IN THE SUPREME COURT OF APPEAL, BLOEMFONTEIN

SCA CASE NO: 484/2021

In the matter between:

HELEN SUZMAN FOUNDATION Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

AND OTHERS

REPLYING AFFIDAVIT IN SECTION 17(2)(F) APPLICATION

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 and deposed to the founding affidavit in the s17(2)(f) application on its behalf. Unless indicated otherwise, I adopt the definitions from the founding affidavit.

2. The facts contained herein are within my personal knowledge and belief, unless the context indicates otherwise, and are both true and correct. 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.

3. This is a replying affidavit to the 2nd, 3rd and 5th respondents' and the Speaker's (collectively, "**the respondents**") answering affidavits in the HSF's s17(2)(f) application, wherein HSF seeks a referral of this Court's decision on costs in SCA case 001/2021 for reconsideration and variation. The

application is predicated on HSF's contention that the Court erred in failing to apply the *Biowatch*[1] principle regarding costs.

4. Below I deal thematically with those portions of the respondents' answering affidavits that require a response. Any allegation that is not specifically traversed should be taken to be denied.

THE RESPONDENTS' CONTENTIONS REGARDING COSTS

5. In essence, the respondents contend that a party seeking to challenge, in the public interest, the legality of the State's response to the COVID-19 crisis must, if unsuccessful, be mulcted in costs. This flies in the face of the *Biowatch* principle.

6. The Speaker argues, in answer, that this Court properly considered the *Biowatch* principle and correctly found that it did not apply to this matter. Similarly, the 2nd, 3rd and 5th respondents argue that the matter was so manifestly inappropriate that it warranted a deviation from the *Biowatch* principle.

7. The respondents advance these arguments despite (a) there being no ventilation of this issue in any of the papers filed before this Court in the HSF's leave to appeal application, and (b) the Full Court's finding that the *Biowatch* principle applied in this matter and that, therefore, costs should not be ordered against HSF (against which the respondents did not seek leave to cross-appeal).

8. The respondents attempt to base their opposition to HSF's application on the caveats to *Biowatch*.[2] In summary, litigation will not enjoy *Biowatch* protection against costs if the litigation was "frivolous or vexatious" or in any other way manifestly inappropriate, the litigant acted with improper motive, or there are other circumstances that make it in the interests of justice to depart from *Biowatch*.

9. As I explain in more detail in the sections that follow:

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

[2] Speaker's answering affidavit par 13, quoting from *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) and the 2nd, 3rd and 5th respondents' answering affidavit par 15 and 16, quoting from *Biowatch*, *supra*, par 24

9.1 The high point of the Speaker's contentions is that the HSF was pursuing "ill-considered" litigation that, seemingly, fell within the caveats to *Biowatch*. But the Speaker fails to indicate why any of the caveats to *Biowatch* apply to the litigation. Instead, the Speaker argues that the HSF simply got it wrong by failing to accept that the judgment in the so-called *WLC* matter[3] applied to and disposed of the HSF's case. Based solely on this, the Speaker contends that HSF falls to be penalised in an adverse costs order regardless of the constitutional nature of this litigation, which is self-evidently in the public interest, and the long line of cases that support HSF's position on costs.

9.2 In like manner, the 2nd, 3rd and 5th respondents, in arguing that HSF ought to bear the costs notwithstanding *Biowatch*, fundamentally misunderstand when litigation will be held to be "manifestly inappropriate". Moreover, they fail to plead any factors that would demonstrate that HSF's litigation was, in fact, manifestly inappropriate.

9.3 Consequently, the respondents' opposition to HSF's application is based on a materially flawed appreciation of how *Biowatch* operates, and, more particularly, when Courts are permitted to depart therefrom.

GROUNDS OF DEPARTURE FROM *BIOWATCH*

10. In *Biowatch*, the Constitutional Court held that "*[i]f 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.*"[4]

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3 *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* 2021 (2) SA 381 (SCA) (18 December 2020)

4 *Biowatch*, *supra*, par 23

11. The authorities indicate that it is a high bar that falls to be met to constitute vexatious or frivolous constitutional litigation.

12. The Constitutional Court in *Harrielall*[5] took cognisance to the exceptions to the *Biowatch* principles:

> "*In* Affordable Medicines *this Court laid down exceptions to the rule. Ngcobo J said:*
>
> > "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."
>
> *This Court takes active cognisance of these limitations on the* Biowatch *principle, which it recently applied in* Lawyers for Human Rights.
>
> *In yet another* Lawyers for Human Rights, *this Court defined the exceptions to the Biowatch rule. It stated*:
>
> > "What is 'vexatious'? In *Bisset* the Court said this was litigation that was *'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'*. And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious." "

13. Thus, the question is not whether the HSF was "ill advised" in pursuing the present constitutional litigation. The bar is much higher. And that bar has not been met.

14. No case has been made out that the HSF was acting *mala fide* or was litigating simply for the purpose of annoying or embarrassing an opponent. Similarly, there is no allegation that the matter is one without serious purpose or value (plainly, it is of purpose and value, speaking to the constitutional allocation of law-making powers, among other things, as I discuss below).

15. The high watermark of the Speaker's case appears to be an argument that – given the *WLC* judgment – the HSF instituted litigation without sufficient grounds.

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5 *Harrielall v University of KwaZuluNatal* 2018 (1) BCLR 12 (CC) par 12 and 13

16. This is denied. "Instituted with insufficient ground" does not mean that a litigant merely has to be incorrect for this exception to *Biowatch* to apply. The exception is not triggered simply if a litigant gets it wrong in constitutional litigation. This would offer no protection at all, and costs would then generally follow the result, which is the very thing *Biowatch* protects against.

17. This was recently confirmed by the Constitutional Court in *Gordhan,*[6] where, in overturning the High Court's departure from the *Biowatch* principle, it held as follows:

> *"Regardless of the EFF's motivation to involve itself in these proceedings, as a private party acting seemingly in the public interest, it pursued arguments of genuine constitutional concern. Although those arguments have been unsuccessful in both the High Court and on appeal before this court, it would be parsimonious to contend that the constitutional arguments the EFF raised were of a specious or opportunistic calibre. The EFF therefore should have received the benefit of the Biowatch principle and should not have had costs awarded against it."*

18. The true query is whether this <u>particular</u> litigation was launched without insufficient grounds such that it (a) constituted an abuse of process and (b) warranted the extraordinary relief of mulcting a non-governmental organisation, litigating not for commercial benefit but out of public interest, in costs. As I demonstrate below, this is not the case. To use the words of the Constitutional Court in Gordhan, there was nothing "*specious or opportunistic*" about the HSF's litigation.

THE *WLC* JUDGMENT

19. The HSF did not simply ignore the *WLC* judgment. As HSF set out – in detail – in its submissions in its leave to appeal application, the *WLC* judgment is wholly distinguishable and did not – at a fundamental level – interact with the case being argued by the HSF. In fact, on a proper interpretation, the *WLC* judgment supported the relief sought by the HSF.

20. The HSF's contentions in relation to how its case was conceptually different to the issues determined in *WLC* was, *inter alia*, set out in its replying affidavit in its leave to appeal application. To avoid

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6 *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC) para 83.

prolixity, I do not repeat those paragraphs, but refer this Court to the annex "RA1" and request that these paragraphs be incorporated by reference. In short, however, to quote the conclusion reached: "WLC *did not 'pertinently, comprehensively and authoritatively' reject or repudiate the structure of the HSF's argument. On the contrary, it reaffirmed its essential correctness.*"

21. The HSF respectfully contends that this Court erred to the extent that it placed any reliance on the *WLC* judgment as being determinative, or even informative, as to why the HSF should not be granted leave to appeal. It is, of course, not clear what reliance, if any, this Court actually placed on the *WLC* judgment. But even if it had been a basis for refusal of leave, that is not enough to warrant a costs order against the HSF.

22. In summary, the Speaker, in submitting that HSF was correctly mulcted with costs, points to nothing more than its contentions that *WLC* was determinative of this case. It was not. But, even were the Speaker correct – which is denied – then the HSF is permitted to be wrong in seeking to distinguish its case from *WLC*, without being ordered to pay costs. It is trite that litigants interpret judgments differently, as do Courts. A difference in interpretation of *WLC* does not render the HSF's litigation illegitimate, frivolous, vexatious or of such an abusive nature that an exception to *Biowatch* is warranted.

THE LITIGATION WAS NOT MANIFESTLY INAPPROPRIATE

23. The 2nd, 3rd and 5th respondents argue that the litigation was allegedly manifestly inappropriate. However, the Constitutional Court has held this threshold "depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court."[7]

24. No factors have been pleaded which amount to an abuse of Court process. Instead, the respondents conflate this requirement with the fact that the Courts disagreed with the HSF. In short, the respondents allege that the HSF should have accepted that its application bore no prospects of success and there

[7] *Lawyers for Human Rights*, *supra*, at par 20

were no compelling reasons warranting an appeal. Even if this is correct (and it is not), this is not an abuse of process. As aforesaid, a constitutional litigant is entitled to bring *bona fide* litigation even if its is incorrect. It is noteworthy that the Full Court did not make any adverse order of costs against HSF, either in the main application or the leave to appeal application, and it did so expressly applying *Biowatch*.

25. In any event, this was a *bona fide* challenge to the novel situation where Parliament indicated that it would abrogate its powers under disaster legislation indefinitely for as long as Covid presented a threat. The HSF contend that this is not a permissible interpretation of the DMA and the allocation of plenary law-making powers thereunder, and that a constitutionally compliant interpretation was available to remedy this. As seen from the underlying papers, the HSF contended that there was a plethora of constitutional jurisprudence supporting its position, which constitutional jurisprudence was now contradicted by the judgment *a quo* in this matter. Moreover, given the novel nature of COVID and the unprecedented duration for which disaster powers were to remain intact, the HSF contended that there were compelling reasons to hear the appeal in addition to the fact that it contended it should succeed on the merits.

26. Ultimately, this Court disagreed with the above submissions. But that is beside the point. That this Court disagreed with HSF's submissions does not mean that HSF abused this Court's processes. It merely means that HSF was held not to be entitled to leave to appeal. In the present litigation, there is no evidence of any abuse of process at all, much less one which is so significant that it warrants a deviation from *Biowatch*.

***BIOWATCH* CONCLUSIONS**

27. The leave to appeal application was a proper constitutional case, brought legitimately by an interested but independent non-governmental organisation, which has a history of litigating in relation to similar matters with substantial success. The application was brought to deal with a question of national import, namely the diversion of significant powers from the legislature and the executive to a select

few under the DMA. The HSF has pursued this litigation out of genuine constitutional concern and it cannot be contended that the constitutional arguments it raised were of a "specious or opportunistic" character.[8]

28. The HSF pursued no personal or commercial interest in the litigation – it was instead public interest litigation dealing with a crisp (albeit complex) constitutional challenge.

29. Much as the State may wish that entities would simply accept the legality of all aspects of its response to COVID, it is not entitled artificially to safeguard itself from legal challenges on this score by threatening costs against those individuals who, *bona fide* but unsuccessfully, seek to challenge aspects of this response. This clearly would have the very chilling effect which *Biowatch* guards against.

30. The Speaker's assertion that there would be no chilling effect is simply baldly stated and is removed from the facts of this case. If left intact, this Court's order will communicate that litigants challenging aspects of the State's COVID-19 response, and in other constitutional litigation, fall to be mulcted in costs if unsuccessful, simply if the State can find case law which it contends supports its position. That is not the correct position. It is directly contrary to *Biowatch* and its progeny. And it would have a deleterious effect on the very litigation that the Constitutional Court has recognised must not, and should not, be deterred.

31. Respectfully, this Court erred in failing to consider and / or apply *Biowatch*. This failure is indeed in error, is exceptional (as set out in the founding affidavit), is manifestly prejudicial to the HSF (and all other potential constitutional litigants) and warrants judicial correction.

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8 *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) at par 83.

EXCEPTIONAL CIRCUMSTANCES

32. The respondents artificially seek to narrow the interpretation of what constitute "exceptional circumstances" in the context of s17(2)(f). In fact, the case law cited by the 2nd, 3rd and 5th respondents simply confirms that this matter indeed meets that requirement.

33. As explained in the founding papers, a failure to apply *Biowatch* would amount to a grave injustice. First, it would prejudice the HSF, which is not a revenue generating enterprise and is an NGO. Second, and more importantly, it would signal to all aspirant constitutional litigants that should they dare, in the public interest, to challenge the State and lose, they will be punished through a costs order.

34. The fact that costs in a constitutional matter are not simply discretionary but have – solely on a misapplication of *Biowatch* – warranted interrogation by Courts readily disposes of the respondents' optimistic contention that costs cannot fall within the ambit of s17(2)(f) and remain wholly discretionary. *Biowatch* and the litigation developed around it indicates the exact opposite. An improper deviation from *Biowatch* is thus extraordinary. It amounts to a grave injustice. It has a significant public interest component. And, more generally, it threatens to undermine the administration of justice by creating the very freezing effect on constitutional litigation that the Constitutional Court has repeatedly warned against.

35. The HSF has thus properly invoked s17(2)(f).

REFUSAL OF CONDONATION

36. Displaying what appears to be nothing less than a transparent attempt to punish the HSF, the Speaker goes on to argue that condonation for the filing of the founding affidavit should be refused as no explanation has been provided explaining the delay. This is blatantly false.

37. The delay was indeed explained in the founding affidavit. In short, the founding affidavit was filed timeously if regard is had to the date upon which the relevant order was received. It is unclear why, but the order dismissing the leave to appeal application, although dated 25 March 2021, was only

communicated to HSF's correspondent and primary attorneys on 13 April 2021. This is some three weeks into the one month period afforded to a party under s17(2)(f) if calculated from the date of the order, rather than the date this Court furnished the order to HSF. The HSF was not in a position – and, properly viewed, was not required – to finalise its strategy and papers in such a truncated period. Confirmatory affidavits from both sets of attorneys will be filed herewith.

38. The Speaker's opportunistic proposition that the HSF should be disqualified from filing papers by virtue of a delay occasioned by this Court is, to say the least, a disappointing one. Moreover, not surprisingly, the Speaker cannot point to any prejudice it alleges it suffers as a result.

39. On the other hand, it is far from clear why the Speaker is opposing condonation or the s17(2)(f) application, unless the Speaker has impermissibly adopted this punitive approach precisely to ensure a chilling effect on constitutional public interest litigation against the State. To allege that HSF should not even be permitted to plead its case, particularly in these exceptional circumstances, is unsustainable.

CONCLUSION

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

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 23 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

Full names: SELLO CRY RAMAHALO
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SOUTH AFRICAN POLICE SERVICE
STATION COMMANDER
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