



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 02/13
[2013] ZACC 12

In the matter between:

JUSTICE ALLIANCE OF SOUTH AFRICA

Applicant

and

MINISTER FOR SAFETY AND SECURITY

First Respondent

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN
POLICE SERVICE (REGISTRAR OF FIREARMS)

Second Respondent

APPEAL BOARD OF FIREARMS

Third Respondent

MINISTER FOR FINANCE

Fourth Respondent

Decided on : 21 May 2013

JUDGMENT

THE COURT

[1] The applicant¹ seeks leave to appeal against an adverse costs order made against it in the Supreme Court of Appeal. The costs order was based on the finding that the appeal did not raise a constitutional issue and that the applicant “in the main represent firearm owners who have a financial interest in the outcome of these proceedings.”² We issued directions calling for written submissions and indicated that the matter would be decided without oral argument.³

[2] In its written submissions the applicant contends that the case falls squarely within the principles set out in *Biowatch*.⁴ The first respondent (Minister) contends that it does not, because there are no exceptional circumstances justifying an appeal against costs only; no constitutional issue was raised; and the Supreme Court of Appeal exercised its discretion in relation to costs judicially.

¹ There were originally two applicants in the Supreme Court of Appeal. The False Bay Gun Club, a voluntary association, was the second appellant in the Supreme Court of Appeal and was liquidated on 31 March 2012, prior to the judgment of the Supreme Court of Appeal on 30 November 2012.

² Supreme Court of Appeal judgment at para 18.

³ On 4 February 2013, the Chief Justice issued the following directions:

- “1. The Chief Justice and other Justices of this Court have considered the application for leave to appeal and decided, in terms of rules 11(4) and 19(6)(b) of the Rules of this Court, to dispose of this matter without hearing oral argument.
2. The parties must file written submissions on behalf of—
 - a) applicant by 13h00 on Monday 18 February 2013; and
 - b) respondents by 13h00 on Monday 4 March 2013.
3. Further directions may be issued.”

⁴ *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[3] *Biowatch* established that: (1) the award of costs in a constitutional matter itself raises a constitutional issue and clothes this Court with jurisdiction;⁵ (2) it will not normally be in the interests of justice to grant leave solely on costs where no exceptional circumstances exist;⁶ (3) it is the nature of the issue, not its characterisation by a litigant, that is relevant in deciding costs in constitutional litigation;⁷ (4) ordinarily, in constitutional litigation, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs;⁸ (5) this is not an inflexible rule;⁹ (6) the issues raised must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication;¹⁰ and (7) in assessing the exercise of judicial discretion in relation to costs the question is whether the court had committed some “demonstrable blunder” or reached an “unjustifiable conclusion”.¹¹

[4] The central issue here is whether a genuine and substantive constitutional issue was at stake.

⁵ Id at para 10.

⁶ Id at para 11.

⁷ Id at para 17, where this Court stated that “[w]hat matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.”

⁸ Id at para 22.

⁹ Id at para 24.

¹⁰ Id at para 25.

¹¹ Id at para 31.

[5] What the Supreme Court of Appeal eventually had to decide was whether persons who voluntarily surrendered firearms under the Firearms Control Act¹² (Act) were entitled to compensation in circumstances where the firearms were not retained by the state.¹³ But that was the last step in a process that started much earlier.

[6] Section 137(5) of the Act provides that the Minister must draft guidelines for the payment of compensation.¹⁴ The Minister failed to do that for a long time and only did so after the applicant obtained a declaratory order in the Western Cape High Court, Cape Town (High Court) that the failure was “unlawful and inconsistent with the Constitution”. The guidelines were then promulgated at the beginning of November 2009.

[7] In February 2010 the applicant sought an order in the High Court that the guidelines “are *ultra vires*, inconsistent with section 137 of the . . . Act and the Constitution . . . and invalid.” This application was largely unsuccessful, except for a minor aspect decided in favour of the applicant. Of some significance is that the High Court made no order as to costs. It also identified one of the issues as whether the

¹² 60 of 2000.

¹³ Supreme Court of Appeal judgment at para 2.

¹⁴ Section 137(5) of the Act reads as follows:

“The Minister must, with the approval of the Minister of Finance, establish guidelines for the payment of compensation, taking into account the—

- (a) financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and
- (b) interests of persons who have applied or may in the future apply for compensation.”

unconstitutionality of any provisions of the Act should be determined by the court of its own accord, despite the fact that the applicant did not challenge the constitutionality of any of those provisions.

[8] Although initially relying on section 25 of the Constitution and vagueness of the guidelines, the applicant did not persist in these contentions, limiting itself to the argument that the guidelines issued by the Minister were *ultra vires* section 137.

[9] The applicant's underlying complaint was really that during the period when there were no guidelines, many people handed in their weapons because they wanted to comply with the general aim of the Act to restrict firearm ownership, but they also did not want to forsake their entitlement to compensation. Unfortunately for them, section 136 of the Act made it quite clear that there would be no compensation for firearms surrendered and destroyed.¹⁵ On this basis the Supreme Court of Appeal had little difficulty in finding

¹⁵ Section 136 of the Act reads as follows:

- “(1) The Registrar may in respect of any firearm or ammunition seized by, surrendered to or forfeited to the State, issue a notice in the *Gazette* stating that it is the intention of the State to destroy that firearm or ammunition.
- (2) Any person who has a valid claim to the relevant firearm or ammunition may, within 21 days after the publication of the notice in the *Gazette*, make representations to the Registrar as to why the firearm or ammunition should not be destroyed.
- (3) If the Registrar is satisfied, after consideration of any representations contemplated in subsection (2), that a valid claim to the relevant firearm or ammunition has not been proved, the firearm or ammunition may be destroyed and no compensation will be payable to anyone in respect thereof.”

that the guidelines that provided no compensation for surrendered and subsequently destroyed firearms were not *ultra vires* section 137 of the Act.¹⁶

[10] The Minister contends that because there was no challenge to the constitutional validity of any of the provisions of the Act, no constitutional issue in the *Biowatch* sense was raised. That is not, without more, a proper basis for finding that no constitutional issue was raised. The attack on the validity of the guidelines as being *ultra vires* section 137 of the Act is based on the principle of legality. Legality is decidedly a constitutional issue.¹⁷ The interpretation of the provisions of the Act in order to decide whether the guidelines fell within their ambit is also a constitutional issue because statutory interpretation must be done in accordance with the dictates of the Constitution.¹⁸ In addition it is clear that the original order forcing the Minister for Police to promulgate guidelines was founded on his failure to comply with the provisions of the Constitution.

[11] The applicant submitted that in addition to misdirecting itself on whether a constitutional issue was raised, the Supreme Court of Appeal also erred in referring to the fact that the applicant was representing firearm owners who have a financial interest in

¹⁶ Supreme Court of Appeal judgment at para 17.

¹⁷ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 56-9.

¹⁸ Section 39(2) of the Constitution reads as follows:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

the outcome of the proceedings. The mere fact of having a financial interest does not necessarily disentitle a litigant from the benefits of *Biowatch* in relation to costs if a genuine constitutional issue has been raised.¹⁹

[12] There is some merit in the contentions that the Supreme Court of Appeal might have been overhasty in dismissing the constitutional aspects of the matter and that the financial interests of the applicant's members should not be over-emphasised. But what must be weighed up against that is the fact that there was no specifically articulated right of its members under the Bill of Rights that the applicant alleged would be adversely affected by the interpretation of the Act. The reliance on section 25 of the Constitution – compensation upon expropriation – was abandoned.

[13] The question whether the interpretation of a statute had potential implication for a litigant's fundamental rights played an important role in establishing constitutional jurisdiction and the necessary interests of justice in granting leave to appeal in cases like *Law Society of South Africa*²⁰ and *Mankayi*.²¹ Had the interpretation of the statute held no adverse effect on an underlying fundamental right, it might have weighed less in deciding whether it was in the interests of justice to hear the matter.

¹⁹ *Biowatch* above n 4 at paras 16-7 and 23.

²⁰ *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society of South Africa*).

²¹ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) (*Mankayi*).

[14] Similar considerations apply here. Are there exceptional circumstances to justify hearing an appeal on costs only?

[15] We think not. While the first round of High Court litigation – aimed at getting the Minister to discharge his statutory obligations and to promulgate the relevant guidelines – may have entailed the exceptional circumstances contemplated in *Biowatch*, namely to force an organ of state to discharge its public functions, the same cannot be said of the current litigation. This was a case about compensation for surrendered firearms and the focus of the applicant’s case was on whether the guidelines fell foul of the Act – while legality review is a constitutional issue the applicant did not seek to vindicate any fundamental right.

[16] Although an *ultra vires* challenge is also a constitutional legality challenge, it is not always one that raises exceptional constitutional considerations. It did not in this case. Nevertheless, courts should be careful not to make costs orders that will inhibit genuine constitutional issues from being raised.

Order

[17] The following order is granted:

1. Leave to appeal is refused.
2. There is no order as to costs.

For the Applicant:

Advocate D Simonsz instructed by
A Batchelor & Associates.

For the First Respondent:

Advocate A Breitenbach SC and
Advocate H Varney instructed by the
State Attorney.