

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 15974/07

In the matter between:

SEA FRONT FOR ALL

First Applicant

SHIRLEY JOAN RABINOWITZ

Second Applicant

and

**THE MEC: ENVIRONMENTAL AND
DEVELOPMENT PLANNING, WESTERN**

CAPE PROVINCIAL GOVERNMENT

First Respondent

**THE DIRECTOR: INTEGRATED
ENVIRONMENTAL MANAGEMENT,**

DEPARTMENT OF ENVIRONMENTAL

AFFAIRS AND DEVELOPMENT PLANNING,

WESTERN CAPE PROVINCIAL GOVERNMENT

Second Respondent

ON TRACK DEVELOPMENTS (PTY) LTD

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

JUDGMENT DELIVERED:

DESAI, J et FOURIE, J:

[1] In terms of our judgment delivered on 26 March 2010, the issue of costs was reserved for later determination. We have now received written submissions from the parties and what follows are our reasons for the costs order which we intend to make.

[2] It is trite that a court has an unfettered discretion in awarding costs and that, generally, a successful party is entitled to its costs.

[3] Applicants have been comprehensively successful in the review application and are accordingly entitled to their costs. The question is which of the respondents should be ordered to pay the costs.

[4] As appears from our judgment on the merits, the relevant decision of the first respondent was set aside as unlawful and invalid on three

different grounds. In **Biowatch Trust v Registrar, Genetic Resources and Others** 2009 (6) SA 232 (CC), it was held that where the conduct of the State is successfully challenged, the State is ordinarily liable for the costs. At paragraph 25 it was stressed that *“particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it”*.

[5] In this instance, the first and second respondents initially opposed the application, but on 3 October 2008, they conceded the third ground of review, namely the impermissible involvement of Commlife. The first and second respondents accordingly filed a notice of intention to abide on 3 October 2008, in which they also withdrew their opposition to the review application. After 3 October 2008, it was only the third respondent that opposed the application.

[6] It is, in our view, important to note that first and second respondents did not concede the other two grounds upon which we held that the first respondent's decision was also unlawful and invalid. These two grounds arose directly from the failure of first respondent to carry out

her duties in the manner required by the law. In the result, it was necessary for the applicants to pursue these other two successful grounds of review (and the further grounds which we did not find it necessary to decide), because third respondent was continuing to oppose the application.

[7] In the circumstances, we are in agreement with the submission on behalf of applicants, that they could not prudently abandon the additional grounds of review which were ultimately successful. As applicants were successful in raising the challenge on the additional two grounds arising from the first respondent's unlawful conduct, it appears to us that the first and second respondents should remain liable for applicants costs, notwithstanding their concession of the merits of the other ground.

[8] It should, however, be borne in mind that subsequent to 3 October 2008, the third respondent persisted in opposing the review application, notwithstanding the withdrawal of their opposition by the first and second respondents. Third respondent persisted with its opposition on all the grounds raised by applicants, including the ground of review conceded by the first and second respondents.

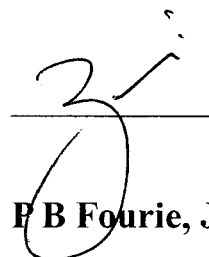
[9] In all the circumstances it would, in our view, be just and equitable for first and second respondents to be held liable for applicants' costs up to 3 October 2008 and that they, together with third respondent, should be liable for applicants' costs incurred after 3 October 2008.

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

1. The first and second respondents are declared liable, jointly and severally, to pay the costs of the applicants up to and including 3 October 2008.
2. The first, second and third respondents are declared liable, jointly and severally, to pay the costs of the applicants incurred after 3 October 2008.
3. The costs of the applicants are to include the costs of two counsel and the costs of the expert witnesses, Lewis and Brümmer.
4. Save as above, each party is to pay its own costs.

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S Desai, J

A handwritten signature in black ink, featuring a large, stylized 'P' followed by a smaller 'B' and a final flourish.

P B Fourie, J