CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 119/16

In the matter between:

LIMPOPO LEGAL SOLUTIONS Applicant

and

VHEMBE DISTRICT MUNICIPALITY First Respondent

MINISTER OF WATER AFFAIRS AND FORESTRY Second Respondent

THULAMELA MUNICIPALITY Third Respondent

Neutral citation:	*Limpopo Legal Solutions v Vhembe District Municipality and Others* [2017] ZACC 30
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Zondo J (unanimous)
Decided on:	17 August 2017
Summary:	leave to appeal —voluntary association —legal standing — public interest *Biowatch* principle — cost order — not urgent — leave is granted

ORDER

On appeal from the High Court of South Africa, Limpopo Local Division, Thohoyandou, the following order is made:

1. Leave to appeal is granted only in respect of the costs order of the High Court of South Africa, Limpopo Local Division, Thohoyandou.
2. Leave to appeal against the High Court's decision that the application was not urgent is refused.
3. The appeal is upheld.
4. The costs order of the High Court is set aside and replaced with:

   "There is no order as to costs."
5. The first respondent is to pay the applicant's costs in this Court.

JUDGMENT

ZONDO J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ and Pretorius AJ concurring)

Introduction

[1] This is an application for leave to appeal against a decision of Semenya AJ sitting in the Limpopo Local Division of the High Court, Thohoyandou (High Court) that the applicant had no *locus standi* (standing) to bring the application that the applicant had brought in that Court under case no: 406/2016, that the matter was not urgent and striking the matter off the roll with costs.

Parties

[2] The applicant is a voluntary association whose object is to promote human rights, ensure that state entities and institutions are held accountable for the use of finances allocated to them in line with the Public Finance Management Act[1] and ensure that state resources and institutions are effectively and efficiently utilised for the benefit of communities. It is a non-profit organisation. The applicant is based in, and, operates from, the Limpopo Province. The first respondent is Vhembe District Municipality. The second respondent is the Minister of Water Affairs and Forestry in Limpopo. The third respondent is Thulamela Municipality.

High Court

[3] The applicant brought an application in the High Court against the three respondents for various orders. It brought the application for the benefit of the residents of Malamulele B, Extension 1, in Limpopo. Those orders included:

- an order declaring the first and third respondents' failure to take reasonable steps to provide sanitation to the residents of Malamulele unlawful, inconsistent with the Constitution and invalid;
- an order compelling the first and/or second and/or third respondent to take all reasonable steps to provide each affected resident with reasonable access to a toilet facility;
- an order that the respondents provide toilet facilities to residents who are unable to afford to install such facilities for themselves; and
- an order declaring that the conduct of the respondents, to the extent that it is inconsistent with sections 152[2] and 153[3] of the Constitution read

[1] 1 of 1999.

[2] Section 152 relates to the "Objects of local government". It provides that:

> "(1) The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government.

with sections 4(2)(f)[4] and 73[5] of the Local Government: Municipal Systems Act[6] is invalid.

[4] In its founding affidavit in the High Court the applicant made it clear that the rights that it contended were being infringed by the conduct of the respondents included the right to human dignity of the residents of Malamulele entrenched in section 10 of the Constitution. Section 10 provides: "Everyone has inherent dignity and the right to have their dignity respected and protected".

[5] The applicant brought its application as an urgent application. The respondents opposed the application and took the points that the applicant had no standing, the

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(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[3] Section 153 relates to the "Developmental duties of municipalities" and provides that:

"A municipality must—

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
(b) participate in national and provincial development programmes."

[4] Section 4(2)(f) provides that:

"(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to—

. . .

(f) give members of the local community equitable access to the municipal services to which they are entitled; . . ."

[5] Section 73 provides that:

"(1) A municipality must give effect to the provisions of the Constitution and—

(a) give priority to the basic needs of the local community
(b) promote the development of the local community; and
(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

(2) Municipal services must—

(a) be equitable and accessible;
(b) be provided in a manner that is conducive to—
(i) the prudent, economic, efficient and effective use of available resources; and
(ii) the improvement of standards of quality over time;
(c) be financially sustainable;
(d) be environmentally sustainable; and
(e) be regularly reviewed with a view to upgrading, extension and improvement."

[6] 32 of 2000.

application was not urgent and there had been no compliance with section 35 of the General Law Amendment Act.[7]

[6] In regard to standing, the applicant's case was, in part, that it was acting in the public interest as contemplated in section 38(d) of the Constitution. In this regard the applicant referred to the fact that, by way of the application, it sought to enforce the rights of the residents of Malamulele entrenched in the Bill of Rights including the right to human dignity. Section 38(d) of the Constitution reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> . . .
>
> (d) anyone acting in the public interest; . . . ."

[7] The High Court held that the applicant was not genuinely acting in the public interest and that, therefore, it had no standing derived from section 38(d) of the Constitution. It came to this conclusion after quoting the following passage from the judgment of this Court in *Lawyers for Human Rights*[8]:

> "The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and, whether it is, objectively speaking, in the public interest for the particular proceedings to be brought."[9]

[8] The High Court held that the application was not urgent because the application could have been brought much earlier. In regard to non-compliance with section 35, the section precludes a court from issuing "any rule *nisi* operating as an interim

[7] 62 of 1955.

[8] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).

[9] Id at para 18.

interdict" unless certain conditions are met. The High Court held by implication that there had been non-compliance with section 35. It expressly held that there was no basis to condone that non-compliance. The High Court then struck the application off the roll with costs.

In this Court

Jurisdiction

[9] Some of the issues that the applicant wishes to raise, if leave to appeal is granted, are constitutional issues. They include the question whether the applicant had standing to bring the application it brought in the High Court and whether the High Court applied *Biowatch*[10] in ordering the applicant to pay costs for the striking off the roll of the matter. This Court has jurisdiction.

Leave to appeal

[10] The applicant seeks leave to appeal against the High Court's decisions that it had no standing to bring the application that it brought in that Court, that the matter was not urgent, that the matter be struck off the roll and that the applicant pay costs. It is not in the interests of justice to grant leave to appeal against the decision that the matter was not urgent and that it should be struck off the roll. However, it is in the interests of justice to grant leave to appeal against the decision that the applicant had no standing and that it pay the respondents' costs. In regard to the decision on standing, this is so because, although the applicant's application was struck off the roll and was not dismissed, the applicant will not be able to pursue the application if the decision that it has no standing stands. The result is that the cumulative effect of the order striking the matter off the roll and the decision that the applicant lacked standing is that it is the end of the litigation between the parties. There are reasonable prospects of success for the applicant on both the issues of standing and costs if it is granted leave to appeal.

[10] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

The appeal

[11] Directions were issued inviting the parties to deliver written submissions on whether the High Court was correct in holding that the applicant had no standing and in ordering the applicant to pay costs. The parties delivered their written submissions. The second respondent conceded that the High Court erred in its conclusion on standing and costs. The third respondent supported the High Court's decision on *locus standi*. This Court decides the matter without oral argument.

[12] In support of its contention that it did have standing, the applicant, inter alia, relied on section 38(d) of the Constitution. It said that it instituted the proceedings in the public interest. The High Court held that the applicant was not genuinely acting in the public interest. It is clear from even the orders that the applicant sought in the High Court that it was genuinely acting in the public interest. The High Court had no proper basis for its conclusion to the contrary.

[13] In *Lawyers for Human Rights* this Court dealt with what needs to be shown in order to establish whether a person or an entity is acting in the public interest.[11] In this regard, this Court quoted with approval a passage from O'Regan J's judgment in *Ferreira*[12] where she said:

> "This Court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These

[11] *Lawyers for Human Rights* above n 8 at para 16.

[12] *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

> factors will need to be considered in the light of the facts and circumstances of each case."[13]

The constitutional provisions that were considered in *Ferreira* were those in the interim Constitution. In *Lawyers for Human Rights* this Court went on to point out that the standing provisions in the interim Constitution and section 38 of the Constitution were, for all practical purposes, the same and the approach advocated by O'Regan J is therefore equally applicable to section 38(d).

[14] The Court also said:

> "The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."[14]

[15] If one has regard to the passages quoted above and to the applicant's affidavit in the High Court, there can be no doubt that the applicant had standing by reason of section 38(d) of the Constitution. The High Court's conclusion that the applicant did not genuinely act in the public interest had no proper basis.

[16] The High Court held that there had been no compliance with section 35 of the General Law Amendment Act. Section 35 applies to cases where a rule *nisi* operating

[13] Id at para 234.

[14] *Lawyers for Human Rights* above n 8 at para 18.

as an interim interdict is sought against the government and other functionaries and institutions mentioned in that section. In this case the applicant was not seeking any such relief. Therefore, section 35 was not applicable. The Court erred in holding that the applicant had to comply with section 35. The result is that the only basis upon which the High Court was justified in striking the matter off the roll was that the matter was not urgent.

[17] With regard to costs, the High Court overlooked the approach to costs relevant to constitutional litigation as set out in *Biowatch*. It simply adopted the approach that costs follow the result. It should not have awarded costs. In doing so, it applied a wrong principle on costs in constitutional litigation against the State. That the court a quo decided the issue of costs on a wrong principle entitles this Court to interfere with the exercise of its discretion on costs. Accordingly, this Court should interfere with that decision and set it aside. In this Court, the first respondent must pay the applicant's costs as it unsuccessfully opposed the application.

[18] In the result the following order is made:

1. Leave to appeal is granted only in respect of the costs order of the High Court of South Africa, Limpopo Local Division, Thohoyandou.
2. Leave to appeal against the High Court's decision that the application was not urgent is refused.
3. The appeal is upheld.
4. The costs order of the High Court is set aside and replaced with:

   "There is no order as to costs."
5. The first respondent is to pay the applicant's costs in this Court.

For the Applicant:	Shadrack Tebeile and Kevin Maluleke instructed by Mampa Edwin Thupane Attorneys
For the First Respondent:	R J Raath SC and M R Rantho instructed by Tshiredo Attorneys
For the Second Respondent:	State Attorney
For the Third Respondent:	Khathutshelo A Mainganye Attorneys