

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 279/23

In the matter between:

SOCIALIST AGENDA OF DISPOSSESSED AFRICANS

Applicant

and

MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

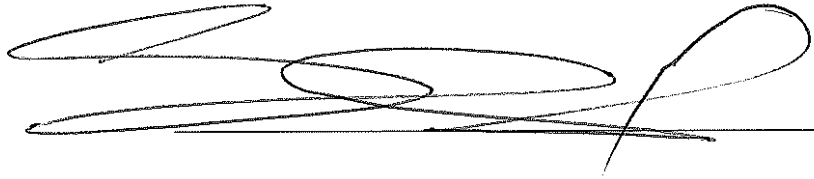
Respondent

FILING NOTICE

DOCUMENTS PRESENTED FOR FILING.

1. Notice of Appointment of ML SHOBA ATTORNEYS as applicant's attorneys of record.
2. Applicant's Practice Note.
3. Applicant's Heads of Argument.

DATED AND SIGNED AT POLOKWANE ON THIS 11th DAY OF MARCH
2024.



ML SHOBA ATTORNEYS

Attorneys for the Applicant

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TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

Braamfontein

AND TO THE STATE ATTORNEY: PRETORIA

Attorneys for the Respondent

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PRETORIA

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REF: 00348/22/Z68

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 279/23

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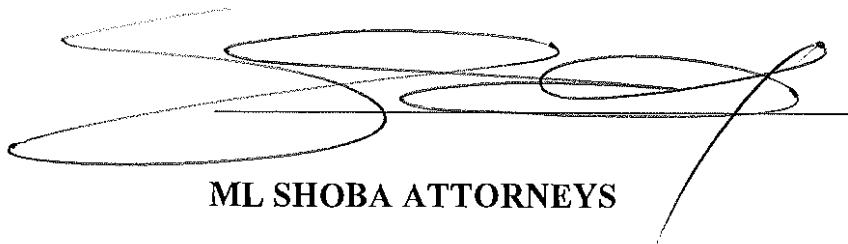
Respondent

NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD

KINDLY TAKE NOTICE THAT the Applicant hereby terminates the services of **RJ PHAKOAGO ATTORNEYS** and appoints **ML SHOBA ATTORNEYS** as its attorneys of record in the above mentioned matter.

KINDLY TAKE NOTICE FURTHER that the Applicant has appointed the address of **ML SHOBA ATTORNEYS** below as the address at which the Applicant will accept notice and service of all process in these proceedings.

DATED AND SIGNED AT POLOKWANE ON THIS 11th DAY OF MARCH
2024.



ML SHOBA ATTORNEYS

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TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

Braamfontein

AND TO THE STATE ATTORNEY: PRETORIA

Attorneys for the Respondent

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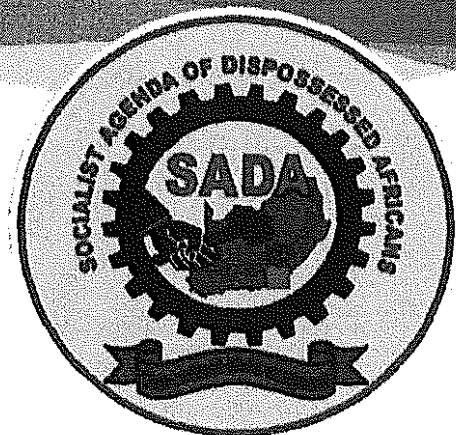
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Office of the Secretary General

Date: 09 March 2024

Dear Mr Phakoago,

1. The above matter refers.
2. We hereby wish to inform you that the Socialist Agenda of Dispossessed Africans terminates your services as its attorney of record in the pending Constitutional Court case under case number CCT 279/23 and the High Court matter under case number 4646/22.
3. Your termination is with effect from 09 March 2024.
4. We wish to thank you for your services in the above two cases and your cooperation with the advocates in the two cases.

Regards

Kgwedi Lethabile

Organize, Reinforce, Educate and Consolidate Towards Scientific Socialism.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 279/23

In the matter between:

SOCIALIST AGENDA OF DISPOSSESSED AFRICANS

Applicant

and

MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

Respondent

APPLICANT'S PRACTICE NOTE

1. Date of hearing: Tuesday, 21 May 2024

2. Number on the Roll: Unknown to the Applicant

3. Attorneys for the Applicant: ML SHOBA ATTORNEYS

Email: Lloyd.mahupas@gmail.com

mlshobattorneys@gmail.com

4. Counsel for the Applicant:

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T.A MAKOLA

L.V MAKOFANE

L.B MOSHOEU

E.A THETE

M.G RAMONYAI

I.M LEKALAKALA

S.K.R MOHLAKA

K.S THUTJA

N. TSHITAMBA

M.J RASESEMOLA

B.R MASHEGO

K.M NTJANA

I.R KEKANA

S. MAPONYA

T.E RAPHIRI

I.P KGATLA

5. Attorney for the Respondent : Mr M Matlala (State Attorney Pretoria)

MashMatlala@justice.gov.za

matlalamj@gmail.com

6. Counsel for the Respondent : Unknown

7. Nature of the applicant's case.

7.1. Application for confirmation of constitutional invalidity in terms of section
172(2)(a) of the Constitution.

8. Estimated duration for oral argument: 1 hour

9. Urgency:

9.1. The matter is not urgent.

10. Issues for determination:

8.1. Whether an order of constitutional invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 handed down by the High Court of South Africa, Gauteng Division, Pretoria on 10 October 2023 must be confirmed.

11. Papers to read: The Court is respectfully requested to read the affidavit filed and the records.

S.S TEBEILE

T.A MAKOLA

L.V MAKOFANE

L.B MOSHOEU

E.A THETE

M.G RAMONYAI

I.M LEKALAKALA

S.K.R MOHLAKA

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M.J RASESEMOLA

B.R MASHEGO

K.M NTJANA

I.R KEKANA

S. MAPONYA

T.E RAPHIRI

I.P KGATLA

COUNSEL FOR THE APPLICANT:

Chambers: Polokwane, Pretoria, Johannesburg and Arusha, Republic of Tanzania

11 March 2024

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 279/2023

In the matter between:

SOCIALIST AGENDA OF DISPOSSESSED AFRICANS

Applicant

and

MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

Respondent

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. Before this Court, the applicant brought an application for confirmation of an order of constitutional invalidity handed down by the High Court of South

Africa, Gauteng Division, Pretoria (“High Court”) on 10 October 2023 per Van der Schyff J.

2. At this stage, the applicant has not yet received any opposing papers from the respondent, save to mention that all the parties were invited by the Chief

Justice to both file heads of argument as follows:

2.1. The applicant to file heads of argument on or before 11 March 2024.

2.2. The respondent to file heads of argument on or before 18 March 2024.

THE PARTIES

3. The applicant is Socialist Agenda of Dispossessed Africans, a political party registered as such in terms of the laws of the Republic of South Africa.

4. The respondent is the Minister of Cooperative Governance and Traditional Affairs, being a Minister responsible for the administration of the Department of Cooperative Governance and Traditional Affairs in the Republic of South

Africa. The respondent is the most senior political head within the Ministry of the Department of Cooperative Governance and Traditional Affairs.

NATURE OF THE APPLICATION

5. This is an application for confirmation of an order of invalidity made by the High Court, and which application is brought in terms of section 167(5) read with 172(2)(d) of the Constitution.

FACTUAL BACKGROUND

6. On 11 December 1998 the Local Government: Municipal Structures Act 117 of 1998 (“Municipal Structures Act”) was enacted.
7. On 1 June 2021 the Local Government: Municipal Structures Amendment Act 3 of 2021 was enacted in order to amend certain provisions of the Municipal Structures Act.

8. On or about 03 November 2021, the local government elections were held in South Africa and the applicant contested those elections at local municipality and district levels within the Sekhukhune District, Limpopo Province.

9. In the Fetakgomo Tubatse Local Municipality, the applicant obtained 2.25 % with a total number of votes of about 3667 votes and it was followed by the Democratic Alliance (“DA”) with 2.04%. In terms of the ranking, the applicant obtained position 3 in the Fetakgomo Tubatse Local Municipality.

10. In the Fetakgomo Tubatse Local Municipality where the applicant contested elections, the seats won by the political parties or political interests were as follows:

10.1. ANC = 54

10.2. EFF = 14

10.3. SADA (applicant) = 2

10.4. DA = 2

10.5. PAWU = 1

10.6. AZAPO = 1

10.7. PAC = 1

10.8. BPSA = 1

10.9. FF PLUS = 1

11. The total number of councillors in Fetakgomo Tubatse Local Municipality is seventy-seven (77).

12. During the council sitting held on or about 23 November 2021 it became apparent that the DA and the applicant obtained same number of seats, namely, two (2) seats, and therefore these two political parties created a situation where “there is an equality of the surpluses” as per section 43(2)(c) of the Municipal Structures Act. The DA’s surpluses and that of the applicant were calculated as follows:

**Number of seats won by a political party ÷ total number of councillors ×
number of seats on the executive committee**

$$2 \div 77 \times 10 = 0.2597 \text{ (SADA)}$$

$$2 \div 77 \times 10 = 0.2597 \text{ (DA)}$$

13. In the light of the above calculations, there was “an equality of the surpluses” between the applicant and the DA and therefore the provisions of section 43(2)(c) of the Municipal Structures Act were invoked and as a result, DA got a seat in the executive committee after winning by way of lot. This triggered the applicant’s application in the High Court.

14. It is common cause that during the council sitting of 23 November 2021, the applicant objected to the application of section 43(2)(c) of the Municipal Structures Act on the basis that it is clear that the impugned provisions undermine the rights of the electorate in that their votes are disregarded.

15. It was requested by the applicant that the remaining seat (seat no 10) in the executive committee be reserved until a legal opinion is sourced by the council from the municipality’s legal advisors. However, the sitting proceeded without

the matter being referred to the municipality's legal advisors for legal opinion, and as a result a 'lot' was applied and the DA won the remaining seat in the executive notwithstanding the fact that the DA obtained 2.04% as opposed to 2.25% obtained by the applicant.

PROCEEDINGS IN THE HIGH COURT

16. The applicant approached the High Court seeking an order of constitutional invalidity of section 43(2)(c) of the Municipal Structures Act.

17. On 10th October 2023 the High Court per Van der Schyff J handed down a judgment and order in terms of which section 43(2)(c) was declared unconstitutional and invalid.¹

18. Although initially the respondent filed notice to oppose in the High Court, at later stage the respondent withdrew its opposition² and subsequently filed

¹ P 92-100 of volume 1 and 101-114 of volume 2.

² P 88 of volume 1.

notice to abide.³ This is correctly recorded in paragraph 2 of the High Court judgment.⁴

IN THIS COURT

19. Following the hand down of the order of invalidity in the High Court on 10th October 2023, the applicant approached this Court in October 2023⁵ seeking an order for confirmation of invalidity in terms of sections 167(5) and 172(2)(d) of the Constitution.

20. The applicant received no opposing papers from the respondent in this Court.

SECTION 43(2)(c) IS INCONSISTENT WITH SECTION 19(3)(a) OF THE CONSTITUTION

21. Section 43(2)(c) of the Municipal Structures Act provides:

³ P 87 of volume 1.

⁴ P 90 of volume 1.

⁵ See applicant's notice of motion in this Court.

“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, **the result must be determined by lot;**” (Emphasis added)

22. In determining whether section 43(2)(c) of the Municipal Structures Act is inconsistent with section 19(3)(a) of the Constitution, it is important to note that although two political parties may obtain equal seats (e.g. 2 seats each) in the municipal council, the said two political parties may have not obtained equal votes during the elections. This case is a clear example.

22.1. SADA with 2 seats and obtained 2.25% (3667 votes).

22.2. DA with 2 seats and obtained 2.04% (3321 votes).

23. It is with respect submitted that in a democratic society based on equality and freedom, the wishes of the voters to have their political parties of choice represented in the executive committee through casting votes to their political

parties cannot be replaced by 'lot'. To do so amounts to violation of the right to vote in that the voters' votes are not counted when determining which political party should get a seat in the executive committee.

24. It is submitted that the replacement of voters' votes by 'lot' constitutes violation of the right to vote enshrined in section 19(3)(a) of the Constitution because if you disregard the number of votes obtained by a political party or political interest, it means that you disregard the votes casted by the voters during elections and therefore it amounts to not counting legitimate votes of the voters. It is submitted that where the political parties or political interests have similar number of seats in the municipal council and have equality in surpluses, the number of votes obtained during the elections should serve as the deciding factor as to which political party or political interest. This will respect, protect and promote the right to vote.

25. It is submitted that the replacement of votes by 'lot' undermines the wishes of the voters, including, their wish to see their political parties of political interests represented in the municipal council.

26. The use of 'lot' obviously disregards the total number of casted votes to a political party and the percentage which that party has achieved during the elections.

27. It is with respect submitted that to an extent that votes are replaced by 'lot' when determining seats with the executive committee, this constitutes disregard of votes casted during the elections and consequently constitutes violation of the right "to vote in elections for any legislative body".

28. The purpose of the percentage is to reflect the number of votes casted to a political party or political interest and their achievements thereof. To disregard these percentages by using lot is tantamount to disregarding the number of votes casted and the interests and wishes of the electorate and which disregard of votes disadvantaged a political party with more votes achieved during the elections. This is so because two political parties with 2 seats each, may have obtained 2500 and 2000 votes respectively.

29. It is submitted that the High Court correctly found that:

“To have regard to the number of valid votes obtained by a political party as a mechanism to overcome what seems to be a tie, does not militate against the scheme of the Act”.⁶

30. It is further submitted that the High Court correctly held:

“As stated above, if all factors and variables were equal, the only logical manner to resolve a tie would be through the lot. Where all variables are, however, not equal, there is, strictly speaking, no tie. In these circumstances, the disregarding of the number of valid votes cast, amounts to disregarding the values for votes and the right to vote”.⁷ (Emphasis added)

31. The High Court correctly found that “parties would be considered to be in all respects equal if there was no distinguishing factor”.⁸ The High Court further correctly found that “it would be wrong to find” that “the difference in electoral support no longer matters.”⁹

32. In the circumstances, section 43(2)(c) violates the right to vote and therefore it is inconsistent with section 19(3)(a) of the Constitution.

⁶ See para 61 of the High Court judgment, p 112 of volume 2.

⁷ Id.

⁸ See para 57 of the High Court judgment, p 110 of volume 2.

⁹ See para 60 of the High Court judgment, p 111 of volume 2.

**SECTION 43(2)(c) OF THE NEW ACT IS INCONSISTENT WITH SECTION
160(8) OF THE CONSTITUTION**

33. Section 160(8) of the Constitution provides:

“Members of a Municipal Council are entitled to participate in its proceedings and those of its sittings, or those of its committees in a manner that—

- (a) allows parties and interests reflected within the Council to be fairly represented;
- (b) is consistent with democracy; and
- (c) may be regulated by national legislation.”

34. For the purpose of determination of whether section 43(2)(c) of the Municipal Structures Act is inconsistent with section 160(8) of the Constitution, it is important for this Court to consider the purpose of object of section 160(8) of the Constitution.

35. In *Masondo NO*¹⁰, this Court per Langa DCJ stated the following in relation to the purpose or object of section 160(8) of the Constitution:

“Section 160(8) is couched in terms very similar to provisions concerning the national legislature (section 57(2)(b)) and the provincial legislatures (section 116(2)(b)). The purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament, provincial legislatures and municipal councils respectively. **In the context of local government, this form of representation finds expression in the municipal council and in committees elected by it.** On the other hand, Sections 91 and 132 of the Constitution which deal with the executive in the national and provincial governments respectively, do not require minority party representation. This is so because the primary purpose of an executive committee and committees which perform executive functions is to ensure effective and efficient government and service delivery.”¹¹

36. Following from the above passage in *Masondo NO*, it is submitted that it cannot serve the purpose of section 160(8) of the Constitution, namely, “to ensure that minority parties can participate meaningfully in the deliberative processes” by using a “lot” to decide which political party or political interest should be represented in the executive committee of a municipal council as opposed to usage of number of votes obtained by the political party or political interest.

¹⁰ *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) BCLR 128 ; 2003 (2) SA 413 (CC).

¹¹ Id at para [18].

37. It is further submitted that where two political parties or political interests have obtained equal seats in the municipal council but did not obtain equal votes during the elections, it cannot be constitutionally obedient with section 160(8) of the Constitution to decide allocation of seats in the executive committee in terms of section 160(6) by using "lot" on the basis that the two political parties have 'equal surpluses'.

37.1. The use of 'lot' will not result in fair representation of political parties or political interests in that, for the purpose of allocation of seats in the executive committee, you cannot treat equally (to treat political parties as if they achieved equal votes) two political parties which did not obtain equal number of votes during the elections.

37.2. The use of 'lot' is inconsistent with democracy which requires consideration of votes to decide who won elections.

37.3. The use of 'lot' is inconsistent with democracy because it disregards the views and wishes of the electorate which were made through voting for a particular political party or political interest.

37.4. A political party's interests cannot be fairly represented if such party's votes are not considered for the purpose of determining who should be allocated a seat in the executive committee where two political parties obtained equal number of seats but did not obtain equal number of votes during the elections.

37.5. To disregard number of votes obtained by a political party or political interest will result in not giving a political party or political interest with more/higher votes an opportunity to be represented in the executive.

37.6. The purpose of counting votes is nothing other than determining which political party or political interest must be represented in the council or executive committee and the use of 'lot' therefore defeat this purpose.

38. The High Court correctly held:

“Where the issue is not whether a minority voice will be heard, but which minority voice will be heard, I am of the view that regard must be had to the electoral voice before resorting to the lot. In these circumstances, fair representation will be consistent with democracy if the number of valid votes obtained acts as a tie-breaker.”¹²

39. In the circumstances, the applicant will submit that an order of invalidity of the High Court must be confirmed for the reasons above.

REMEDY

40. It is submitted that section 43(2)(c) of the Municipal Structures Act must be declared constitutionally invalid and the order of invalidity by the High Court be confirmed.

41. It is trite that section 172(1)(b) of the Constitution provides for the powers of the courts in constitutional matters. The section provides that a court may make any order that is just and equitable.

¹² Id at para 62.

42. Following an order of constitutional invalidity by the court, section 172(1)(b) of the Constitution provides a number of constitutional remedies that are available, including suspension of declaration of invalidity.

Is suspension of declaration of invalidity just and equitable remedy?

43. In the present case, the applicant seeks an order that pending the period of 18 months within which Parliament must amend the impugned section, section 43(2)(c) be read in a particular way and that such reading-in operates with immediate effect.

44. In *Mlungwana*¹³ this Court was asked by the applicants “to declare section 12(1)(a) unconstitutional with immediate and retrospective effect”¹⁴.

¹³ *Mlungwana and Others v S and Another* 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC).

¹⁴ Id at para [102].

45. *Mhlope*¹⁵ this Court per Mogoeng CJ stated:

“Although it is undoubtedly desirable that every objectively available address be recorded on the national common voters’ roll, the decision to impose that obligation on the IEC in respect of the pre-December 2003 voters is best left to Parliament. Separation of powers requires that courts should be cautious not to intrude into the otherwise exclusive domain of other arms of the State unless it is constitutionally permissible to do so. This is not such a case. An order directing the IEC to do more than what section 16(3) requires of it amounts to an unintended and unjustifiable usurpation of Parliament’s legislative powers.” (Footnote omitted)

46. In *Phaahla*¹⁶ this Court made inter alia the following order:

“Parliament must, within 24 months from the date of this order, amend section 136(1) of the Correctional Services Act to apply parole regimes on the basis of date of commission of an offence, pending which the section shall read as follows:

“Any person serving a sentence of incarceration for an offence committed before the commencement of Chapters 4, 6 and 7 of the Correctional Services Act is subject to the provisions of the Correctional Services Act 8 of 1959, relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those chapters.””

¹⁵ *Electoral Commission v Mhlope and Others* 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).

¹⁶ *Phaahla v Minister of Justice and Correctional Services and Another (Thakanye Intervening)* 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC).

47. It is submitted that in the present case, it is constitutionally permissible for this Court to “intrude into the otherwise the exclusive domain” of the Legislature and read-in some words in section 43(2)(c) of the Municipal Structures Act for the reasons to follow.

47.1. An order in prayer 2 of the notice of motion does not require the presiding officer during the election of executive committee to do more than what section 43(2)(c) requires the presiding officer to do.

47.2. Construction of section 43(2)(c) in a manner suggested in prayer 2 of the notice of motion does not strain the language in section 43(2)(c).

47.3. No serious challenges would be resulted in the proposed amendment set out in prayer 2 of the notice of motion.

47.4. In case there are by-elections in local government, the impugned provisions will be used and therefore suspension of declaration of invalidity will result in suspension of democracy. Democracy cannot be suspended.

53. In the circumstances, it is submitted that an order that is just and equitable is an order as follows:

53.1. The order of invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 of the High Court of South Africa, Gauteng Division, Pretoria is confirmed.

53.2. Parliament must, within eighteen (18) months from the date of this order, amend section 42(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, pending which section 43(2)(c) shall read as follows:

“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, the result must be determined by the political party or political interest with the highest number of votes obtained during the elections”

53.3. The order in paragraph 2 operates with immediate effect.

53.4. The Respondent is ordered to pay the costs of the application in this Court, including the costs of three counsel.

COSTS

54. It cannot be gainsaid that the present application raises constitutional issues.

55. It is trite law that in constitutional litigation between a private party and the state, if a private party succeeds, the state must be ordered to pay the costs, and in the event the state succeeds against the private party, there must be no order as to costs.

56. In *Biowatch*¹⁷ this Court had the following to say in relation to costs in constitutional litigation:

¹⁷ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

“The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If 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.”¹⁸ (Footnote omitted)

57. Although the present application is not opposed by the respondent and the opposition in the High Court was withdrawn, it is submitted that the principle in *Biowatch* that “the state bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution” makes it clear

¹⁸ Id at para [23].

that *in casu* the respondent is not exonerated from paying the costs of this application. The High Court correctly applied this principle.¹⁹

58. In *Tebeila Institute*²⁰ this Court was invited to determine an appeal against a costs order in constitutional litigation between a private party and the State wherein the applicant (private party) litigated in furtherance of the right to education.

59. This Court in *Tebeila Institute* stated:

“There are considerations militating in the applicant’s favour in this Court. **The subject of the challenge it litigated, namely access to further education, was plainly constitutional.** And those on whose behalf it brought the challenge – students in the country’s rural areas – are entitled to particular respect for their social and constitutional entitlements.

Moreover, there are exceptional circumstances warranting this Court’s intervention.

First, this is the first time this Court has been confronted with a case where a litigant

¹⁹ See para 66 of the High Court judgment, p 113 of volume 2.

²⁰ *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* (CCT155/14) [2015] ZACC 4; 2015 (4) BCLR 396 (CC).

who has successfully vindicated constitutional rights has been deprived of its costs.

The case therefore makes a singular claim for intervention.

Second, it is nearly six years since this Court handed down *Biowatch*. The applicant's plaint affords this Court a useful opportunity to restate the principles laid down in *Biowatch* and to emphasise the rationale behind them. In particular, the case serves as a reminder to judicial officers handing down costs orders that litigants successfully asserting their constitutional rights against state institutions should get their costs unless there are "carefully articulated and convincing" reasons to deprive them of those costs."²¹ (Footnotes omitted)

60. It is with respect submitted that this Court must in handing down a costs order in a constitutional matter of this nature, be mindful that successful private litigants asserting their constitutional rights against the State must be awarded costs even if the application is not opposed.

²¹ Id at paras 15-17.

61. In *Hotz*²², this Constitutional bench was confronted with leave to appeal and not application for confirmation of an order of invalidity, this Court stated the following in relation to the issue of costs in constitutional litigation between the State and private party:

“Constitutional issues are implicated because the matter invokes certain rights including the rights to education, freedom of expression, to assembly, demonstration, picket and petition as well as the right to freedom of association. While the prospects of success on the merits are poor, the applicants’ complaint about the High Court’s failure to exercise judicial discretion when mulcting them with costs does bear prospects of success. The SCA confirmed the High Court’s costs order without determining whether the discretion was exercised judicially. The interests of justice warrant granting leave to appeal to determine whether the High Court’s costs order is irrational as contended for by the applicants. In the circumstances, I would grant leave to appeal.”²³ (Footnotes omitted)

²² *Hotz and Others v University of Cape Town* (CCT280/16) [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC).

²³ *Id* at para 14.

62. It is submitted that in the present case, it is clear that the matter raises constitutional issues, and therefore the general principle of costs order in constitutional litigation between a private party and the State laid down by the Constitutional Court in *Biowatch* is applicable to the issue of costs.

63. In the circumstances, it is submitted that in the event this application succeeds, the respondent must be ordered to pay the costs of this application, including the costs of two counsel.

CONCLUSION

64. The applicant has made out a case for the relief sought in the notice of motion.

65. The applicant, accordingly, prays for an order as follows:

65.1. The order of invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 of the High Court of South Africa, Gauteng Division, Pretoria is confirmed.

65.2. Parliament must, within eighteen (18) months from the date of this order, amend section 42(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, pending which section 43(2)(c) shall read as follows:

“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, the result must be determined by the political party or political interest with the highest number of votes obtained during the elections”

65.3. The order in paragraph 2 operates with immediate effect.

65.4. The Respondent is ordered to pay the costs of the application in this Court, including the costs of three counsel.

S.S TEBEILE

T.A MAKOLA

L.V MAKOFANE

L.B MOSHOEU

E.A THETE

M.G RAMONYAI

I.M LEKALAKALA

S.K.R MOHLAKA

K.S THUTJA

N. TSHITAMBA

M.J RASESEMOLA

B.R MASHEGO

K.M NTJANA

I.R KEKANA

S. MAPONYA

T.E RAPHIRI

I.P KGATLA

COUNSEL FOR THE APPLICANT:

Chambers: Polokwane, Pretoria, Johannesburg and Arusha, Republic of Tanzania

11 March 2024

LIST OF AUTHORITY

Legislation

1. Local Government: Municipal Structures Act 117 of 1998.
2. Local Government: Municipal Structures Amendment Act 3 of 2021.

Other authority

3. Constitution of the Republic of South Africa, 1996.

Case law

1. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).
2. *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) BCLR 128; 2003 (2) SA 413 (CC).
3. *Electoral Commission v Mhlope and Others* 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).

4. *Hotz and Others v University of Cape Town* 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC).
5. *Mlungwana and Others v S and Another* 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC).
6. *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)* 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC).
7. *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC).