IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR230/2018

In the matter between:

eTHEKWINI MUNICIPALITY — First Appellant
(First Respondent in the Court *a quo*)

CHAIRPERSON: eTHEKWINI MUNICIPALITY
BID EVALUATION COMMITTEE — Second Appellant
(Second Respondent in the Court *a quo*)

CHAIRPERSON: ETHEKWINI MUNICIPALITY
BID ADJUDICATION COMMITTEE — Third Appellant
(Third Respondent in the Court *a quo*)

KAMLESH RAJOO — Fourth Appellant
(First Invited Party in the Court *a quo*)

GREGORY STANDISH EVANS — Fifth Appellant
(Second Invited Party in the Court *a quo*)

In the matter between:

WESTWOOD INSURANCE BROKERS
(PROPRIETARY LIMITED — Applicant
in the Court *a quo*

and

eTHEKWINI MUNICIPALITY — First Respondent
in the Court *a quo*

CHAIRPERSON: ETHEKWINI MUNICIPALITY
BID EVALUATION COMMITTEE — Second Respondent
in the Court *a quo*

CHAIRPERSON: ETHEKWINI MUNICIPALITY
BID ADJUDICATION COMMITTEE — Third Respondent
in the Court *a quo*

N C SOUTH WEST BROKERS CC	Fourth Respondent in the Court *a quo*
WANDA FINANCIAL CONSULTANTS (PROPRIETARY) LIMITED	Fifth Respondent in the Court *a quo*
WATERSURE (PROPRIETARY) LIMITED	Sixth Respondent in the Court *a quo*
INDWE RISK SERVICES (PROPRIETARY) LIMITED	Seventh Respondent in the Court *a quo*
MSUNDUZI CHRISTOPHER NKOMO, N.O.	Eighth Respondent in the Court *a quo*

JUDGMENT

Vahed J (Olsen and Masipa JJ concurring):

[1] The fourth respondent in the court below (N C South West Brokers CC) ("South West") was the successful tenderer in respect of a tender put out by the first appellant (who was also the first respondent in the court below) ("the municipality"). The tender was for the provision of water loss insurance for underground water leaks of individual dwelling units which would be available to domestic consumers of water supplied by the municipality. Aggrieved at the award of that tender by the municipality the applicant in the court below (Westwood Insurance Brokers (Pty) Ltd) ("Westwood") applied to the court *a quo* for dual-pronged relief. Firstly, it sought interdictory relief preventing the implementation of the tender and the conclusion of any contract flowing from it, and, while that interdict was in place, secondly, it sought to review and set aside the award of that tender claiming, instead, that the award ought to be made to it.

[2] The court below (D Pillay J) granted the interdict after hearing argument on 29 September 2016. On the return day on 7 October 2016, after hearing further argument, the learned Judge put in place provisions for the adjudication of the review. This she did by requiring the parties to craft a proposed abbreviated order, truncating the time periods foreshadowed in Rule 53. When that was achieved she made that order in chambers on 10 October 2016 and directed that she would hear the review herself. On the further extended return day the municipality, which was the only party that opposed the application, no longer opposed the challenge to the award of the tender and consented to it being set aside. It (i.e. the municipality) however would not agree to the further relief substituting the applicant in the court *a quo* for the fourth respondent in the court *a quo* as the successful tenderer.

[3] On that extended return day (15 November 2016) an order in the following terms was made:-

> "1. By consent:
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> (a) The award of the tender described by the first respondent as "*Water loss insurance for underground leaks of individual dwelling units (WS 6678)*" (hereinafter referred to as "the tender") by the first respondent to the fourth respondent is set aside.
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> (b) The decision of the eighth respondent handed down on 15 June 2016 dismissing the appeal against the first respondent's award of the tender to the fourth respondent is set aside.
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> (c) The first respondent is ordered to pay the costs of the application for the First Order Prayed and the Second Order Prayed, such costs to include those consequent upon the employment of senior counsel.

2. Not by consent:

(a) The first respondent is directed to appoint the applicant as the successful tenderer under the tender.

(b) The question is reserved as to any further order that the Court may make regarding the recovery of costs by the first respondent from its officials involved in the process of tender.

(c) Any person having an interest in the further order contemplated in the preceding paragraph of this order may make written submissions to the Court in this regard by 22 November 2016."

[4] I pause at this stage to observe that no directions accompanied that order, particularly in regard to who was expected to make the written submissions foreshadowed in paragraph 2(c) of the order and more particularly as to how that aspect was to be drawn to the attention of any person who might be interested in making submissions.

[5] No further submissions were made and on 8 December 2016 the court below delivered a judgment ("the main judgment") the basis for which it described as follows:

"[5] Ordinarily, Ethekwini's consent would have obviated a reasoned judgment. However, the concession of the review came only after its counsel vigorously defended the award on constitutional and other grounds. The matter is one of public interest. Furthermore, Ethekwini did not consent to my order awarding the tender to Westwood. Hence the parties are entitled to reasons; and I am obliged to justify the orders I granted and may still grant. I turn first to sketch the background and identify the issue in dispute. Thereafter I respond to submissions made on 29 September 2016 that resulted in the first order before scrutinising the

decisions of the second respondent, i.e. the Bid Evaluation Committee (BEC) and the eighth respondent who determined the appeal."

[6] The main judgment described the issue in dispute thus:

"[11] The singular challenge to the award of the tender to South West is whether the latter complied with clause 3 of the conditions and specifications of the tender. Clause 3 stipulated the following using a bold font for emphasis:

> 'Registration offers underwritten by insurance companies licenced to operate in South Africa will only be considered. A letter of undertaking from the insurance company must accompany the offer. **The underwriter must be registered with the Financial Services Board (FSB)**.'

[12] On information received from its sources in the marketplace Westwood contended that South West failed to comply with clause 3 in that the letter it submitted with its bid was not, firstly, underwritten by an insurance company licenced to operate in South Africa; secondly if the underwriter was some entity bearing the name 'Marsh' it was not registered with the FSB; and thirdly the 'Marsh' letter did not amount to an undertaking to underwrite insurance for water loss. Westwood was strengthened in its contentions that South West had failed to comply with condition 3 when it received a memorandum from Mr Sibusiso Shezi dated 21 August 2015, which was attached to the decision of the eighth respondent."

[7] However, the learned judge had had her suspicions aroused:

"[40] Ethekwini and its BEC have much to explain. Any explanation that might have been forthcoming was aborted once Ethekwini conceded the review. Such information was still relevant for determining whether I should confirm the award of the tender to Westbrook. Full disclosure was also necessary in compliance with the constitutional duty of public officials to function transparently and accountably. Without disclosure or at least an offer to disclose, if that would have been more cost effective and convenient, the inference that something untoward had happened arose. Hence in my order of 15 November 2016 I invited any person having an interest in the further cost order I contemplated to make written submissions to the Court by 22 November 2016. None has been forthcoming."

[8] Paragraphs 71 to 78 of the main judgment contained the order the court made on 8 December 2016. It needs to be set out: -

> "Order
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> [71] The first respondent Ethekwini shall serve a copy of this judgment and order on the office of the Mayor, the office of the Municipal Manager (sic) by 20 December 2016.
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> [72] The Mayor and the Municipal Manager shall deliver affidavits (attested to by themselves or any person having knowledge) in which they furnish the name and contact details of the officials from the insurance and treasury departments, the various SCM officials, the Contracts Manager and the Divisional Manager for Water and Sanitation and any other person who participated in the awarding (sic) Contract Number WS6678 for 'water loss insurance for underground water leaks of individual dwelling units' to the fourth respondent (NC South West Brokers CC) by 20 January 2017.
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> [73] The Mayor and the Municipal Manager shall deliver a copy of this judgment and order on (sic) the persons they name in the affidavits referred to in the preceding paragraph, the fourth and eighth respondents, Mr Sibusiso Shezi and Silindile Blose by 20 January 2017.
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> [74] The persons referred to in the preceding paragraph and any other person who participated in the awarding the above Contract (sic), or who have an interest or information about the awarding the above Contract (sic), are given leave to deliver affidavits giving evidence to assist the court to determine the reason for awarding the Contract.
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> [75] The fourth and eighth respondents, Silindile Blose, the persons named in the affidavits delivered by the Mayor and the Municipal Manager and any other person who participated in support of awarding the above Contract to the fourth respondent are directed to show cause on affidavit why an order should not be made that:

a. he, she, it or they, jointly or severally, the one paying the others to be absolved, shall indemnify Ethekwini by paying all costs *de bonis propriis* Ethekwini incurred in this litigation.

b. Ethekwini shall serve this order on the office of the Auditor-General established in terms of s 181(1)(e)of the Constitution of the Republic of South Africa, 1986.

c. Ethekwini shall pay the applicant's (Westwood's) costs that were reserved on 2 September 2016, 29 September 2016 and 7 October 2016.

[76] Proof of service of the judgment and order in terms of para 73 shall be filed in court by 31 January 2017.

[77] The affidavits referred to in paragraphs 74 and 75 shall be served on the court and all other persons affected by such affidavits, in the case of

a. paragraph 74 by 31 January 2017

b. paragraph 75 by 14 February 2017

[78] Any person wishing to be heard in open court shall indicate by letter to reach the office of the Registrar of the High Court, Durban by 20 February 2017, failing which the matter will be disposed off (sic) in chambers on the documents delivered by that date."

[9] Affidavits furnishing the required information were apparently delivered and a number of the identified officials, including the fourth ("Ms Rajoo") and fifth (Mr Evans") appellants, delivered affidavits in response to paragraph 75(a) of that order. The court *a quo* then, on 5 April 2017, delivered a judgment which underpinned the costs orders foreshadowed in the order of 8 December 2016 ("the costs judgment"). It criticised the conduct of a number of the officials and role players (including that of Ms Rajoo and Mr Evans) and extended to some 36 pages.

[10] The seeds of the suspicions sown in the main judgment appear to have germinated in the costs judgment:

> "[87] A tender of R80 million was large enough to be taken very seriously. Importantly, if South West got away with its misrepresentation, vulnerable people occupying, for instance, municipal and other sub-economic housing schemes would have had no insurance for water leaks. The cost of the water leaks would have had to be borne by eThekwini and by extension all its tax paying residents. Coinciding with a devastating drought, the lack of insurance for water leaks would have been catastrophic for water supplies if the leaking pipes were not repaired quickly. Why South West's bid was not rejected at the outset for non-compliance adds to the mystery as to how it passed the scrutiny of so many officials charged with the responsibility of safeguarding public procurement against illegalities.
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> [88] A recurring theme of this judgment is the non-disclosure of relevant information. Whether this is deliberate or not is not always impossible to tell. Irrespective, when determining liability for costs, the fact of the non-disclosure alone counts. It must be measured against the constitutional obligation of all persons performing public services to be accountable and transparent. Disclosure is also important for individuals to avoid or mitigate their liability for costs. If all those involved are exposed then the burden on each individual would be mitigated if an order for joint and equal liability is imposed. Also, if those who had a greater hand in awarding an unlawful tender are exposed then the liability for costs of those who played a less significant role would be commensurately minimised. This approach commends itself for the greater cause of inculcating accountability and transparency in every sphere of public procurement, including enforcement.
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> [89] I analysed the evidence in some detail to assess where in the range from ignorance, incompetence, negligence, corruption or something else the conduct of the decision-makers fall (sic) in order to determine whether some should be held more or less liable than others in order to apportion costs appropriately. I cannot single out individuals as having committed acts of corruption because the evidence does not go that far. However, given how bizarre the decision is I cannot exclude that possibility but that is for some other process to uncover. Ostensibly, all the participants were negligent, inattentive to their responsibilities and unaccountable. I have not been able to uncover why this was so."

[11] The costs judgment concluded with the following order: -

"[96] Accordingly I make the following order:

1. The fourth respondent shall indemnify the first respondent by paying fifty per cent (50%) of its costs.

2. The remaining fifty per cent (50%) of the first respondent's costs shall be paid in equal shares by the following:

   a. Contracts Administrator – Nonhlanhla Zondo;
   b. Divisional Manager for Regional Customer Services Water and Sanitation – Bridgette Ntusi;
   c. The Manager Contracts and Materials – Tarry Bartholomew;
   d. Head of eThekwini Water and Sanitation – Edwin Msweli;
   e. Deputy Head Supply Chain Operations – Sandile Ngcobo;
   f. Members of the Bid Evaluation Committee namely,
      i. Vincent Cebekhulu
      ii. Kamlesh Naidoo
      iii. Zandile Sithole
      iv. Greg Evans
      v. Max Mthembu
      vi. Tumo Mpetsane

   g. Members of the Bid Adjudication Committee namely,
      i. Andre Petersen
      ii. Dave Renwick
      iii. Sandile Mnguni

   h. The eighth respondent; and
   i. The City Manager who confirmed the award to South West.

3. The Acting City Manager Ms Nene shall forthwith serve or cause to be served a copy of this judgment on the Mayor and all those liable for costs above.

4. The Ms Nene or her replacement shall report to the court on the steps she or he has taken to recover costs under this judgment on affidavit by 30 July 2017 and thereafter on the last day of each month until the costs are paid or the court orders otherwise.

5. The registrar of this court shall serve a copy of this judgment on the Auditor-General by fax or any other convenient means.

6. There is no order for costs against Ms Silinidle Blose.

7. Any person having an interest in my judgment is given leave to apply for leave to appeal against this judgment."

[12] Not surprisingly this appeal was conceived. It was preceded by an application for leave to appeal which produced yet a third judgment on 31 July 2017 extending over some 17 pages ("the LTA judgment").

[13] The municipality applied for leave to appeal against the orders set out in paragraphs 96(2), 96(3) and 96(4) of the costs judgment. Ms Rajoo and Mr Evans each responded to the "invitation" contained in paragraph 96(7) and applied for leave to appeal against their respective inclusion in paragraph 96(2)(f) of the costs judgment. They were referred to as the first and second invited parties respectively.

[14] The observations made in the opening paragraphs of the LTA judgment, including its tone, is insightful:

> "[1] Why did the Ethekwini Municipality, the first respondent, award a tender for the provision of insurance for water loss to a bidder who tendered professional indemnity insurance? This is the question I posed to counsel appearing for Ethekwini in the opposed application on 15 November 2016. The question resulted in Ethekwini conceding that the award should not have been made and tendering to pay the costs of Westwood Insurance Brokers (Pty) Ltd, the unsuccessful tenderer and applicant in the review. That question remains unanswered ever since I first raised it, despite the lapse of more than six months, the expansion of the court record in the application for leave to appeal to about 300 pages and, an invitation to all the officials involved in the process that resulted in the decision to

make the award, to make representations to avoid a cost order against them personally.

[2] Not a single employee offered an explanation as to why indemnity insurance was accepted instead of water loss insurance. Worse still, not a single employee acknowledged that the award was irregular and that but for Westwood's urgent application, a socio-economic catastrophe was inevitable. No one has apologised or shown remorse. If the employees were unaware at the time they were processing the award, they could not have been in any doubt after Ethekwini's concession and the reasons for my judgment, that the award was unlawful. In the absence of any explanation from the employees I concluded that there was none, at least none that was lawful, reasonable or justifiable.

[3] Furthermore, the failure to acknowledge the irregularity convinced me that those involved were also not willing to be held accountable for their irregular decisions. Ethekwini fortified this conviction not only by conceding the application, by failing to advance any reason for either making the unlawful award or by subsequently capitulating in the urgent application but also, vitally, by failing to take up the court's invitation to make representations regarding its proposed order for costs *de bonis propriis*. If the failure and persistent refusal by Ethekwini and its employees to account for their unlawful conduct was baffling then, now this application for leave to appeal against the judgment dated 5 April 2017 in terms of which the court granted a special order indemnifying Ethekwini against costs poses another question: Whose interests does Ethekwini represent in applying for leave to appeal against a judgment that is entirely in its favour and those of the people its officials are elected or appointed to represent?

[4] In preparing for the hearing of this application it became clear that there was no voice for the people of Ethekwini. To say that by applying for leave to appeal Ethekwini is seeking advice from the appellate courts on the propriety of the order avoids the question. It is also not correct. If it is advice that Ethekwini wants then it could simply choose to abide by the decision of the appeal court. Better still, it could defend the judgment favouring its own and the public interest. Instead, Ethekwini has positioned itself against the judgment. Hence the second unanswered question.

[5] Ethekwini's stance and the lack of representation of the people of the city prompted me to ask the Chairman of the Bar Council to assign counsel to represent notionally the people of the city. For this the court is indebted to the Bar

and to Mr Broster SC who rose to the occasion with a *pro bono* brief on less than 48 hours notice.

[15] Leave to appeal, as sought, was granted to the Full Court. Unless any aspect appealed against requires individual treatment, they will be referred to collectively as "the adverse costs orders".

[16] Should that brief sketch of the background to this appeal generate an interest in any or all of the three judgments produced by the court below those judgments can be found at [2016] ZAKZDHC 46 (8 December 2016) (as to the main judgment), [2017] ZAKZDHC 15 (5 April 2017) (as to the costs judgment) and [2017] ZAKZDHC 29 (31 July 2017) (as to the LTA judgment).

[17] Before dealing with the appeal certain general observations regarding the manner in which aspects of the costs incurred were dealt with in one or more of the hearings before the learned judge *a quo* must be made.

[18] On each of the occasions on 2 September 2016, 29 September 2016 and 7 October 2016 the question of costs was reserved. Although I am unable to find any reference to what happened to the costs incurred subsequent to 7 October 2016 up until the order was made in chambers on 10 October 2016 it seems very likely that those costs were also reserved.

[19] When the order setting aside the award of the tender (and the further relief) was made on 15 November 2016 nothing was said about those reserved costs (ie. the costs incurred after 7 October 2016). They were not included in paragraph 1(c) of that

order as they ought to have been. A direct beneficiary of and significant interested party in those reserved costs was the applicant in the court *a quo* i.e. Westwood. Yet apart from reminding the court *a quo* to deal with the reserved costs in the order of 15 November 2016 (which the court omitted to do), Westwood played no further part in the proceedings beyond 15 November 2016. The learned judge *a quo* records this fact in paragraph 70 of the main judgment.

[20] In paragraph 75(c) of the order of 8 December 2016 the learned judge referred to the identified reserved costs by including questions concerning them in the *Rule nisi* contemplated in that paragraph of her order. Regrettably, nothing further was said about that aspect of the matter in the costs judgment.

[21] The LTA judgment deals extensively with the then intended grounds of appeal. It is also suggestive of the fact that the court below was favoured with full argument on the ramifications of this appeal. The LTA judgment, in its treatment of each of the grounds of appeal, defends the approach adopted by it in the main judgment and the costs judgment. I make that general observation because in my view that approach should have emerged more naturally in either the main judgment or the costs judgment and not as a defensive stance in the LTA judgment.

[22] We received much assistance from counsel in the appeal. Mr *Gajoo* SC represented the municipality, Mr *du Plessis* SC, with Mr *Suleman* represented Ms Rajoo and Mr *J P Broster* represented Mr Evans. Because the judge *a quo* arranged for the participation by counsel as an *amicus curiae* (Mr *L B Broster* SC) we considered

it prudent to invite his continued participation in the appeal. We are grateful for his assistance as well.

[23] The appeal record was not delivered in time and there was a delay in applying for a date for the hearing of the appeal. It accordingly lapsed. We were furnished with an extensive and well-motivated application for condonation and for the re-instatement of the appeal. That was granted.

[24] The municipality also requested us to entertain an application to admit additional evidence on appeal. At the commencement of proceedings it became abundantly clear that no case had been made out for us to receive additional evidence and the application was refused.

[25] The appellants raised and argued a number of discrete grounds of appeal. Some were common to all three appellants, while others were confined to one or two appellants only. I intend dealing with those grounds as individual topics rather than, unless necessary, from the perspective of the appellant on whose behalf they were advanced.

[26] It was argued that the learned judge lacked jurisdiction to make the adverse costs orders because they did not form part of the case before her.

[27] The basis of Westwood's application was to prevent the municipality from awarding and implementing a tender to South West. The main judgment acknowledged that the issue was South West's compliance with a single condition of

tender (ie. underwriting by an insurance company registered with the Financial Services Board (see para 6 above)). Westwood neither sought the adverse costs orders nor did it allege any misconduct or fraud on the part of the municipality or its officials. The learned judge *a quo* raised the issues *mero motu*. They were not traversed in the pleadings (affidavits).

[28] It was not for the court below to raises the new issues not traversed in the affidavits.

[29] The following extract from *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA) is relevant (footnotes omitted):

> "[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded." There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.
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> [14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties However, it is then for the parties to determine whether they wish to adopt the new point. They

may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[15] This last point is of great importance because it calls for judicial restraint. As already mentioned Gamble J "required" the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, Counsel who appeared in this Court and in the court below, confirmed that the judge's own description, that he "required" the points to be argued, was accurate. They were not asked for their submissions on whether this was an appropriate approach to the matter or even, which was more pertinent, whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points. The authority on which the judge relied in adopting this approach was not in point. That was a case where the court, *on the application of one of the parties*, held that he could dispense with the hearing of oral evidence, notwithstanding the case having been referred for the hearing of such evidence, because the questions raised on the papers could be determined without hearing such evidence and the evidence could not affect the resolution of those issues. It is a far cry from that for a court to raise issues that do not emerge from the papers and have not been canvassed in the affidavits and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties."

[30] It was also, with respect, not appropriate for the court below to regard itself as constitutionally obliged to protect the citizens of Durban by making the adverse costs orders. In *Fischer* the observation was made that this was so particularly where a constitutional complaint was not raised on the papers. For that, reliance was placed

on *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) (footnotes omitted):

> "39. It is impermissible for a party to rely on a constitutional complaint that was not pleaded. In *Prince v President, Cape Law Society, and Others*, Ngcobo J stated:
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> > 'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.' [footnote omitted.]"

[31] Recently, with reference to Constitutional Court authority, the Supreme Court of Appeal raised these cautions in *Bondev Midrand (Pty) Ltd v Puling & another, Bondev Midrand (Pty) Ltd v Ramokgopa* 2017 (6) SA 373 (SCA) (footnotes omitted):

> "[8] As appears from the judgment in *Madzhie*, the application to re-transfer the property was unopposed and the matter came before court for judgment by default. When the matter was initially called on 12 August 2016, the learned acting judge informed counsel for the applicant that he was inclined to dismiss the application as he had reservations relating to the question 'whether this type of retransfer clause is consistent with public policy and with the provisions of s 26(1) of the Constitution'. The matter was then postponed until 19 August 2016 for counsel to prepare heads of argument relating to the issue. However, on that date counsel for the applicant indicated in chambers that the applicant had filed a notice of withdrawal, tendering costs. Uniform rule 41(1)*(a)* provides that once a matter had been set down a party may withdraw proceedings with the leave of the court, and such leave was granted. That should have been the end of the matter as it is

not ordinarily the function of a court to force a party to proceed with an action against its will or to investigate why the party wishes to abandon such action – see *Levy v Levy* [1991] ZASCA 81; 1991 (3) SA 614 (A) at 620B. But four months later the learned acting judge gave reasons for consenting to the withdrawal. He dealt with various constitutional issues, stating that the clause was grossly unreasonable towards a purchaser 'that wishes to pursue the suburban dream incrementally' and that a repurchase clause is 'not central to the business of a developer or the operations of a homeowners association,' before concluding that the present type of repurchase clause is an instance where enforcement should be refused.

[9] With due respect, the least said about this judgment is probably the better. It obviously reflects the learned acting judge's personal viewpoint but it was inappropriate, to say the least, to have pronounced upon the issue in the circumstances. As I have said, the applicant wished to abandon an application for default judgment and all that was required was the court's consent. This was not an instance that required a formal judgment, let alone one in respect of constitutional issues that had not been raised or canvassed in the papers and in respect of which interested parties had neither been forewarned nor heard. A court should refrain from dealing with legal issues unnecessary to determine in order to properly deal with a matter before it. This is all the more so in Constitutional matters. As the Constitutional Court said in *Albutt* a passage to which it subsequently referred with approval in *Aurecon*:

> 'Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so.'

[10] In the light of the paucity of the information before it, and not having heard the various parties who may well be interested in a matter such as this, it was inappropriate for the court in *Madzhie* to reach the conclusion that it did in regard to the constitutionality and lack of enforceability of the repurchase clause that was registered against the title deeds of the property."

[32] And the caution was issued still more recently by the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) (footnotes omitted):

> "[19] The court a quo was thus correct in holding that the plaintiff did not prove that it bore any risk in respect of the Discovery. It did not prove an interest in the litigation and consequently failed to establish *locus standi*. The court also rightly found that no contract came into being because there was no consensus regarding the terms (and nature) of the agreement. That should have been the end of the matter. Indeed, the court a quo held that the failure to prove *locus standi* was 'dispositive of the entire action'.
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> [20] But then the court embarked on an analysis of the common law duty to act in good faith, and, with extensive reference to *Barkhuizen*, concluded that the agreement was against public policy and therefore invalid. This, after it had scarcely found that no agreement had been concluded between the plaintiff and the defendant. The court stated that the public policy concerns discussed in *Barkhuizen* found expression in the Act and went on to find that the agreement violated the Act in numerous respects. Neither of these issues was raised in the pleadings; they were introduced by the court a quo of its own accord.
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> [21] On first principles, a judgment must be confined to the issues before the court. In *Slabbert*, this court said:
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> > 'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'
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> [22] Our adversarial system of determining legal disputes is a procedural system in which parties actively and unhindered may put forward a case before an independent decision-maker. An important component of the system is the rule that the parties must frame the issues for decision and present their case, and assign to the court the role of neutral arbiter of the case presented. In *Fischer*, this court stated the rule as follows:
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> [QUOTATION (para 13 of *Fischer*) OMITTED]
>
> [23] In my view, a fundamental reason for maintaining the adversarial system in which the parties identify the dispute, is to ensure that judicial officers remain

> independent and impartial and are seen to be so. This is a cornerstone of any fair and just legal system. When a judge intervenes in a case and has recourse to issues falling outside the pleadings which are unnecessary for the decision of the case and departs from the rule of party presentation, there is a risk that such intervention could create an apprehension of bias. The court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality."

[33] Fortified by that weight of authority I am thus of the view that it was impermissible for the court *a quo* to have traversed issues that were not raised on the papers before it, thereby making the adverse costs orders. I have not lost sight of the fact that in the LTA judgment the learned judge acknowledged the brief history of courts making similar costs orders furnished to her by counsel. She reminded herself of the warning in *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA):

> "[54] In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed."

[34] As was observed by the learned judge of appeal in that extract, in this case too, the adverse costs orders were not sought and therefore not addressed.

[35] In any event, calling for further affidavits by way of the *Rule nisi* issued at the conclusion of the main judgment did not in any way address another obvious issue: None of the conclusions reached in the main judgment were open for further debate. However, the court *a quo* appeared to recognise the need for representations and considered the adverse costs orders to be permissible, provided only that an adequate opportunity for such representations was afforded to the affected parties. For this conclusion reliance was placed on *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC). Regrettably, *Lushaba* was considered by the learned judge to require only adequate notice. In my respectful view that was incorrect because it ignored, as was also stated in *Lushaba*, the superior principle of joinder. It is to the question of joinder that I now turn.

[36] The adverse costs orders were made by the court *a quo* in the absence of the parties affected thereby being joined in the proceedings. That much is common cause and was acknowledged by the learned judge in the LTA judgment.

[37] *Lushaba* was a case about the many medical negligence claims being brought against the State. There the Constitutional Court said this:

> "[11] It is understandable that trial courts are concerned about the flood of medical negligence litigation aimed at provincial health departments. It is on public record that staggering increases in claims have occurred in recent years, at enormous cost to the public capacity to render health services. It is equally understandable that at times trial courts feel frustration that litigation costs mount up, as delays become more and more protracted, while injured claimants suffer. Worst of all, litigious lawyers seem to prosper and bureaucrats seem to get off scot-free, blithely taking no responsibility. But the Court here sought to apply inapposite implements to a profound structural problem. The quest to bring accountability to those who are responsible for the tragic proliferation of damages claims, and the

seeming morass of never-ending litigation amidst which deserving claimants are sometimes made to suffer, must take a different form.

[12] The High Court was driven to issue the second order after it had found that the MEC could not be held personally liable for costs. But in doing so, the Court departed from the terms of its previous order. It will be recalled that on 16 October 2014, the Court had ordered thus:

> '[S]hould the [MEC] be of the view that he should not be held personally liable, he should identify such person in the Department of Health of Gauteng, as well as persons in the office of the state attorney, who should be personally held liable for the costs as well as the reasons why they should be so held liable.'

[13] For many reasons, this was indeed a strange and incompetent order. First, this is not how parties who were not involved in particular litigation should be joined. Second and more seriously, the order reveals that the Court impermissibly authorised one of the parties before it to exercise a judicial power. In its terms the order referred to in the preceding paragraph left it to the MEC to decide whether he was personally liable. But, if he took the view that he should not be personally liable, he should identify persons who should be held personally liable and significantly furnish reasons why those persons should be held liable."

[38] In *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC intervening)* 2017 (3) SA 335 (CC), [2017] ZACC 8 the importance of joinder was described in the following terms (footnotes omitted):

> "[74] Given this chain of responsibility, there may thus be no grounds, in the end, for considering whether any individual officials of SASSA should be mulcted, personally, in costs. The office-holder ultimately responsible for the crisis and the events that led to it is the person who holds executive political office. It is the Minister who is required in terms of the Constitution to account to Parliament. That is the Minister, and the Minister alone.
>
> [75] All these aspects require further scrutiny, but that can only be done after the potentially affected parties are joined to the proceedings in their personal capacities and given an opportunity to explain their conduct in relation to each of these issues."

[39] In a later judgment in the same case, *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC intervening)* [2017] (9) BCLR 1089 (CC), [2017] ZACC 20 the court said (footnote omitted):

> "[4] Joinder is the easier issue to resolve. If the possibility of a personal costs order against a state official exists, it stands to good reason that she must be made aware of the risk and should be given an opportunity to advance reasons why the order should not be granted. Joinder as a formal party to the proceedings and knowledge of the basis from which the risk of the personal costs order may arise is one way – and the safest – to achieve this."

For that statement reliance was placed on *Lushaba*, amongst others.

[40] It is undoubtedly so that the adverse costs orders have a real impact upon the rights of both the municipality and the individuals concerned. Seen from that perspective the court in *Snyders and Others v De Jager (Joinder)* 2017 (5) BCLR 604 (CC) considered the importance of joinder in this light:

> "[9] A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard."

[41] In my view, and if the court below was entitled to be anxious about perceived irregularities (or whatever) surrounding the tender process, joinder was absolutely central to any process beyond the discrete *lis* placed before it.

[42] Regrettably, notwithstanding having all these decisions drawn to her attention the learned judge *a quo* defended the non-joinder in the following terms in the LTA judgment (footnotes omitted):

> "[31] The effect of the order in this case is no different from that in [*Black Sash* [2017] ZACC 8] granted in similar circumstances. The Constitutional Court did not stipulate joinder as the exclusive means of providing an opportunity to be heard. To insist that this court should have formally granted a rule *nisi* joining the interested parties would be to prefer form to substance. In no way did this court's call for representations deny the interested parties all the rights available to persons formally joined.
>
> [32] In this case as in [*Black Sash* [2017] ZACC 8], the prospect of recovering costs *de bonis propriis* emerged only after Ethekwini conceded defeat without accounting for the unlawfulness. The call for representations was an open one with the court having no evidence whatsoever of the reasons for Ethekwini making an irregular award and subsequently conceding that it was unlawful. The representations could have ranged from anything between identifying a person who intimidated officials into making an irregular award to employees being genuinely mistaken or unaware of the difference between professional indemnity insurance and water loss insurance. Consequently the call for representations was intended to seek guidance on how the court should take the matter further.
>
> [33] The submission that the court should have formally joined interested parties to the proceedings would have been a good one if there were factual disputes about the unlawfulness. As in [*Black Sash* [2017] ZACC 8], the substantive merits had already been determined. That Ethekwini accepted an offer of indemnity insurance instead of insurance for water loss was a fact never in dispute. That the irregularity was substantive and self-evident was also not in dispute. Neither was the fact there has been no explanation because there can be none, at least not one that is rational. Therefore the award of the tender in this instance was distinguishable from others in which disputes of fact and the possibility of rational explanations arose. Disputes of fact require processes in which they can be resolved by allowing every interested person an opportunity to produce evidence and to be heard. An adversarial approach would have been adopted if disputes of fact had emerged from the representations, e.g. about who caused the illegality.

That approach was not required in this instance either on the substantive merits or on the proposed order for costs *de bonis propriis*.

[34] Hence guided by *Lushaba*, the process the court adopted was appropriately attenuated to receiving representations from interested parties before imposing the cost orders against them.

[35] The invitation to make submissions in writing, and if so desired, in open court, was wide enough for any interested person to seek legal counsel, to ask for a postponement, to ask to be joined formally or ask for any other procedural (re)arrangements. No one asked for any of these options, not even to be heard in open court. However, another court might find that more should have been done to ensure that interested persons had a better opportunity to be heard."

[43] To my mind joinder was vitally important, and no mere formality, because it carried with it the notions of a right to a fair hearing and observed a fundamental principle of the rule of law that no one be condemned without a hearing or a reasonable opportunity to state their case. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) the right was explained in these terms (footnotes omitted):

"[11] This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution.[16] The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.[17] It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this. They are not, however, an

exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of section 34."

And in *Lushaba* the principle was set out thus:

"[18] Another principle breached is that without notice and opportunity to make representations, the High Court punished the three officials. It is a fundamental principle of our law that no one should be condemned without a hearing. This is part of the rule of law which is foundational to our constitutional order."

[44] These considerations emerge because:

a. The individual officials were not formally parties to the proceedings. They took no part in the litigation events and the submissions that culminated in the main judgment. They thus had no opportunity to proffer a version, offer comment on positions taken in the affidavits or simply to react to propositions put by the court during argument.

b. I have already remarked, *en passant*, that no directions accompanied the order made on 15 November 2016.

c. After delivery of the main judgment (on 8 December 2016) the individual officials had varying periods of time to respond to it. For example, Ms Rajoo and others only became aware of the main judgment and what was expected of them on 17 January 2017, others on 23 January 2017. However none were informed of a right to legal representation.

d. Mention must be made of Ms Rajoo who, in her affidavit, disclosed that she was never made aware of the order made on 15 November 2016 and never afforded an opportunity to deliver an affidavit. This she regarded as "…highly regrettable as … the Order of the 8 December 2016 could have been prevented". In addition she indicated that all she had to work with the was main judgment and that her request for "…the Court Papers and Bid Records…" had not been responded to by the time she was expected to deliver her affidavit. The question that arises is this: If Ms Rajoo, an attorney, was thus hamstrung, what was the position of the other, lesser (legally) trained, individuals?

e. None of the individuals were presented with a set of questions or queries related to the potential liability for costs, or had the benefit of knowing which aspects of the main judgment required treatment so as to avoid the adverse costs orders.

[45] Instead, the court below drew adverse inferences and conclusions from facts that had never been properly proved. It is well established that in formulating a test for holding public officials accountable the courts have set a very high bar. As far back as in *Coetzeestroom Estate and G. M. Co. v Registrar of Deeds* 1902 TS 216 Innes CJ said the following

> "To mulct [an] official in costs where his action or his attitude, though mistaken, was *bona fide* would in my opinion be inequitable. And it would be detrimental to that vigilance in the administration of the [the public office], which it is so essential in the public interest to maintain. For the [official] would be chary in giving effect to his own views on points of practice, if the result might be an order against him to

pay the costs of a successful application; and this would be so whether the Government indemnified him or not. On the other hand, if costs are not to be given against the [official], when his action has been *bona fide* though mistaken, it is only right that an applicant who *bona fide* and upon reasonable grounds asks for an order against the [official] on a matter of practice should be similarly protected. Such an applicant should not, if unsuccessful, be ordered to pay the costs of the [official]. This general rule we shall follow for the future; but the Court will reserve to itself the right to order costs against the [official] if his action has been *mala fide* or grossly irregular, and against an applicant who has unreasonably or frivolously brought the [official] into Court."

[46] A long line of cases culminates in *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC intervening)* [2017] (9) BCLR 1089 (CC), [2017] ZACC 20 where the following is now the benchmark (footnotes omitted):

"[6] When public officials were guilty of acting in *mala fides* (bad faith), courts have in the past made personal costs orders against them. Costs orders have been given against judicial officers where they have acted in bad faith. In *Regional Magistrate* Van Winsen AJ held that it "is the existence of *mala fides* on the part of the judicial officer that introduces the risk of an order of costs *de bonis propriis* being given against him". A similar approach was taken in *Moeca* in which an order to pay costs *de bonis propriis* (from his or her own pocket) was made against an administrative official. He had handled this enquiry so badly and had made an order so inappropriate that the Court held that, on the assumption that *mala fides* must be shown, that it had.

[7] These rules are now buttressed by the Constitution. Accountability and responsiveness are founding values of our democracy. All organs of state must provide effective and accountable government. The basic values and principles governing public administration include: the promotion and maintenance of a high standard of professional ethics; the promotion of efficient, economic and effective use of resources; public administration must be development-orientated; people's needs must be responded to; public administration must be accountable; and transparency must be fostered by providing the public with timely, accessible and

accurate information. Cabinet members are responsible for the powers and functions of the executive assigned to them by the President and they must act in accordance with the Constitution. All constitutional obligations must be performed diligently and without delay.

[8] The question of what would constitute improper conduct can be answered with reference to two linked issues: institutional competence and constitutional obligations. From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap.

[9] Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order."

[47] I interpose to return to the question of the inferences drawn by the court below. In this regard it is apposite to remind one of what was said in *Motswai v Road Accident Fund* 2014 (6) SA 360 (SCA) (footnotes omitted):

"[46] But apart from the irregularity and unfairness of the proceedings before the first judgment, the judge's reasoning is wrong. She drew inferences from the documents that were before her without calling for any further evidence. In this regard our courts have stated emphatically that charges of fraud or other conduct that carries serious consequences must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase. In my view the documents before the judge raised questions regarding the efficacy of the claim and the costs incurred in the litigation to date – no more. The judge was entitled – indeed obliged – to investigate these questions and if necessary to call for evidence. But she was not entitled to draw conclusions that appeared obvious to her only from the available documents. As was said in the well-known dictum of Megarry J in John v Rees:

'. . . [E]verybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable

> conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.' "

[48] I referred earlier (para 10 above) to aspects of the costs judgment. There the learned judge *a quo* referred to her search "…in the range from ignorance, incompetence, negligence, corruption or something else [amongst] … the decision makers … [but could not] single out individuals as having committed acts of corruption because the evidence [did not go] that far". It is appropriate to make the observation that the whole tenor of the costs judgment was that while the search for corruption proved fruitless, ignorance, incompetence and negligence was established. Those, in the main, were the inferences that were drawn. However, no finding of *mala fides* or gross negligence or dishonesty was made.

[49] This was recognised by the learned judge in the LTA judgment when she said:

> "[36] All interested parties had two opportunities to state why they processed the award in the way they did. None disclosed whether he or she acted in good or bad faith, dishonestly, negligently, mistakenly or out of genuine ignorance. Hence the court had no option but to found its decision to award costs *de bonis propriis* on the refusal to account for an irrational decision. A refusal to account is unconstitutional. The onus rests on those refusing to account to show why they should not be mulcted with costs or penalised in some other way. Another court may come to a different conclusion about the duty to account."

[50] On its own showing the court below committed a misdirection.

[51] On those arguments the appeal must succeed.

[52] However, there are other aspects of this matter, not dealt with pertinently by either the court below or during the appeal, which trouble me.

[53] The quartet of *Black Sash* judgments in the Constitutional Court must now be regarded as the gold standard for the determination of how and when public officials who are acting in a representative capacity may be ordered to pay costs out of their own pocket. Some of those judgments have already been referred to earlier, but for a complete view they are:

a. *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC intervening)* 2017 (3) SA 335 (CC), [2017] ZACC 8 ("*Black Sash 1");*

b. *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC intervening)* [2017] (9) BCLR 1089 (CC), [2017] ZACC 20 ("*Black Sash 2*");

c. *South African Social Agency and another v Minister of Social Development and others* [2018] 10 BCLR 1291 (CC), [2018] ZACC 26 ("*Black Sash 2A*"); and

d. *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC intervening)* [2018] (12) BCLR 1472 (CC), [2018] ZACC 36 ("*Black Sash 3*")

[54] The striking differences between the *Black Sash* cases and the present matter include the following:

a. The representative official ultimately held personally liable in *Black Sash* (the Minister) had featured in the case throughout. At the conclusion of *Black Sash 1* no order for costs was made. Instead they were reserved and the Minister given an opportunity to show cause why she should not be joined in her personal capacity and why she should not pay costs out of her own pocket. Prior thereto the Minister, as a named respondent, had had a full opportunity to engage with the merits of the case. In the present appeal the officials held responsible for costs had had no opportunity to engage with the merits of the litigation process.

b. In the case before us the entire *lis* before the court below (including the question of costs) was disposed of by the order of 15 November 2016. The municipality *had been ordered* to pay Westwood's costs. The three sets of reserved costs, although mentioned, were never subsequently dealt with. In any event, those three sets of reserved costs were entirely unconnected to the subsequent enquiries embarked upon by the court *a quo.*

[55] Those differences mean that, the reserved costs aside, upon the order of 15 November 2016 being made the case came to an end with no issue surviving beyond that date. In *Black Sash* however, the entire question of costs remained a live issue.

[56] To my mind the suggestion that *post* 15 November 2016 the learned judge *a quo* was *functus officio* is eminently arguable.

[57] That brings me to a second area of concern. However it is necessary to deviate slightly into the discussion that unfolded in *Black Sash 2A*, which was not a case in the direct line of *Black Sash 1, 2 and 3*, but instead concerned an application for an extension of the suspension of the declaration of invalidity of the underlying tender. But personal costs orders featured too in *Black Sash 2A*. Like in *Black Sash 1 & 2*, the court issued an earlier order joining the two representatives in their personal capacities and asked them to show cause why they should not pay costs personally. There the court said:

> "[36] In the order of 23 March 2018, the question of costs was reserved for determination at a later date. This was necessitated by the fact that the order envisaged an enquiry into whether the former Minister of Social Development, Ms Bathabile Dlamini and SASSA's acting CEO, Ms Pearl Bhengu should be enjoined and be held personally liable for costs of the application. In their respective affidavits, both of them have urged this Court not to order them to pay costs in their personal capacity.
>
> [37] It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation. In *Black Sash 2*, this Court made it clear that this test applies to conduct relating to litigation and the discharge of constitutional obligations. Froneman J said:
>
> > 'Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order.'
>
> [38] In her written submissions the Minister contended that to hold her personally liable for costs would constitute an impermissible encroachment on the powers of

> the other arms of government. She submitted that this Court lacks the authority to hold a Minister to account by ordering her or him to pay costs out of her or his pocket. There is no merit in this argument. As mentioned, *Black Sash 2* affirms the principle that public officials may be ordered to pay costs out of their own pockets if they are guilty of bad faith or gross negligence. The source of that power is the Constitution itself which mandates courts to uphold and enforce the Constitution. It is apparent from *Black Sash 2* that the object of a costs *de bonis propriis* order is to vindicate the Constitution.
>
> [39] The other submission advanced by the Minister was that it is not competent to make such a costs order in the absence of a request from one of the litigants. The contention is ill-conceived. At common law, courts may raise the issue of a personal costs order of their own accord provided that they act fairly against the affected party. Fairness demands that such a party be warned that the court contemplates issuing a personal costs order and the affected party must be afforded an opportunity to address the court on the issue.
>
> [40] The order of 23 March 2018 meets the requirement of fairness. It called the Minister and the acting CEO to show cause why they should not be enjoined in their personal capacities and be held personally liable for costs. In response to the order, these officials have filed affidavits and written submissions. Therefore, the process followed in matters of this kind have been adhered to."

[58] The reference to *affected party* must be construed to refer to someone who is already a party to the litigation, i.e. one of the litigants already before the court.

[59] If that were not the case then the individual officials, as in the present appeal, are joined into the litigation at a time when the principal findings on the merits of the dispute are no longer capable of being disputed, and in any event beyond revisiting by the court.

[60] That observation by itself unfolds into yet another concern. Bringing the individual officials into the litigation at that point in the case places each of them in an

extremely invidious position. The point is best explained with the example of corruption and coercion. It will be recalled that each of the officials subjected to the adverse costs orders occupied different positions at different levels of seniority and management accountability. It is extremely difficult for a particular official (or group of officials), who is/are keen to protect and preserve his/their livelihood/s, to respond to the threat of an adverse costs order and explain away conduct by disclosing coercion from a corrupt superior or political head which was made under threat directed at that official's continued employment.

[61] Its seems to me that the principle of being able to hold public officials to account by the threat of adverse costs orders for errant conduct is one easily stated but, other than in the case of heads (whether political or departmental), difficult to implement at a practical level where one deals with ordinary line functionaries.

[62] In advancing its arguments (particularly those concerning the question of a failure to join and the linked question of establishing bad faith or dishonesty or gross negligence) the municipality adopted the approach that the adverse costs orders had a chilling effect that would frustrate the municipality's fulfilment of its obligations. Employees would in future be unwilling to serve on committees if faced with the likelihood that any remissness on their part would render them liable for payment of legal costs. This was suggested to the court *a quo* when leave to appeal was sought. In the LTA judgment the suggestion was responded to as follows:

> "[37] No one took the court into its (sic) confidence to disclose what the 'little error' was in this case. It is this refusal to disclose that attracts the punitive cost orders. That punishment must fit the offence is an essential tenet of our common law now well entrenched in our constitutional and labour law jurisprudence. If an error is

indeed little, the sanction will be commensurately slight. However, when the error is a failure to account in the face of a constitutional obligation to do so and when the consequences for the people of the city are so dire, the error is not little, the sanction of one-fifteenth of 50 per cent of the costs hardly extreme.

[38] The committee system of procurement leaves little scope for errors. A decision is not that of an individual even though an individual eventually signs off the award. It is three layers of committees that contribute in various ways to the decision. Therefore the system is designed precisely to entrench and inculcate a bureaucratic, and for the most part, a tick box approach to procurement. Honest employees attentive to their responsibilities need suffer no paralysis. In the unusual instance of a genuine error occurring employees could escape liability and punishment but only if they account fully for how the error occurred. Without accountability, transparency and remorse no reprieve is permissible is a basic tenet of our natural law."

[63] In my view that response demonstrates precisely why the bar has to be set as high as the discussion in this judgment reveals.

[64] The appeal succeeds. Paragraphs 96.2, 96.3 and 96.4 of the order made on 5 April 2017 by the court *a quo* under Case No 8221/2016 are set aside.

_____
Vahed J

_____
Olsen J

_____
Masipa J

CASE INFORMATION:

Date of Hearing: 07 June 2019
Date of Judgment: 31 January 2020

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