IN THE SUPREME COURT OF SOUTH AFRICA
BLOEMFONTEIN

SCA CASE NO: 001/2021
CASE NO: 32858/20

In the matter between :-

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

FILING SHEET

DOCUMENT: 2nd, 3rd and 5th RESPONDENT'S ANSWERING AFFIDAVIT **(Reconsideration)**

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IN THE SUPREME COURT OF SOUTH AFRICA

SCA CASE NO.: 01/2021

GP case no.: 32858/20

In the matter between:-

HELEN SUZMAN FOUNDATION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
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
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent

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SECOND, THIRD AND FIFTH RESPONDENTS' ANSWERING AFFIDAVIT
[Reconsideration]

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P

I, the undersigned

NANGAMSO QONGQO

do hereby make oath and state that:

1. I am an adult female attorney of the High Court of South Africa and a Senior Assistant State Attorney, practising as such at the Office of the State Attorney situated at 316 SALU Building, 316 Thabo Sehume Street, Pretoria.

2. I am the attorney of record for the second, third and fifth respondents ("**Executive respondents**") in this matter and am duly authorised to depose to this affidavit on their behalf by virtue of the position that I hold. I was the deponent to the answering affidavit on behalf of the Executive respondents in the main proceedings for leave to appeal before this Court. I remain authorised to depose to this affidavit.

3. The Executive respondents oppose the applicant (interchangeably referred to as "**HSF**")'s application for reconsideration, for two reasons. The first is that the provision on which the applicant relies, section 17(2)(f) of the Superior Courts Act 10 of 2013 ("**Superior Courts Act**") can only be used in exceptional circumstanes, and the second is that the HSF's application falls outside the scope of the *Biowatch*[1] principle.

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[1] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

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NO EXCEPTIONAL CIRCMSTANCES SHOWN

4. Section 17(2)(f) provides that:-

> *"The decision of the majority of the judges considering an application [for leave to appeal], 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 reconsideration and, if necessary, variation."* [Underlining added].

5. In order to invoke section 17(2)(f), the HSF is required to show exceptional circumstances. The HSF's main arguments on that score are these:

   5.1. There were no arguments before the SCA pertaining to costs, and not all the respondents sought costs against the HSF.

   5.2. The High Court applied the principle laid down in *Biowatch*,[2] and expressly declined to order costs against the HSF.

   5.3. The Constitutional Court has repeatedly interfered with lower courts' discretion to ensure that *Biowatch* is adhered to.

   5.4. No arguments were made (in the application for leave to appeal) as to why the *Biowatch* principle should be departed from.

   5.5. Even though the second, third and fifth respondents sought costs in the appeal, they did not explain why they were entitled to costs, why the *Biowatch* principle should be departed from, or why the High Court was wrong in applying it.

   5.6. The HSF's application involves constitutional litigation by a non-governmental organisation in the public benefit. In other words, the HSF sought no commercial benefit in bringing this case.

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[2] *Biowatch.*

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This, so the argument goes, placed the application within the purview of *Biowatch*.

6. The Superior Courts Act does not define "*exceptional circumstances*", and courts have been reluctant to lay down a general definition.[3] In *S v Liesching*[4] *and others*, the Constitutional Court held that the dictionary definition of "*exceptional*" must be the starting point of the enquiry. It quoted from the dictionary as follows:

> "*The Oxford English Dictionary defines 'exceptional' as 'of the nature of or forming an exception; out of the ordinary course, unusual, special.'*"

7. In the context of section 17(2)(f), the Constitutional Court in *Liesching* held that:

> "*Without being exhaustive, exceptional circumstances, in the context of s 17(2)(f), and apart from its dictionary meaning, should be linked to either the probability of grave individual injustice . . . or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs.*"[5] [Underlining added].

8. The Court went on to observe that section 17(2)(f) serves to:

> "*. . . [K]eep the door of justice ajar in order to cure errors or mistakes, and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition, might have yielded a different outcome. It is therefore a means of preventing an injustice.*

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[3] *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399:*S v Petersen* 2008 (2) SACR 355 (C) paras [55] – [56].
[4] *S v Liesching and others* 2019 (4) SA 219 (CC) at para [131].
[5] S *v Liesching* para [138].

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This would include new or further evidence that has come to light or that became known after the petition had been considered and determined."[6] [Underlining added].

9. In *Avnit,*[7] Mpati P stated:

> *"Prospects of success alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of that ilk. But the power under s 17(2)(f) is one that can be exercised even when special leave has been refused, so 'exceptional circumstances' must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result."*[8]

10. It is apparent from these cases that section 17(2)(f) was intented for actual merits of the case and not for cost orders, which are discretionary.

11. Notably, what constitutes exceptional circumstances is determined by the facts of each case.[9] Circumstances which may be regarded as 'ordinary' in one matter may be considered 'exceptional' in another. Ultimately, it is the function of the Court's President to determine whether, on a case-by-case basis, the circumstances can be found to be exceptional.[10]

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[6] *S v Liesching and others* 2017 (2) SACR 193 (CC) para [54].
[7] Avnit v First Rand Bank (20233/14) [2014] ZASCA 132 (23 September 2014).
[8] ibid at para [7].
[9] *S v Liesching and others* 2019 (4) SA 219 (CC) para [132.]
[10] *S v Liesching and others* para [132].

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12. The HSF has placed no facts before the Court on the basis of which it could assess whether exceptional circumstances exist. The contention, ultimately, that no arguments were placed before this Court by the parties as to why the High Court's costs order should not departed from does not assist the applicant. Courts have over and again said that an order of costs is wholly within the discretion of the Court. Nothing has been placed before this Court to warrant a departure from that principle.

APPLICATION WAS MANIFESTLY INAPPROPRIATE

13. In *Affordable Medicines*[11], the Constitutional Court established 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. Ngcobo J stated the principle as follows:

> *"The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case."*[12] [Underlining added].

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[11] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).

[12] *Affordable Medicines* at para [138].

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15. The principle comes from this passage in *Biowatch*[13]:

> "... *[T]he general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise*." [Underlining added].

16. This Court was correct to order the HSF to pay costs; because its application was manifestly inappropriate. This the applicant was told by three courts. It ought to have accepted that its application and subsequent attempted appeal bore no reasonable prosects of success, and that there were no other compelling reasons, including conflicting judgments, why the appeal should be heard. Yet, the HSF persisted.

17. In seeking leave to appeal before this Court, the applicant argued that there are prospects of success and that the High Court judgment "*gives rise to conflicting judgments relating to the standard*" to be met by legislative and other measures to respect, protect, promote and fulfil the rights in the Bill of Rights."[14] The applicant did not identify the specific judgment that conflicts with the judgment of the High Court. It was therefore not correct that the High Court's judgment gives rise to conflicting judgments.

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[13] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at para [24].

[14] FA, para 57.

18. In an attempt to make out a case for compelling reasons, the applicant alleged that:

> *"The arguments and contentions are novel and there is no similar precedent or case law already considering the question of when and how section 7(2) obligations upon the State require the initiation and preparation of COVID specific legislation through a constitutionally-appropriate understanding of the Disaster Act."*[15]

19. There was nothing novel about the interpretation of legislation in order to determine whether reasonable and effective measures exist to safeguard the rights in the Bill of Rights. The applicant itself in its founding affidavit referred this Court to *Glenister II*, *Metrorail* and *Women's Legal Centre* as authorities for what the standard required to meet the obligation in section 7(2) of the Constitution is.

20. The duty to safeguard the rights in the Bill of Rights is imposed on the State. In its papers before the High Court, the State (both the Executive and Parliament) stated clearly that during the COVID-19 pandemic, it is relying on the Disaster Management Act 57 of 2002 ("DMA") as a mode via which it fulfils its obligations under section 7(2). To counter that, it behoved the applicant to challenge the DMA as inadequate. This, it did not do.

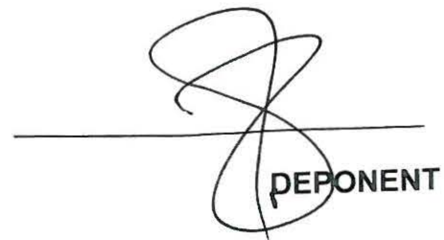
21. The applicant's contention that the DMA is a temporary measure is not supported by the text and scheme of the DMA itself. Absent a challenge to the DMA itself, or a demonstration of the aspects in which the DMA falls short of the section 7(2) standard, this Court would not reasonably come

[15] FA, para 61.

to a finding that controverts the Full Court's finding. This was a glaring error that was pointed to the applicant by the High Court.

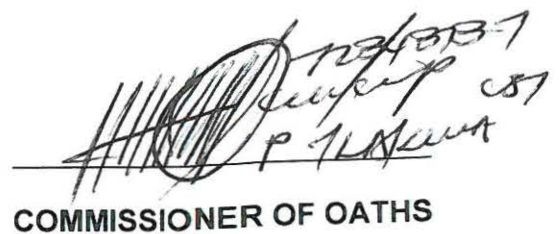
22. The applicant's application before ths Court was therefore manifestly inappropriate and was correctly met with a costs order.

WHEREFORE I pray that the applicant's application be dismissed with costs, including the costs of two counsel.



DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on this the 03 day of JUNE 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.



COMMISSIONER OF OATHS