Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER:UM117/21

In the matter between:

SAKELIGA NPC	**APPLICANT**
and	
SEDIBENG WATER BOARD	**FIRST RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL: NOTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	**SECOND RESPONDENT**

MEMBER OF THE EXECUTIVE COUNCIL:NORTH WEST PROVINCE : FINANCE	**THIRD RESPONDENT**
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**FOURTH RESPONDENT**
MINISTER OF FINANCE	**FIFTH RESPONDENT**
MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	**SIXTH RESPONDENT**
NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY	**SEVENTH RESPONDENT**
DITSOBOTLA LOCAL MUNICIPALITY	**EIGHTH RESPONDENT**
MAHIKENG LOCAL MUNICIPALITY	**NINTH RESPONDENT**
RATLOU LOCAL MUNICIPALITY	**TENTH RESPONDENT**
PREMIER OF THE NORTH WEST PROVINCE	**ELEVENTH RESPONDENT**

Coram: WESSELS AJ

Date: 2 June 2025

ORDER

i. The first respondent is ordered to pay the costs of the application (inclusive of the costs of the argument on costs) on a party and party scale, except for the costs of the answering and replying affidavits, which costs are to be paid on a scale as between attorney and client.

ii. The costs of the argument on costs shall be paid on a party and party scale B.

JUDGMENT

Introduction

[1] The issue to be determined is whether the first respondent is liable to pay the applicant's attorney and client costs of this application. The issue of costs stem from an application

brought by the applicant to interdict the first respondent from suspending all operations and maintenance services to municipalities within the municipal district of the seventh respondent and the eventual review of the decision to suspend.

[2] The first respondent assails the issue of costs on the basis that, although it conceded to the interdictory relief contained in the notice of motion, the first respondent contends that the applicant would not have succeeded with a review of its decision to suspend. On this basis, the first respondent contends that each party should pay its own costs, alternatively costs on a party and party scale.

Facts

[3] On 25 May 2021, the first respondent instructed its employees by written notice to suspend bulk water supply and ancillary services ('the suspension notice') to the eighth, ninth and tenth respondents. All three of the aforementioned respondents fall within the municipal district of the seventh respondent (Ngaka Modiri Molema District Municipality).

[4] Upon learning of the suspension notice on 26 May 2021, the applicant's attorney of record telephoned the regional manager of the first respondent to inform him of the consequences of such a decision. The first respondent's regional manager refused to retract the suspension notice.

[5] On 26 May 2021, the applicant's attorney of record forwarded correspondence to the first respondent, inter alia, demanding the withdrawal of the suspension notice by no later than 27 May 2021. This letter included a warning that the applicant would approach a High Court for interdictory relief against the first respondent, along with a cost order as between attorney and client if the first respondent failed to accede to the demand.

[6] The applicant received no reaction to its correspondence of 26 May 2021, and issued an urgent application out of this Court on 28 May 2021 to interdict the first respondent from implementing its decision to suspend the bulk water supply and ancillary services to the seventh, eighth, ninth and tenth respondents ('the respondent municipalities'). This relief was sought in parts A and B of the notice of motion.

[7] Part C of the notice of motion is a review application, in terms of which the applicant sought to declare the first respondent's decision to suspend the bulk water supply and ancillary services to the respondent municipalities unconstitutional and unlawful, and to have this decision reviewed and set aside.

[8] On 29 May 2021, the first respondent's attorneys assented to the relief sought in parts A and B of the notice of motion in a letter addressed to the applicant's attorneys ('the 29 May 2021 letter'). The letter reads:

> '*1. We act for and on behalf of Sedibeng Water Board ("our client").*

2. In respect of the notice dated 25 May 2021, signed by Mr Sibongiseni Mbadamana and annex to the founding affidavit, marked X3, we have been instructed by our client as follows:

2.1 the notice was an internal communication to our client's employees and does not constitute a record of decision;

2.2 no decision, as contemplated in section 1 of the Promotion of Administrative Justice Act three of 2000, has been taken to terminate the provisions of Operations and Maintenance services or the services for Bulk Water Supply at the various municipalities mentioned therein;

2.3 the notice shall be withdrawn on Monday, 31 May 2021.

3. Our client intends engaging with the various municipalities regarding the payment of arrears due to our client and the conclusion of contracts regulating the terms of the provision of such services.

4. In the circumstances, our client hereby undertakes to:

4.2 continue with the provision of Operations and Maintenance services at Lehurutshe, Mahikeng and Ratlou Local Municipalities; and

4.3 continue with the provision of services for the Bulk Water Supply at Ditsobotla Local Municipality.

5. In the circumstances, kindly confirm that the application under case number 117/2021, will be withdrawn, with each party to pay its own costs.'

(emphasis added)

[9] The application was removed from the roll on 31 May 2021 by agreement and the costs were reserved. The reason for the removal of the application from the roll was cited in the order as *"The First Respondent gave an undertaking to comply and the parties agreed that the matter is to be removed with cost reserved"*

[10] The matter served again before this Court on 7 October 2021, on which date the application was again postponed to 18 February 2022, and the first respondent was ordered to file its answering affidavit on or before 28 October 2021. In this order, the first respondent was ordered to pay the costs occasioned by the postponement.

[11] The first respondent failed to file its answering affidavit timeously in terms of the order of 7 October 2021, but there was no formal objection to the late filing of the first respondent's answering affidavit, and the applicant filed its replying affidavit.

Legal Principles

[12] Section 34 of the Constitution, dealing with access to courts, provides for the following:

> *'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court*

or, where appropriate, another independent and impartial tribunal or forum.'

[13] The adjudication of any matter before a court necessarily involves the adjunct adjudication of costs. The Constitutional Court enunciated the role of costs in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union*[1] as follows:

> *'In all taxations it is important to keep in mind the one overarching general principle applicable to all awards of party and party costs, a principle which applies to this Court as it does to the SCA. This principle was put in the following terms by Innes CJ in Texas Co. (S.A.) Ltd. v Cape Town Municipality:*
>
> > *"Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation…"*

[14] Costs are normally adjudicated on different grounds from those of the subject matter of a case. In deciding costs, a court is guided by two well-established principles. First, a cost order is always within the discretion of a court, which discretion is to be exercised judicially. The second principle is that costs normally follow the result.

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[1] President of the Republic of South Africa and Others v Gauteng Lions Rugby Union [2001] ZACC 5; 2002 (2) SA 64 (CC) para 15

[15] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[2] the Constitutional Court confirmed the notion that the second principle is subject to the first. The Constitutional Court, without attempting to provide an exhaustive list, provides for a number of exceptions to the second principle. The following remarks made by the Constitutional Court in this matter are apposite:

> *'Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs 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. If the need arises the rules may have to be substantially adapted; this 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.'*

Application to the facts

[16] The effect of the statement contained in the 29 May 2021 letter is that there is no decision of the first respondent to be reviewed.

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[2] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CT5/95) [1996] ZACC 27; 1996 (2) SA 621 (CC) para 3

Upon receipt of this letter by the applicant, the application became academic. All that remained to be determined was the issue of costs.

[17] In stark contrast to the content of the 29 May 2021 letter, the first respondent reverses course in its answering affidavit filed on 3 December 2021. In the answering affidavit, the first respondent alleges that a decision was indeed taken. With regard to the decision, the first respondent advances inter alia, that it did not exercise its power mala fide, it followed fair procedure, its decision was substantially fair and rational and that there were no exceptional circumstances present that would have entitled a court to interdict the first respondent from exercising its statutory power.

[18] In the 29 May 2021 letter, the first respondent represented to the applicant a pertinent factual position, which is that the first respondent had not taken a decision to terminate the bulk water supply and ancillary services to the respondent municipalities.

[19] Following the receipt of the 29 May 2021 letter, the applicant did not pursue the review of the decision any further, as the first respondent, through its attorney, explicitly conceded the non-existence of a decision.

[20] The filing of a record of decision that stands to be reviewed, represents the cornerstone of review proceedings as is provided for in rule 53(1)(b). The Supreme Court of Appeal underscored the importance of a record in review proceedings in *Democratic*

Alliance and Others v Acting National Director of Public Prosecutions and Others[3] wherein the following was remarked:

> *'It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated,would be infringed.'*
>
> *(emphasis added)*

[21] Of particular concern is the fact that the first respondent fails to explain the glaring disparity between the factual statements in the 29 May 2021 letter and the belated reference to the existence of a decision contained in its answering affidavit.

[22] In the 29 May 2021 letter, the first respondent's attorney clearly states that he acts on behalf of the first respondent. It represented the first respondent throughout this application. In the absence of an explanation to the contrary, it must be accepted that the first respondent's attorney was duly authorised to make the representations on its behalf.

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[3] Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA) at par 37

[23] The defence that the first respondent sought to make out in the answering affidavit is materially inconsistent with the 29 May 2021 letter. The first respondent failed to explain this contradiction despite the opportunity to do so.

[24] With the filing of the answering affidavit, the applicant was denied the opportunity to obtain the record of the decision and to supplement its application, as it was entitled to do under the provisions of rule 53.

[25] This Court is not enjoined to consider the merits of the review application on the issue of costs, and if it were, it would have been to the clear disadvantage of the applicant as a result of the applicant's inability to deal with the review proceedings.

[26] The applicant was successful with a substantial part of the relief claimed in its notice of motion, and it should succeed on costs.

Attorney and client costs

[27] Save for a contractual agreement to the contrary, costs between attorney and client are typically awarded when a party to litigation has engaged in misconduct or when there is no merit in a party's case.

[28] The belated filing of the answering affidavit and the failure of the first respondent to deal with its inherently contradicting versions before this Court cannot be ignored. The first respondent

conducted its opposition to the application in a manner worthy of this Court's censure which warrants a special order of costs.

[29] Although costs as between attorney and client are sought against the first respondent, this Court finds no compelling reason to hold the first respondent liable for all the costs of the application as between attorney and client.

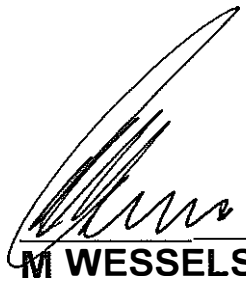
[30] Having considered the total conspectus of facts this Court has been presented with, the reasonable conclusion to be drawn is that the offending conduct of the first respondent's is only confined to the filing of its answering affidavit.

Order

[31] Resultantly the following order is made:

i. The first respondent is ordered to pay the costs of the application (inclusive of the costs of the argument on costs) on a party and party scale, except for the costs of the answering and replying affidavits, which costs are to be paid on a scale as between attorney and client.

ii. The costs of the argument on costs shall be paid on a party and party scale B.



M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Date of hearing	**:28 February 2025**
Heads of argument filed:	**:3 March 2025**
Date of judgment	**:2 June 2025**

APPEARANCES

Counsel for Applicant	**:Adv JI Verwey**
Instructed by	**:Kriek Wassenaar & Venter Inc**
	:Pretoria
	:c/o Labuschagne Attorneys
	Mahikeng
Counsel for Respondent	**:Adv MM Tsama**
Instructed by	**:AA Solwande Attorneys**
	:Sandton
	:c/o Tiro Attorneys
	:Mahikeng