

IN THE SUPREME COURT OF APPEAL, BLOEMFONTEIN

SCA CASE NO: 001/2021

In the matter between:

**HELEN SUZMAN FOUNDATION**

Applicant

and

**THE SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

Second Respondent

**THE CABINET OF THE REPUBLIC OF  
SOUTH AFRICA**

Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL  
OF PROVINCES**

Fourth Respondent

**THE MINISTER OF COOPERATIVE  
GOVERNANCE AND TRADITIONAL AFFAIRS**

Fifth Respondent

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**AFFIDAVIT IN TERMS OF SECTION 17(2)(F)**

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I, the undersigned,

**FRANCIS ANTONIE**

do hereby make oath and state that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("HSF"). I am duly authorised to depose to this affidavit on its behalf.
2. The facts contained herein are within my personal knowledge and belief, unless the context indicates otherwise, and are both true and correct.



3. Where I make legal submissions, I do this on the strength of the advice of my legal representatives, which advice I accept as being correct. I am advised that a complete set of the affidavits and judgments in the dismissed application will be filed herewith, with the order and judgment of the court *a quo*.

## OVERVIEW

4. This is an application under section 17(2)(f) of the Superior Courts Act, 2013, to deal only with the question of costs.
5. The underlying matter which served before this Court was one for special leave to appeal against the whole of the judgment and order handed down by the Full Court ("**the Full Court**"), in the High Court, Gauteng Division Pretoria, on 7 October 2020 ("**the Full Court Decision**").
6. In the application before the Full Court, the HSF sought orders:
  - 6.1 declaring that:
    - 6.1.1 Parliament has failed to fulfil its duties under sections 42(3), 44(1), 55(1) and 68 of the Constitution, to consider, initiate and prepare and pass legislation regulating the state's response SARS-CoV-2 and COVID-19 (together, "**COVID**")
    - 6.1.2 the President, in his capacity as head of the National Executive, together with Cabinet, has failed to fulfil the duty to prepare and initiate legislation that regulates the state's response to COVID; and
    - 6.1.3 Parliament and Cabinet have failed to fulfil their duty to respect, protect, promote and fulfil the rights in the Bill of Rights;
  - 6.2 directing that:

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- 6.2.1 Cabinet must, without delay, prepare and initiate legislation that has as its purpose the regulation of the state's response to COVID; and
- 6.2.2 Parliament must, without delay, pass legislation that has as its purpose the regulation of the state's response to COVID.
7. In the Full Court Decision, the Full Court accepted three of HSF's main propositions in support of the relief sought:
- 7.1 COVID poses a serious, ongoing threat to the life, well-being and rights of all South Africans, such that the state's obligations under section 7(2) of the Constitution are engaged;
- 7.2 Parliament and the National Executive have had enough time to initiate and pass COVID-specific legislation to deal with this extraordinary threat; and
- 7.3 the legislative process is intrinsically and instrumentally valuable, for it allows for accountability, public participation, and transparency, and ensures better outcomes, i.e. concrete laws better able than regulatory law-making to tackle and respond to harms and threats.
8. Having accepted these propositions, the Full Court found against HSF only on a fourth, namely, that section 7(2) of the Constitution does not require the Executive and Parliament to pass COVID-specific legislation. Instead, it was held that the Disaster Management Act, 2002 ("**the DMA**") was the State's response to COVID and that any relocation of plenary law-making power thereunder was permissible and subject to no temporal limitations.

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9. Aggrieved by the Full Court Decision, the HSF applied for leave to appeal, but both the Full Court and then this Court denied leave. The first to fifth respondents opposed the leave to appeal application to this Court.
10. On 13 April 2021, HSF was informed that its leave to appeal application to this Court had been dismissed, with costs. A copy of the notification to HSF's representatives, dated 13 April 2021, is annexed marked "A".
11. As I explain below, no argument was led on costs. Not all of the respondents even sought costs. Importantly, the Full Court, in the judgment appealed against, had expressly declined to order costs, holding that it found "*it appropriate that the applicant be afforded the protection provided by the Biowatch rule and be shielded from an adverse costs order.*"<sup>1</sup> And, similarly, even its judgment dismissing leave to appeal, the Full Court once again held that "*no order as to costs would be warranted.*"<sup>2</sup> This is in keeping with the trite constitutional principles regarding the awarding of costs in constitutional litigation (the *Biowatch* principle).
12. Applying such principle, as did the Full Court, HSF's leave to appeal application should not have been dismissed with costs (the HSF does not, respectfully, agree that the application should have been dismissed at all, but this s17(2)(f) is concerned only with costs).

### **THE *BIOWATCH* PRINCIPLE**

13. In *Biowatch Trust v Registrar Genetic Resources and Others*,<sup>3</sup> the Constitutional Court dealt with the question of costs in constitutional litigation

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<sup>1</sup> Full Court Judgment ([2020] ZAGPPHC 574 (5 October 2020)) para [117]

<sup>2</sup> Full Court leave to appeal judgment ([2020] ZAGPPHC 700 (4 December 2020)) para [16]

<sup>3</sup> 2009 (6) SA 232 (CC)



against the state. The Constitutional Court endorsed the finding in *Affordable Medicines Trust*<sup>4</sup> that, as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.

14. As held by the Constitutional Court:

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

*The rationale for this general rule is three-fold. 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 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."*<sup>5</sup>

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<sup>4</sup> *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA247 (CC)

<sup>5</sup> *Biowatch* paras 22 and 23.



15. Where courts have departed from the *Biowatch* principle, the Constitutional Court (among others) has permitted appeals solely on this basis, so as to uphold this principle. Simply by way of example, see the Constitutional Court's rulings in *Hotz and Others v University of Cape Town*<sup>6</sup>, *Ferguson and Others v Rhodes University*<sup>7</sup> and *Limpopo Legal Solutions and Others v Vhembe District Municipality and Others*.<sup>8</sup>
16. The Constitutional Court has repeatedly seen fit to interfere with lower courts' discretion regarding costs to ensure that the *Biowatch* principle is adhered to.

### APPLICATION TO THIS MATTER

17. There were no arguments before this Court as to why *Biowatch* should be deviated from. The first respondent, with a supporting affidavit from the fourth respondent, did not even seek costs in HSF's leave to appeal application.
18. The second, third and fifth respondents did request costs in the appeal, but did not explain why they were entitled to costs, why the *Biowatch* principle should be departed from, or why the High Court had been wrong in applying the *Biowatch* principle. The extent of their reference to cost was as follows:

*"[99] For these reasons, the proposed appeal bears no prospects of success and the application must be dismissed with costs. There is also no compelling reason why the appeal should be heard."*

19. That is the sole mention of costs, outside of the prayer at the end of the affidavit (*"WHEREFORE I pray that the applicant's application be dismissed with costs, including the costs of two counsel."*)

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<sup>6</sup> 2018 (1) SA 369 (CC)

<sup>7</sup> 2018 (1) BCLR 1 (CC) (7 November 2017)

<sup>8</sup> 2017 (9) BCLR 1216 (CC) (18 May 2017)

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20. There was thus no argument from any of the respondents regarding *Biowatch* and why it should not apply.
21. Moreover, this is a case that clearly attracts the *Biowatch* principle: it involves constitutional litigation by a non-governmental organisation, which sought no commercial benefit and rather sought important, public interest relief pertaining to Parliament and the Executive's position under the DMA.
22. To this end: the underlying matter was about the fundamental issue of the proper location of constitutional power, and the effect that a proper understanding of the Constitution's conscious separation and specification of different functions has on the entire machinery of our government's—legislative, executive and judicial—to respond to the particular threat and harm caused by COVID.
23. The Full Court quite correctly accepted that:
- 23.1 COVID poses a serious, ongoing threat to the life, well-being and rights of all South Africans, such that the state's obligations under section 7(2) of the Constitution are triggered;<sup>9</sup>
- 23.2 Parliament and the Executive have had sufficient time to pass COVID-specific legislation to deal with this extraordinary threat; and
- 23.3 the legislative process is intrinsically and instrumentally valuable, for it allows for accountability, public participation, transparency, and ensuring better outcomes,<sup>10</sup> that is, concrete laws better able to meet harms and

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<sup>9</sup> Full Court Decision para [71]

<sup>10</sup> Full Court Decision para [43], [44], and [75]

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threats, than regulatory law-making.

24. Having reached these conclusions, the Full Court then differed with the HSF. It held that the DMA may be interpreted to arrogate to the executive all the primary legislative power which is (ordinarily) constitutionally allocated to the legislature, in circumstances where a disaster, as defined, triggered this under the DMA.
25. The HSF does not seek to reargue the merits of the matter, but simply highlights that the nature of this litigation involved the location of primary legislative power, involving the intersection between the DMA and the Constitution, and implicated no commercial interests at all.
26. *Biowatch* plainly applied to this matter. And, evidently, as held by the Full Court, this litigation was neither frivolous nor vexatious.<sup>11</sup>
27. Therefore, HSF's leave to appeal application should not have been dismissed with costs.
28. Notwithstanding this, and despite there being no argument on this score, costs were nonetheless awarded against the HSF.

### **EXCEPTIONAL CIRCUMSTANCES**

29. We submit that exceptional circumstances exist such that the President of this Honourable Court should exercise her power under section 17(2)(f), which allows her to refer the decision in relation to costs to the court for reconsideration and, if necessary, variation.

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<sup>11</sup> Full Court Decision para [117]

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30. The exceptional circumstances appear from the facts set out above. In summary, when refusing leave to appeal this Court ordered costs against HSF, despite:
- 30.1 the nature of this matter (constitutional litigation by a non-governmental organisation, which sought no commercial benefit and rather sought important, public interest relief);
  - 30.2 the binding *Biowatch* principle;
  - 30.3 the findings of the High Court that the *Biowatch* principle did apply in this matter and that costs should not be ordered against HSF; and
  - 30.4 that no argument was advanced as to why HSF ought to be ordered to pay costs.

### THE RELIEF SOUGHT

31. In the circumstances, the HSF requests the President of this Honourable Court to exercise her power under s17(2)(f) refer the decision on costs to the court for reconsideration and variation (with or without directions).

### CONDONATION

32. The order dismissing the HSF's leave to appeal application is dated 25 March 2021. It was only communicated to HSF's correspondent, and then primary attorneys, on 13 April 2021.
33. This application is launched within the one month period provided for if the date of communication is considered. It is, however, outside of one month from the date of the order itself.

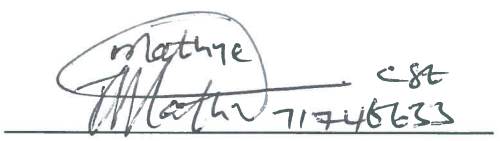


34. It is submitted that this is an important matter, not only for HSF but for all litigants who wish to consider constitutional litigation. A failure to remedy the costs order has the very real potential to have a chilling effect on important constitutional litigation going forward.
35. Moreover, the State suffers no prejudice by virtue of the belated filing of this application (belated if 25 March 2021 is taken to be the date, although the HSF was not aware of the order at such time). The filing hereof does not prejudice any hearing date or ability to respond (as provided for in law). It has arisen solely due to the disconnect between the order date and the receipt thereof by HSF's correspondents and attorneys.
36. In the circumstances, to the extent necessary, it is requested that condonation be granted for the filing of this application.



FRANCIS ANTONIE

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at PARKVIEW on this the 13 day of MAY 2021, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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COMMISSIONER OF OATHS



Full names: IRENE MATHYE  
Business address: 71 SUNDALK AVENUE  
PARKVIEW  
Designation: CONSTABLE  
Capacity:

"A"

**Daniel Rafferty**

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**From:** Christelle Slack <cslack@symok.co.za>  
**Sent:** 13 April 2021 13:05  
**To:** Daniel Rafferty; Dylan Cron; Pooja Dela; Liam Minné; Matthew Kruger  
**Cc:** Lazyja Venter  
**Subject:** HELEN SUZMAN FOUNDATION // THE SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS  
**Attachments:** FW: Emailing: PracticeDirective-01-2018[20181207]; SCAN FOR: FFS2771[2021-04-13 12-59-21]

LEGAL SOLUTIONS THROUGH  
CONSTANT INNOVATION

SYMINGTON DE KOK  
ATTORNEYS  
SOLUTIONS

Dear Sir

We attach hereto Order received from the SCA today.

Please note that in terms of sec 17(2)(f), "The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for consideration and, if necessary, variation".

Kindly take note the affidavit in terms of S17(2)(f) not to exceed 10 pages.

**Please acknowledge receipt.**

Regards

**Christelle Slack**  
Supreme Court of Appeal  
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[cslack@symok.co.za](mailto:cslack@symok.co.za)

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Enquiries: Mr Myburgh

Date: 26 MARCH 2021

Ref: 001/2021

YOUR REF: L Venter/csl/FFS2771

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YOUR REF: 239/202100079 P1 H

State Attorney  
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BLOEMFONTEIN  
9300

Mr/Ms

**APPLICATION FOR LEAVE TO APPEAL  
HELEN SUZMAN FOUNDATION v THE SPEAKER OF THE  
NATIONAL ASSEMBLY & OTHERS**

With reference to the application lodged in this office on 04 JANUARY 2021 this Court ordered on 25 MARCH 2021 that the application be dismissed as per attached order:-

Yours faithfully

  
PSW MYBURGH (Mr)  
REGISTRAR

REGISTERED POST (H/B/D/O)

YOUR REF: 32858/2020 Mlambo JP, Kollapen & Baqwa JJ (Court a quo)

Registrar of the High Court  
Private Bag X 67  
PRETORIA  
0001

Copy for your information.

  
EM



## SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 001/2021  
GP CASE NO: 32858/2020

BEFORE THE HONOURABLE JUSTICES ZONDI JA AND GORVEN AJA

On the 25<sup>th</sup> MARCH 2021

In the application between:

<b>HELEN SUZMAN FOUNDATION</b>	<b>Applicant</b>
and	
<b>THE SPEAKER OF THE NATIONAL ASSEMBLY</b>	<b>1<sup>st</sup> Respondent</b>
<b>THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</b>	<b>2<sup>nd</sup> Respondent</b>
<b>THE CABINET OF THE REPUBLIC SOUTH AFRICA</b>	<b>3<sup>rd</sup> Respondent</b>
<b>CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES</b>	<b>4<sup>th</sup> Respondent</b>
<b>THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS</b>	<b>5<sup>th</sup> Respondent</b>

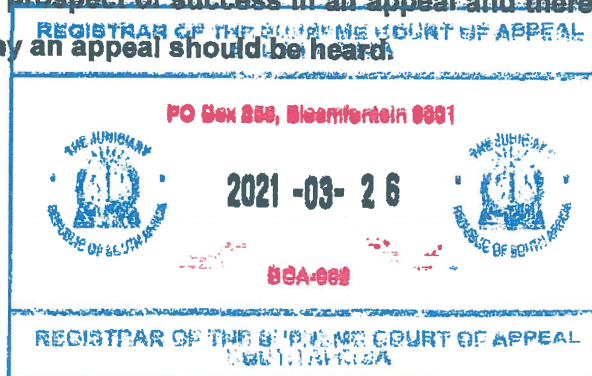
Having considered the Notice of Motion and the other documents filed.

IT IS ORDERED THAT:

1. Condonation as applied for is granted. The applicant for condonation is to pay the costs of the application.
2. The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.

BY ORDER OF THIS COURT

**COURT REGISTRAR  
PSW MYBURGH (Mr)**



*[Handwritten signature]*