IN THE SUPREME COURT OF APPEAL

BLOEMFONTEIN

S17(2)(f) Case no:_____

SCA Case no. 001/21

GP Case Number: 32858/2020

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**
CABINET OF THE REPUBLIC OF SOUTH AFRICA	**Third Respondent**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCE	**Fourth Respondent**
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Fifth Respondent**

FILING SHEET

Documents filed: **1.** **First Respondent's Answering Affidavit**

DATED AT CAPE TOWN THIS 9th DAY OF JUNE 2021

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BLOEMFONTEIN

AND TO: **WEBBER WENTZEL**

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IN THE SUPREME COURT OF APPEAL
BLOEMFONTEIN

CASE NO: 001/2021

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
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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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SPEAKER'S ANSWERING AFFIDAVIT

I,

THANDI RUTH MODISE,

state under oath that:

INTRODUCTION

1 I am the Speaker of the National Assembly and the first respondent in this application.

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2 The National Assembly is one of the houses of the Parliament of the Republic of South Africa as envisaged in section 42(1)(a) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**"). I was elected as Speaker of the National Assembly in terms of section 52(1) to (3), read with Part A of Schedule 3, of the Constitution, with effect from 21 May 2019.

3 I depose to this affidavit in my official capacity as the Speaker and on behalf of the National Assembly.

4 I have knowledge of the facts to which I depose unless it is apparent from the context that I do not. What I say in this affidavit is true and correct, to the best of my knowledge and belief. The submissions of law I make in this affidavit are made on the National Assembly's lawyers' advice.

OVERVIEW OF THE SPEAKER'S OPPOSITION

5 The applicant ("**HSF**") launched an application for leave to appeal to this Court on 4 January 2021. The application was out of time. It was accompanied by an application for condonation. Both applications were considered and dealt with by two judges of this Court. The condonation application was granted with costs, but the application for leave to appeal was refused also with costs. The order issued by the Registrar of the Court describing the order to that effect is attached as "**SNA1**".

6 HSF has now filed a further application to the President of this Court. This time HSF asks for reconsideration only of the costs order described in annexure

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"**SNA1**" and not that part of the order dismissing the application for leave to appeal. HSF has brought its application in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 ("**SC Act**").

7 I immediately point out that from the election made by HSF to merely limit its request for the reconsideration of the costs order, it logically follows, and I proceed on the apparent premise, that the order which dismissed the application for leave to appeal is final in effect. It means that HSF accepts or should accept, without difficulty, that its application for leave to appeal did not have any prospects of success, from the beginning, and that the Full Court, as well as the two judges of this Court, were justified in dismissing it. I deal with the significance of this fact, on the question of costs, later on.

8 More significant, though, is the fact that HSF has failed to demonstrate that there are exceptional circumstances that justify the President of this Court to refer the costs order made by the two judges of this Court for reconsideration. There is no grave injustice that arises because of the costs order granted by the two judges of this Court that refused leave to appeal. The two judges did not make the error or mistake that the purpose of section 17(2)(f) sought to enable the President of this Court to cure. There was no mistake at all.

9 The Constitutional Court, this Court and the High Courts have repeatedly indicated that the *Biowatch* principle is not simply to be had for the asking. The courts have often cautioned litigants about pursuing ill-advised litigation

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against the State and seeking to rely on the *Biowatch* principle.[1] The present case is a textbook case of a litigant who pursued ill-considered repeated litigation in separate Courts without any justification. As I explain below, HSF unsuccessfully sought to procure direct access from the Constitutional Court on the very issues that were considered and dismissed by the Full Court.

10 Moreover, this Court has correctly held that consideration of cost orders does not justify the grant of the application for leave to appeal. It has also held that the mootness or otherwise of an appeal does not depend on the question of costs. These are vitally instructive examples that consideration of a costs order should not play a role in the determination of the existence or otherwise of exceptional circumstances required in terms of section 17(2)(f) of the Act.

BIOWATCH **DOES NOT APPLY**

11 On the costs order, I begin by stating that the grant or refusal of costs, including costs connected to litigation of a constitutional nature, resides in the discretion of the Court seized with a matter. The appeal court will only interfere with the exercise of the discretion to grant or refuse costs if that discretion is exercised on a wrong principle, or arbitrarily, or there is some compelling consideration of justice that compels interference.[2]

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1 *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC), para 18; See, also, *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC), paras 36 to 38; *Motala v Master of the North Gauteng High Court, Pretoria* 2019 (6) SA 68 (SCA).

2 *Hotz v University of Cape Town* 2018 (1) SA 369 (CC), para 28.

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12 Additionally, a court of appeal may not interfere with the discretion of the court of the first instance unless, and only if, the discretion was not judicially exercised.[3] The fact that the court of appeal may itself have exercised the discretion differently is of no moment.[4] Moreover, in this instance, HSF has failed to demonstrate that the two judges of this Court did not exercise their discretion judicially.

13 The Constitutional Court has repeatedly stated that the *Biowatch* principle is not a licence for litigants to institute frivolous proceedings against the State. The *Biowatch* principle is not a bond for risk-free litigation for any party seeking to litigate against the State – "*it is not a licence to litigate with impunity against the state*".[5] I am advised that in the *Lawyers for Human Rights v Minister in the Presidency*,[6] the Constitutional Court held that:

> *"(The rule) does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, Biowatch said, if the constitutional grounds of attack are frivolous or vexatious, or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the 'character of the litigation and [the litigant's] conduct in pursuit of it', even where the litigant seeks to assert constitutional rights."*[7]

14 I am advised and respectfully submit that the rationale for the *Biowatch* principle is three-fold: first, to prevent the chilling effect that adverse

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3 *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC) para 42 citing *Naylor v Jansen* 2007 (1) SA 16 (SCA), para 14.

4 *Hotz v University of Cape Town*, para 25.

5 *Motala v Master of the North Gauteng High Court, Pretoria* 2019 (6) SA 68 (SCA), para 98.

6 *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC).

7 *Lawyers for Human Rights v Minister in the* Presidency, para 18; *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC), paras 36 to 38.

costs orders might have on litigants seeking to assert constitutional rights; second, to ensure that parties are not discouraged from prosecuting constitutional litigation in the public interest; and third, to ensure that, whenever there are reasonable grounds to challenge state action, "*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*".[8]

15 On 18 December 2020, this Court decided the issue HSF raised in the application for leave to appeal in *President of the RSA v Women's Legal Centre Trust*; *Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* (***WLC judgment***).[9] The *WLC judgment* clearly interprets the ambit and scope of section 7(2) of the Constitution, based on causes of action manifestly similar to those pleaded by HSF before the Full Court. Once this Court's *WLC judgment* was handed down, HSF should not have pursued further litigation to this Court. However, HSF persisted despite the clear and decisive decision of this Court in the *WLC judgment*. Remarkably, HSF does not confess ignorance or lack of awareness of the *WLC judgment*. It also has not suggested that the WLC *judgment* is mistaken as a matter of law, or requires reconsideration on any justifiable basis.

16 By launching the application for leave to appeal after the *WLC judgment*, HSF was thus pursuing ill-advised litigation without sufficient ground. I am advised

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8 *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC), para 23.

9 *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* [2021] 1 All SA 802 (SCA).

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and submit that HSF's application is the type of litigation that the Constitutional Court and this Court have held that costs orders may properly be granted against the unsuccessful litigation.

17 I point out that HSF has not adduced any evidence at all to show the existence of exceptional circumstances. It merely relies on its contention that the *Biowatch* principle was binding on the Full Court. The contention is simply a *petition principi* and fails to appreciate that the Full Court, as did the two Judges of this Court and dismissed the application for leave to appeal, exercised a discretion. There is no suggestion that they were not aware of the identity of the parties to the applications for condonation. There is also no suggestion that, in the application for condonation, HSF was seeking an indulgence and was required to tender and pay the costs of that application due to the lateness of the application for leave to appeal over which the respondents were not responsible. There is now an appreciation that the application for leave to appeal is without merit, now that the order of the two judges of this Court dismissing that application has become final, in terms of the provisions of section 17(2)(f) of the SC Act.

18 I conclude this section by pointing out that almost for a year, the respondents have had to deal with litigation stridently pursued by HSF, initially in the Constitutional Court and thereafter in the High Court, to seek promulgation of COVID-19 specific legislation promulgated by Parliament and to declare Parliament's reliance on the provisions of the Disaster Management Act 53 of 2005 and Regulations made thereunder in the management of the national state of disaster to be unconstitutional.

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19 The Constitutional Court declined HSF's invitation for direct access to deal with its application on those matters. The Full Court dismissed its contentions on the merits of that application. The respondents have had to incur unnecessary costs to oppose HSF's litigation on each front. These costs are borne by the public purse and should not have been incurred in the first instance. Prudence would have required that HSF ceases its ill-advised application for leave to appeal to this Court after the *WLC judgment*. It sailed on blithely, mistaken in its belief that the *Biowatch* principle was of application. I submit that no reasonable litigant would have pressed ahead with a costly application for leave to appeal in these circumstances, especially where, as here, the application was out of time.

20 The two judges of this Court exercised a proper discretion in granting the costs order. I respectfully submit that HSF's case was always ill-advised and was one with no serious purpose or value. Accordingly, the President of this Court should dismiss this application.

CONDONATION SHOULD BE REFUSED

21 HSF does not provide a detailed explanation for the delay in filing the application for leave to appeal within the time prescribed in the SC Act. Condonation should be refused.

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22 I have already dealt above with the gravamen of the first respondent's opposition to this application. I do not intend to repeat those points here. Any averments in HSF's founding affidavit that are inconsistent with what is set out above are accordingly denied. In this section of the affidavit, I only deal with the few remaining factual averments in HSF's affidavit that the first respondent disputes.

Paragraphs 29 and 30 (including the subparagraphs)

23 I deny that there are exceptional circumstances that warrant the President of this Court's intervention. The *Biowatch* principle does not apply when the unsuccessful party pursues ill-advised litigation that has no serious purpose or value. HSF's application for leave to appeal was manifestly inappropriate. This Court conclusively decided the issue HSF wanted this Court to decide in the appeal in the *WLC judgment*. Once the *WLC judgment* was handed down, the application for leave to appeal based on the ambit and scope of section 7(2) of the Constitution was misdirected and unreasonable. None of the reasons given in the founding affidavit constitutes compelling reasons that justify reconsideration of the order of the two judges of this Court.

24 I am advised and submit that HSF has failed to demonstrate anything of the nature described by the Constitutional Court.[10] and this Court[11] as constituting

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[10] *Liesching v S* 2018 (11) BCLR 1349 (CC), paras 133 to 139; *Cloete v S; Sekgala v Nedbank Limited* 2019 (5) BCLR 544 (CC).

[11] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23 September 2014), para 6 and 7.

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exceptional circumstances. There has not been an error or mistake or new evidence that has come to light. There is no reasonable basis for claiming that grave injustice will arise if the reconsideration does not occur.

Paragraph 34

25 I deny that the costs order will have a chilling effect. As I have stated elsewhere in this affidavit, the Constitutional Court and this Court have held that there are instances when unsuccessful litigants that litigate against the State should be ordered to pay costs.

CONCLUSION

26 For the reasons set out above, I submit that the application for leave to appeal should be dismissed on the ground that no exceptional circumstances exist as required in terms of section 17(f). There is no grave injustice that will arise if the President of this Court does not reconsider the costs order.

WHEREFORE, I ask for an order dismissing this application.

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THANDI RUTH MODISE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the _____ day of **JUNE** 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER
RONDEBOSCH STATIC PROTECTION
PSS: WESTERN CAPE
2021 -06- 08
EENHEIDS BEVELVOERDER
RONDEBOSCH STATIESE STASIE BEWAKING
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