Reportable:	YES
Circulate to Judges:	YES
Circulate to Magistrates:	YES
Circulate to Regional Magistrates	YES

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M311/2021

In the matter between:-

SAKELIGA NPC	1st Applicant
CENTRE FOR GOOD GOVERNANCE AND SOCIAL JUSTICE NPC	2nd Applicant
BAREND LOURENS SNYMAN	3rd Applicant

and

DITSOBOTLA LOCAL MUNICIPALITY	1st Respondent
THE MUNICIPAL MANAGER / ACTING MUNICIPAL MANAGER OF THE DITSOBOTLA LOCAL MUNICIPALITY	2nd Respondent
PREMIER OF THE NORTH WEST PROVINCE	3rd Respondent
PROVINCIAL EXECUTIVE OF THE NORTH WEST PROVINCE	4th Respondent
MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: CO-OPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	5th Respondent

MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	6th Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	7th Respondent
MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	8th Respondent
MINISTER: NATIONAL DEPARTMENT OF FINANCE	9th Respondent
MINISTER: WATER AND SANITATION	10th Respondent
NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY	11th Respondent
ESCOM SOC LTD	12th Respondent
MAGALIES WATER BOARD	13th Respondent
THE ADMINISTRATOR: DITSOBOTLA LOCAL MUNICIPALITY	14th Respondent

JUDGMENT

FMM REID J:

Introduction:

[1] This merits of the matter have become settled between the parties, and the only issue for this Court to determine is the question of costs.

[2] The matter has a long and convoluted history. I will summarise the facts relevant to the determination of an appropriate cost order.

[3] The initial matter (main application) was set down and heard for argument over a period of two (2) days, being 05 and 06 October 2023. At the end of 05 October 2023, the parties reached an agreement on the merits of the matter.

[4] The following order was made an order of court on 6 October 2023:

> *"1. The Provincial Executive for the Province of North West, as contemplated in section 139 of the Constitution ("the Provincial Executive") is obliged to exercise the powers and perform the functions referred to in section 139(5) of the Constitution of the Republic of South Africa ("the Constitution").*
>
> *2. Pending the resolution of the crisis in the financial affairs of Ditsobotla and the securing of the ability of Ditsobotla to meet its obligations to provide basic municipal services:*
>
> *2.1 The Provincial Executive must comply, as a matter of urgency, with its obligations and duties in terms of section 139(5) of the Constitution in respect of*

Ditsobotla, and exercise the powers and perform the functions referred to in section 139(5) of the Constitution.

2.2 *The Provincial Executive must assume responsibility for the implementation of the financial recovery plan approved by the sixth respondent, (the Finance MEC), on 12 July 2023 in accordance with the notice published by the Provincial Executive on 23 May 2023 to invoke section 139(5)(c) of the Constitution.*

2.3 *The Provincial Executive must forthwith impose and implement the approved recovery plan aimed at securing the ability of Ditsobotla to meet its obligations to provide basic municipal services and to meet its financial commitments as envisaged in section 139(5)(a) of the Constitution, read together with section 146 of the MFMA.*

3. *That the Provincial Executive is ordered and directed to monitor the restoration of and continuation of basic municipal services to the community of Ditsobotla, and to report back on the aforesaid and the implementation of the financial recovery plan, including:*

3.1 *To report every third month in terms of the reporting requirements set out in part 4 of the financial recovery plan, and to serve on the parties and file such progress reports with the court together with an affidavit confirming such reports.*

4. *The third to sixth respondents are ordered and directed to meaningfully engage with the applicants and their*

representatives on the recovery of Ditsobotla and the issues underlying the financial crisis of the municipality.

5. *The applicants are granted leave to supplement the founding affidavit, to amend the notice of motion, and to seek such further relief as may be necessary, including in terms of section 139(7) of the Constitution, should further breaches, and/alternatively continued breaches, of the constitutional rights of the communities of Ditsobotla, in relation to the provision of basic municipal services to the communities of Ditsobotla, occur after the granting of this order, alternatively should there not be substantial implementation and progress made regarding Ditsobotla's recovery within a period of three months and every three months thereafter in terms of the financial recovery plan, or the applicants be of the view that the respondents have failed to comply with the order of this court, in which event the respondents shall have a period of 15 (fifteen) days to answer such supplemented papers and to such supplementary relief claimed.*

6. *The third to sixth respondents are ordered to pay the costs of Part B of this application, including all reserved costs and the costs of all appearances to date, jointly and severally, the one to pay the other to be absolved, such costs to include the costs consequent upon the employ of two counsel where so employed.*

7. *Costs of Part A to be argued."*

[5] This judgment deals with the costs incurred in Part A of the application. It is trite that the conduct of the litigating

parties plays a role in the judicial exercise of the court in determination of van appropriate cost order.

[6] For the purposes of a cost order, I do not deem it necessary to provide a factual summary of all the events in the application. I will only deal with the issues that directly or indirectly have an impact on a cost order.

[7] The costs sought by the applicant is divided in two (2) parts in relation to Part A of the application, namely:

7.1. The costs of Part A that includes the reserved cost and appearances up to date of filing of amended notice of motion in Part A, as ordered by Mahlangu AJ, is sought against Municipality Ditsobotla 1R and 3R to 6 R up to 14 February 2023.

7.2. The second part of the cost order sought is against the Ngaka District Municipality from 14 February 2023 onwards. An order was granted by Djadje DJP directing the further filing of affidavits on 14 February 2023.

[8] The first and most prominent issue that arise to my mind, in the issue of providing water to all people in South Africa, is the Governments' Constitutional duty to do so. The aforesaid is encapsulated by the **Constitution of the Republic of South Africa**, 108 of 1996 (the Constitution) in section 27 as follows:

> *"**27 Health care, food, water and social security***
> *(1) **Everyone has the right to have access to-***
> *(a) health care services, including reproductive health care;*
> ***(b) sufficient food and water**; and*
> *(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
> *(3) No one may be refused emergency medical treatment."*
> (own emphasis)

[9] There is no other manner in which to interpret this basic human right, that everyone in South Africa has the right of access to sufficient water. It is unacceptable for Government entities to blame each other, contractors, or other entities, where the people of South Africa has been ensured that their

basic human rights of access to water is protected by the Constitution. Every individual is not only guaranteed the constitutional right to water, each individual is granted the constitutional right to sufficient water. The fact that this water should be clean, potable and easily accessible is not something that should warrant any debate.

[10] The following facts are taken into account by this Court in determination of an appropriate cost order:

10.1. The respondents did not provide any answer to the facts and allegations made by the applicants in the founding affidavit, for example that the respondent's offices were locked, and no overseeing of the execution of the first court order in terms of which water was to be provided, was done.

10.2. The facts in the founding affidavit set out that there was no water in certain areas at all. In the absence of water, the consequences are dire, as can be seen from the photographs attached to the founding affidavit. The lack of water was referred to as a water crisis.

10.3. The members of the public had no access to a basic water supply, and faced the real threat of starvation for the lack of water. It is not only the people that suffer life threatening consequences, but also the animals which, in the absence of rain, are dependent on people for the supply of water. It is very concerning, and indeed shocking, that members of the community and animals, face the real threat of starvation in the absence of governance complying with its constitutional duties.

10.4. The water that the applicants, and other members of the public, could access from boreholes, were inaccessible due to the electricity crisis of frequent load shedding. The public was consequently left without water as they were not able to switch on the pumps to pump the water from the ground. The issue of electricity is also a crisis that is to be laid at the door of government. The facts before me illustrate that there was one instance, where the community was left without accessible potable water, for a continuous

period of seven (7) days. To say that this is utterly shocking, is an understatement in no uncertain terms.

10.5. There is photographic evidence of children and residents, including elder residents, carrying water for several kilometres to have some water at their residences.

10.6. When the application was launched, the respondent parties were unequivocally informed that they would run the risk of bearing the cost in the event of opposing the application.

[11] In addition to the relief sought in the Notice of Motion, the applicants have requested costs against Ditsobotla and other respondents from the onset of the litigation.

[12] By virtue of the order of Mahlangu AJ on 13 October 2022 substantial success was obtained by the applicants.

[13] The order that was eventually obtained by settlement, also proved that substantial success was obtained by the

applicants.

Respondents arguments

[14] It is argued by the respondents that the root cause for the request of a punitive cost order in this matter, is actually something out of the control of the respondent, being a national water crisis and national energy crisis.

[15] The respondents argue that the applicants seek a punishment measure against the respondents because the municipalities failed in executing constitutional duties, but the municipalities did the best they could under the circumstances.

[16] The respondents pray that each party should be ordered to pay its own costs.

Legal principles

[17] A crisp summary of the legal principles applicable to costs occurred in litigation, is set out by the Constitutional Court as described in the South African Law Journal of Human Rights, 1997 SAJHR 318, with reference to the matters of **Ferreira v**

Levin NO and Others; Vryenhoek v Powell NO and Others 1996 (2) SA 621 (CC) as follows:

"The second of the Ferreira and Vryenhoek cases addressed the issue of costs incurred during the litigation of the first matter. The Constitutional Court held that the approach to costs developed by the Supreme Court over the years offered a useful point of departure to the question of costs in constitutional litigation. The Court noted two basic principles developed by the Supreme Court. The first is that the award of cost is generally left to the discretion of the presiding judicial officer. The second is that the successful party should, as a rule, be awarded his or her costs. This second principle is, however, subject to the first and to a number of exceptions. The Court observed that any adaptation of these two principles to constitutional litigation should take place on a case-by-case basis.

In the instant case, the Court considered relevant to the determination of costs that the applicants were unsuccessful in the substance of their dispute. On the other hand, the applicants were in any event obliged to approach the Constitutional Court because of an incorrect referral from the court below. The Court expressed its disapproval of the respondent's failure to oppose the incorrect referral. Consequently, the Court held that justice and fairness would be best served if all parties were ordered to pay their own costs."

[18] In the matter of the **Institute for Democracy in South Africa and Others v African National Congress and Others** 2005 (5) SA 39 (C) the principles of costs are relevant to this matter, as it involves constitutional and public interest litigation. In that matter private litigants were litigating for public purposes and in the public's interest, similar to the matter before me. The Court found that private persons should not be discouraged from litigating in the public's interest and for public purposes and in the process be doing so by running risk of an adverse cost order if the court were to take a different view from the private litigant. The court applied the principles applicable to cost and came to the conclusion that it would be fair and in the interest of justice that each party pay their own costs.

[19] It was emphasised in **Institute for Democracy in South Africa and Others v African National Congress and Others** 2005 (5) SA 39 (C) that the general principle in relation to constitutional rights and public interest litigation involving private litigants, should be that the private litigant, where so litigating *bona fide* for public purposes and public

interest, should not be saddled with a cost order.

[20] In the case of **Spiers v English** (1907, p. 122), in which the plaintiff claimed the revocation of a probate obtained by the defendants of a certain will, Sir Gorell Barnes stated the position thus:

> *"In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made the Court has to consider whether the facts warrant either of those principles being brought into operation."*

[21] In an article publicised in the South African Law Journal 2008

SAJHR 263 titled "**Remedying the maladies of *'lesser men or women'*: the personal, political and constitutional imperatives for improved access to justice**" by Mark Heywood and Adila Hassim (qualifications omitted) the following comment is applicable to the fair determination of cost in this matter:

> ***"Abstract***
> *The South African Constitution establishes a vision for the country that is based on fundamental individual equality and non-discrimination, supported through rigorous respect for the rule of law. This vision of the role of law in society as integral to upholding constitutional principles, however, relies on ensuring access to legal services. This is, in fact, directly provided for in s 34 of the Constitution. The recognition of the importance of access to justice has been a cornerstone of the work of Justice Edwin Cameron throughout his career as both a judge and an activist. This article examines the continuum between access to legal services and access to justice and the need for individualised access to legal services in order for constitutional rights to be enforced. The authors hold that there are positive obligations on the state, as well as the courts, to facilitate access to justice. While the state has been discharging this duty mainly in the sphere of criminal justice, there is a duty and a growing need to enable the advancement of constitutional and civil claims. Unless the need for justice and remedies for injustice are met by the courts and the law, there will be negative consequences for the popular*

legitimacy of the courts and indeed the Constitution itself."

[22] The further quotation reads as follows:

"Some of the reported and unreported cases that the ALP has been involved with include: ***Hoffmann v SAA*** *2001 (1) SA 1 (CC);* ***NS v SA Mutual Life Assurance Society t/a Old Mutual*** *2001 ZALC 65;* ***A v X*** *case no JS 597/02 (LC);* ***Perreira v Buccleuch Montessori Pre-School*** *case no 4377/02 (WLD);* ***VRM v Health Professions Council of South Africa*** *case no 26129/01 (TPD);* ***Costa Gazidis v Minister of Public Administration*** *case no A 2050/04 (TPD);* ***Naude v The Member of the Executive Council, Department of Health, Mpumalanga*** *case no JS 331/2004 (LC);* ***Treatment Action Campaign v Minister of Health*** *case no 15991/04 (TPD);* ***Treatment Action Campaign v Minister of Health*** *2005 (6) SA 363 (T);* ***N v Government of the RSA*** *2006 (6) SA 543 (D);* ***N v Government of the RSA*** *2006 (6) SA 575 (D);* ***Minister of Health v New Clicks*** *SA 2006 (2) SA 311 (CC);* ***NM v Smith 2007 (5) SA 250 (CC); South African Security Forces Union v Surgeon General*** *case no18683/2007 (TPD).*

For example, as foreshadowed earlier, in NM, one of the issues under appeal concerned whether the applicants should have been penalised in relation to costs for turning down an offer of a financial settlement, made on the eve of the trial, having chosen instead to seek a vindication of their rights. In this regard, in his minority judgment, Langa CJ made the following trenchant observation:

> *"While I accept that, as the Respondents contend, Rule 34 serves an important purpose and undermining the potential to save costs would remove any impetus to make offers*

> *of settlement different principles apply to cases involving constitutional rights. This case is about the essential constitutional rights to dignity and privacy of some of the most vulnerable people in society … No matter the value of the offer, it does not give acknowledgement of wrong doing that is often far more valuable than any money could be."*
>
> *By saying this, Langa CJ suggests that courts have duties not only in terms of measuring law and conduct against the Constitution, but also in measuring, where appropriate, the rules and procedures for access to justice. Langa's statement implies that there is a need for the courts to consistently interpret their inherent powers so as to make the legal system and the courts themselves more accessible and affordable to poor people."*

[23] In my view, the above support the general principle that cost is at the discretion of the court hearing the matter. It also emphasises that the courts should be cognisant of the fact that private litigants that approach the courts for legal relief on issues that involve public interest, should have the liberty to approach the court, and that accessibility to courts of the members of the public, acting in public interest, should be encouraged.

[24] Where a private litigant, or private group, approaches the court in the interest of a group of people, the court should exercise its discretion in such a manner that fairness would

prevail, taking into regard that a private entity litigates with limited funds against a public or government entity which litigates with public funds. Even if the private party is not successful, as was found in **Institute for Democracy in South Africa and Others v African National Congress and Others** 2005 (5) SA 39 (C), the court should be hesitant to grant a cost order against the private party.

Analysis

[25] The applicant (Sakeliga) has initiated this litigation in the interest of the public. It takes no stretch of the imagination to see that the community was at its wits end and had no choice but to resort to litigation to enforce a basic human right: the right to water.

[26] Instead of setting measures in place to comply with their constitutional duty to provide the community members with water, or to do an investigation to establish where things went array to result in such a desperate state, the governmental arms blamed each other, and the contracting parties. The Municipality (local sphere) blamed the

Provincial (provincial sphere) and both blamed the private contracted parties.

[27] The respondents elected to defend the application. The defence of the respondent entailed vigorous argument before a settlement was reached. I cannot find any excuse in the conduct of the respondents. The respondents were delaying the inevitable: trying to circumvent their constitutional duty to provide sufficient water to the members of the public. The opposition of the application was, in my view, totally unnecessary.

[28] The applicant was substantially successful in the application and is entitled to its costs.

[29] On analysis of the facts of the matter and in application of the legal principles, this Court finds the conduct of the respondents opposing the application at all costs, unwarranted in light of their constitutional duties.

[30] In the exercise of my judicial discretion, and in application of the above-stated legal principles, the conduct of the

respondent deserves to be met by a penalising cost order on an attorney and client scale.

[31] The volume of the application, which is no less than 15 lever arch files, as well as the intricacy involved in the legal arguments, factual position and application of the legal principles, justify the appointment of two counsel.

ORDER

In the premise, the following order is granted:

(i) The respondents are ordered to pay the costs of the applicant, as sought by the applicant, on an individual and several basis, the one paying the other to be absolved.

(ii) The respondents are ordered to pay the applicant's cost on a scale as between attorney and own client.

(iii) The costs of the applicant are to include the costs of two

or three counsel where so employed, including the cost of a senior counsel.



FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE JUDGMENT RESERVED: **6 OCTOBER 2023**

DATE JUDGMENT HANDED DOWN: **22 JULY 2024**

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