining what are proper fees for counsel to charge their client for the work they did. That is mainly an attorney and client issue and when dealing with a party and party situation it is only the first step. When taxing a party and party bill of costs the object of the exercise is to ascertain how much the other side should contribute to the reasonable fees the winning party has paid or has to pay on her or his own side. Or, to put

RS2, 10-10, ch6-p44

it differently, how much of the client's disbursement in respect of her or his own counsel's fees would it be fair to make recoverable from the other side?²⁴⁵

Lastly, the one material difference between the calculation process in the Supreme Court of Appeal and the Constitutional Court relates to the preparation of heads of argument. The Supreme Court of Appeal emphasizes the presentation of oral argument. Indeed, the rules of the Supreme Court of Appeal specifically provide that heads of argument are meant only to constitute succinct outlines of the arguments to be advanced at the hearing. The Constitutional Court, however, places far greater emphasis on written submissions. Rule 22(2) of the Constitutional Court Rules

241 *Hennie De Beer* (supra) at para 14.

242 [2010] ZACC 10 ('*Tongoane*').

243 *Ibid* at para 130.

244 *Ibid* at para 131.

245 *Gauteng Lions* (supra) at para 47. See also *Hennie De Beer* (supra) at para 15.

specifically provides that a fee for written argument may be allowed as a separate item. In the Supreme Court of Appeal, the practice is to award counsel a significant first-day fee. That fee encompasses remuneration for work done in preparation for the hearing. While it is appropriate for the taxing master to allow separate remuneration for the preparation of written submissions in the Constitutional Court, taxing masters in the Constitutional Court do not award a 'heavy first-day fee'.²⁴⁶ As the Constitutional Court has observed: 'That would condone cumulative debiting and result in excessive fees being allowed.'²⁴⁷

6.9 Clarifying the Meaning of Costs Awards

Although costs awards are generally simple, it is possible — as the decision in *Chonco III* illustrates — from them to create confusion.²⁴⁸ *Chonco III* concerned a dispute about whether the Constitutional Court's costs award required the government to pay the costs in the High Court and the Supreme Court of Appeal. Although the order explicitly indicated that the government should pay the costs in the Supreme Court of Appeal, it did not mention the High Court. However, the text of the judgment made it clear that the government should pay costs in the High Court as well. Khampepe J relied on the Court's powers under Rule 29 of its rules — which incorporates Rule 42 of the High Court rules²⁴⁹ — to alter the order to properly reflect the intention in the judgment.

246 *Gauteng Lions* (supra) at paras 44-45.

247 *Ibid* at para 45.

248 *Minister for Justice and Constitutional Development v Chonco & Others* 2010 (7) BCLR 629 (CC), [2010] ZACC 9 ('*Chonco III*').

249 Rule 42 reads:

(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.