REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 51825/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

6/9/24
DATE

SIGNATURE

In the matter between:

DYNAMIC RECOVERY SERVICES (PTY) LTD Applicant

and

STATE INFORMATION TECHNOLOGY SOC LIMITED First Respondent

CYBERLINX SECURITY (PTY) LTD Second Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10: 00 am on 06 September 2024.*

Summary: The applicant seeks to be awarded or protected from a costs order on application of the *Biowatch* principle. The applicant is not insulated from a costs order once the matter becomes moot. Continuation with a moot matter is tantamount to an abuse of Court process and actually constitutes reckless litigation. A costs order is warranted under those circumstances. Where an

applicant asserted a constitutional right, a protection in *Biowatch* becomes available until the matter changes character and loses the constitutional touch. A party who asserts a constitutional right is not liable to costs in the event the matter is dismissed by a Court. The appropriate order is that of each party paying its own costs. Held: The applicant is liable to pay punitive costs for costs incurred after mootness and not other prior costs as insulated by *Biowatch*.

JUDGMENT

MOSHOANA, J

Introduction

[1] Is the *Biowatch*[1] principle a watchdog against cost orders for all instances where a case has been dismissed by a Court? In this judgment, the reach and purport of the *Biowatch* judgment shall be considered. As a departure point, an award of costs involves an exercise of a wide discretion, which is to be exercised judiciously with due regard to the applicable principles. This matter involves a unique situation where an applicant, as a *dominis litis,* declares that the litigation it had commenced had become moot and severed only the issue of costs to be decided independently.

[2] The genesis of the matter before Court now is a review application seeking to review and set aside administrative decisions made by the first respondent, State Information Technology Agency SOC Ltd (SITA) during 2021. One of the impugned decisions favoured the second respondent, Cyberlinx Security (Pty) Ltd (Cyber). The review application was litigated with a fair amount of apparent acrimony and was characterised by a barrage of interlocutory applications. To my mind, that manner of litigation was uncalled for given the focal point of the dispute between the parties involved. Since the matter has become frugal and linear, it is unnecessary for this Court to definitively express a view on those interlocutory applications. Owing to the

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[1] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC).

fact that the applicant has declared that the review application has since become moot, the remaining issue for determination is the issue of costs.

[3] This judgment shall only deal with the issue of costs associated with the review application which has since been declared moot by the applicant itself. For avoidance of doubt, an interlocutory application dubbed "cost *de bonis propriis* application" was later settled by the parties and shall not form part of this judgment.

Background facts appertaining the present application

[4] In 2020, SITA issued a request for bids under reference number RFB2268/2020 for the RENEWAL OF EXISTING MCAFEE LICENCES AND SUPPORT SERVICES TO SITA FOR THE DEPARTMENT OF DEFENCE for a period of 36 months. The applicant, Dynamic Recovery Services (Pty) Ltd (Dynamic) submitted a bid for the said request. Owing to some validity issues, this request was subsequently cancelled. Prior to the cancellation, on 24 February 2021, SITA issued another request for the same services under reference number RFB2382/2020 for a period of 24 months. Cyber is a splinter entity from Dynamic. Dynamic and ostensibly Cyber responded to this second request.

[5] On 15 April 2021, SITA informed Dynamic that its bid to the second request was unsuccessful. On 20 April 2021, SITA informed Dynamic that the first request was cancelled. When Dynamic was so informed, Cyber had already invoiced SITA for the licenses. Aggrieved by the decision to cancel the first request and the non-award of the second request, on or about 15 October 2021, almost six months later, Dynamic launched a Promotion of Administrative Justice Act, 2000 (PAJA) review against the decisions of SITA as outlined above. As pointed out above, the prosecution of the review application was not smooth and a number of interlocutory applications were launched, some of which were unnecessary, in my view.

[6] Ultimately, the review application was enrolled for hearing in the opposed motion Court on 23 January 2023. At this point of enrolment, the costs *de bonis propriis* interlocutory application was not ripe for hearing. The allocated judge, Madam Justice Neukircher, took a view that since the interlocutory application was not ripe for hearing and that this matter deserved a special third Court allocation, it ought to be removed from the normal opposed motion roll. The learned Neukircher J informed the parties in writing on 13 January 2023 of her decision to remove the matter from the roll. Efforts

were made to have the matter feature in the third Court motion roll. The parties met with the Deputy Judge President of this Division to sort out the logistical arrangements to have this matter heard on 28-29 August 2024 in the third Court.

[7] In the meanwhile, the period of two years allocated to the second request awarded to Cyber expired on 31 March 2023. Despite this event, litigation continued unabated. At a much later date, Dynamic informed the respondents that the review application has since become moot because it was overtaken by the events- expiry of the two years period. Owing to this stance, all the parties agreed that only the issue of costs associated to the review application was a live issue and required determination by this Court. Prior to the hearing of the matter, as the allocated judge, I raised certain issues and directed the parties to attend to them and or prepare submissions on them.

Analysis

[8] Thematically, the present motion agitates the question whether the *Biowatch* insulation on mulcting with or awarding of costs does vacate during a litigation process, and if so, when? This motion presents a unique situation where an applicant, as a *dominis litis,* without necessarily terminating the *lis,* informed the respondents that the relief it sought has since lost its practical benefit to it, and in a manner of speaking, the motion has since become moot. A matter becomes moot if it no longer presents a live dispute between the parties.[2]

[9] Courts exist in order to resolve concrete disputes between litigants. A Court, unless the interests of justice dictate otherwise, generally dismisses matters which no longer present a live dispute and decidedly shy away from disseminating legal advice on academic matters.

[10] In *Koko v Eskom Holdings SOC Limited,*[3] the following was said:-

> "[21] The doctrine of mootness is well developed in the American constitutional jurisprudence. A case becomes moot if a party seeks to obtain judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some

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[2] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 21 fn 18.

[3] [2018] ZALCJHB 76.

matter which when rendered, for any reason, cannot have practical effect upon an existing controversy. Courts exist to resolve an existing controversy and not abstract issues.

[22] The mere fact that the matter is moot does not constitute an absolute bar for a court to hear a matter. The overriding factor is that the order will have some practical effect on the parties and others. The Constitutional Court had set out the following as potentially relevant factors; the nature and the extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; the fullness or otherwise of the argument advanced and resolving disputes between different courts. Added to the factors is the interest of justice." (Footnotes omitted)

[11] Before the present review application became moot, the applicant was principally seeking to review and set aside two separate, but distinct administrative decisions taken by an organ of the State, SITA. As outlined above, the first decision related to the cancellation of a bidding process for the acquisition of the services of providing and maintaining the McAfee licence for a period of three years. The second decision related to the awarding of a tender to Cyber for the provision of the same services in the cancelled bid for a period of two years, much to the chagrin of the applicant.

[12] When the applicant launched the review proceedings, the awarded tender had already run for a period of six months and Cyber had already been remunerated in some respects. However, since the award was for a period of two years, there was some eighteen months period left on the awarded contract. This, it seems, somewhat gave the applicant a hope that this matter shall be dealt with before the lapse of that remaining period.

When did the application for review become moot?

[13] This question, although it assumed some significance for the parties during the argument of this matter, in my view, recedes into the background regard being had to the primary question outlined earlier. I say so for reasons that will become apparent in due course. If the Court was, as it were, compelled to answer this question so elevated to some prominence by the parties before it, it would answer it in favour of the applicant as the *dominis litis*. For the sake of posterity, the contention of the applicant is that the

application acquired mootness in March 2023 -at the end of the two-year period of the award.

[14] The contention of SITA was somewhat ambivalent. Mr Manchu SC, appearing for SITA, submitted that when the applicant gained knowledge of the payment made to Cyber, the review application became moot. However, in consonant with the applicant, he conceded that the application was indeed mooted in March 2023. The contention of Cyber also vacillated between various positions. On the one hand, it contended that the application was mooted from the get go, whilst on the other hand, it pointed out to various dates in 2022. The above contentions notwithstanding, mootness is not equivalent to the decay of a claim. In the context of prescription, once a matter prescribes, it gains the status of being unenforceable in law. On the contrary, a moot matter does not automatically gain the status of unenforceability in law.

[15] A Court, unlike in a prescribed matter, retains a discretion to, if the dictates of justice so commands, entertain a moot matter. To my mind, it cannot be correct to conclude that mootness ousts the jurisdiction of a Court. Dogmatically, a Court can only dismiss a matter in instances where it retains jurisdiction over a matter. Just to buttress this point, section 16(2) of the Superior Courts Act[4] accords a Court hearing an appeal a discretionary power by reasons of mootness to dismiss an appeal. Nonetheless, none of the two respondents asserted that the matter was moot at any point. The mootness point was sprung as a surprise package by the applicant itself. Stealing from the sports parlance, the applicant issued to itself a red card.

[16] Accordingly, the question of when the review application become moot has no significance when the primary question which this matter agitates is to be answered. Similarly, the allied question of who caused the application to be moot lacks the driving force. A matter becomes moot because its practicality and benefit, in a manner of speaking, gets overtaken by events. In the present matter, had it been heard and decided on 23 January 2023, it would not have been overtaken by the event-the expiry of the awarded contract. It is common cause that this Court, per the learned Madam Justice Neukircher, removed the matter from the opposed motion roll for reasons

[4] Act 10 of 2013 as amended.

spelled out in an email directed to the parties ten days before the allocated date of hearing.

[17] It is unnecessary in this judgment to interrogate and deliver any comment on the validity or otherwise of the reasons for the removal of the matter. This Court was reliably informed by all the parties that the review application was ripe for hearing on 23 January 2023. Nevertheless, the applicant, with full knowledge of the looming mootness of the review application, did not persist that the review application be heard ahead of the looming mootness, nor took prudent steps to prevent the identified mootness event from setting in.

[18] This Court pointed out to counsel for Dynamic that it is difficult to fathom how a blame may be approbated to anyone for the happening of a mootness event. It must be so that it was within the knowledge of Dynamic that the awarded contract is to expire within a period of two years. By way of an example, it is unheard of for a party to contend that another party has caused the prescription of a matter to happen. In order to prevent prescription, a party to be hit by prescription is required to take steps to interrupt the running of prescription. If hit by prescription, it is difficult to accept that a party may escape the legal consequences of prescription simply because some party is to blame for the happening of prescription. In similar vein, a party staring mootness in the face has a duty to take prudent and necessary steps to prevent the mootness from setting in.

[19] Having said all that, I now turn to the veritable question pertinent to the primary question outlined earlier.

Does a matter loose, at any stage of the litigation, the shield of the Biowatch principle and if so when?

[20] The melancholic reality is that the *Biowatch* insulation is often times abused by litigants. The Constitutional Court issued the following stern warning:

> "[25] Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in *Affordable Medicines*. The issues must be

genuine and substantive, and truly raise constitutional considerations relevant to the adjudication."[5]

[21] The key and central question on the application of what popularly assumed the tag 'the *Biowatch* principle', is whether a litigant asserts a constitutional right or not. Differently put, is the litigant presenting a constitutional matter or not? I must confess, regard being had to the provision of section 2[6] of the Constitution, deciding whether a legal matter is a constitutional matter or not is but a difficult pony to ride. This section is cast in a manner that would, in my view, bring almost every conceivable legal dispute within the realm of a constitutional matter.

[22] Nevertheless, in the present motion, Dynamic effectively alleged a breach of section 217 of the Constitution. By that reason, the review application asserted a constitutional right. In fact, all the parties are congruent to each other that the review application set off as a constitutional matter. The respondents, in consonant to each other, submitted that at a point, the review application lost its constitutional nature, and it was thereby spewed out of the *Biowatch* insulation.

[23] At no stage is it apparent or pleaded that Dynamic changed its pleadings from asserting a constitutional right to a non-constitutional right. This position puts paid to any assertion that the applicant acted like a chameleon and changed colour of its asserted claim. Up until the applicant red carded itself, the application was endowed with the armour of the *Biowatch* insulation because it asserted a breach of a constitutional right. To my mind, although the applicant correctly conceded that after 31 March 2023, it became liable for the costs of litigation, such liability arose not because the litigation changed texture and colour but because the applicant was reckless, as it were, in not terminating the *lis* after it acquired a mootness status which rendered it susceptible to being dismissed. Nevertheless, even if, as it appears to be the case, after the review application achieved mootness, in persisting with a costs claim only, Dynamic would no longer be asserting a constitutional right. Once mootness sets in, the honeymoon is over. In that success costs pursuit exercise, no constitutional right is capable of being asserted. It is for that reason that this Court

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[5] *Biowatch* above n 1.

[6] This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

takes a view that Dynamic is liable to pay the costs after the mootness set in. The veil would have fallen off the face.

[24] The Constitutional Court in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others (Normandien)*[7] stated the following:

> "[69] I consider it to be highly inappropriate for Normandien to leave litigation pending before this Court with the knowledge that the case is moot on the facts.
>
> [71] It is clear that Normandien's actions were merely a disguised attempt to recover costs.
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> [72] The effect of these factors is that Rhino by Normandien's dilatory conduct has been forced to pursue this litigation before this Court even though Normandien recognised that the case was moot. Normandien's conduct is reprehensible and an abuse of process which warrants a punitive costs order."

[25] One of the conduct that was found to be reprehensible by the Constitutional Court was the refusal by Normandien to withdraw the action that was moot, simply because an offer to pay its costs was not made. Similarly, in this matter, despite contending that the matter was moot, Dynamic persisted to pursue this matter on the issue of costs. Dynamic ought to have terminated the present litigation shortly after 31 March 2023, when, on its own version, at that time, the review application was moot. Persisting with the review application in order to obtain a favourable costs order was equally reprehensible and an abuse of process. As it was the case in *Normandien*, a punitive costs order is warranted for that conduct.

[26] Thus, to my mind, the review application did not at any stage lose the *Biowatch* insulation to the extent that it still asserted a constitutional right. It remained the pleaded case of Dynamic that in making and cancelling the awards, SITA did not act fairly, equitably and transparently as enjoined by section 217(1) of the Constitution. When the review application became moot, it simply assumed the risk of being dismissed by virtue of it being moot. It was never dismissed. It simply remained the candidate of being dismissed should it find itself in a Court of law. However, the prudent thing to have been done was for Dynamic to have terminated the litigation related to

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[7] 2020 (6) BCLR 748 (CC).

the review application as soon as it dawned on it that the application had acquired mootness status. The next question I turn to is whether the *Biowatch* principle applies in instances where the applicant red carded itself.

Does Biowatch principle apply in this particular instance?

[27] Just to recap, the principle developed in *Affordable Medicines*[8] and perfected in *Biowatch* is that in a constitutional matter, a litigant against the State or its organ is entitled to costs if successful in the litigation. If no success is achieved, the litigant is not liable to be mulcted with costs owing to the chilling effect of such orders. The exception to that general principle is that frivolity and vexatiousness denudes the litigant of the insulation. The opaqueness in the present matter emerges because the applicant wittingly, as it were, in my view, red carded itself. Although it did not terminate the litigation formally, technically, it did so because it did not persist with the review relief. The question of awarding costs always comes at the tail end of any litigation. What precedes the possible award of costs is a finding of either success or failure with regard to the relief a party seeks.

[28] Unfortunately, this Court did not receive the pleasure of expressing a view whether the application should have failed or succeeded. Ordinarily, in terms of Rule 41(1)(a) of the Uniform Rules of Court, where a party withdraws a matter such a party must consent to pay the costs associated with the aborted litigation. Despite having red carded itself, the applicant chose not to invoke this rule. Nevertheless, the applicant had available to it the option not to tender costs for any reason it chooses to employ, including that it is protected by *Biowatch*. However, Rule 41(1)(c) allows the other party to apply to Court on notice for an order as to costs. Since neither success nor failure was achieved in the present application, it is unwise and actually inappropriate for this Court to make any speculation on the issue of success or failure. Were this Court to do so, it would, contrary to the doctrine of mootness, be giving the parties legal advice as opposed to resolving a concrete dispute, it being the role of a Court.

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[8] *Affordable Medicines Trust and Others v Minister of Health and Another* 2005 (6) BCLR 529 (CC).

[29] As section 16(2)(a)(i)[9] of the Superior Courts Act provides that mootness leads to a dismissal of a matter, generally, a Court should not entertain a matter that has become moot. This Court agrees with Mr Manchu SC for SITA, who ably argued that an applicant faced with mootness cannot proceed with the issue of costs only unless exceptional circumstances are demonstrated.[10] Idiomatically speaking, the baby gets thrown out with the bathwater. Once the matter loses its practical benefit, so does a party lose the opportunity to seek a costs relief? In *Khumalo and Another v Twin City Developers (Pty) Ltd and Others,*[11] the majority Court had the following to say:

> "[58] In *Mgwenya NO & others v Kruger & another*, the first respondent, an ordained pastor of the Apostolic Faith Mission Church of South Africa, whose pastoral status was terminated by the Church passed away before the hearing of the appeal. In view of the demise of the first respondent, the appellants conceded that there was no live issues remaining between the parties and that the appeal and any order made thereon would have no practical effect or result. The appellants however contended that the church would be saddled with costs orders made in favour of first respondent and this would be most 'unfair' to the church.
>
> [62] For all those reasons there are no exceptional circumstances justifying this court to have regard only to the consideration of costs. The appeal must therefore fail."

[30] On that approach, it becomes unnecessary for the Court to hold a crystal ball in order to see whether the review will have achieved some success to be awarded costs on application of the *Biowatch* principle.

[31] On the contrary, on application of the usual consequences of mootness, a matter is dismissible as opposed to being capable of achieving some success. Accordingly, on application of the *Biowatch* principle, having not achieved success, Dynamic should not be mulcted with costs. Having not assessed the merits or demerits of the review application, this Court is not in a position to conclude that the application was frivolous and vexatious. None of the respondents suggested that the review

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[9] When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

[10] Section 16(2)(a)(ii) provides that save under exceptional circumstances, the question whether the decision have no practical effect or result is to be determined without reference to any consideration of costs.

[11] [2017] ZASCA 143.

application was frivolous and vexatious. In law, a claim is vexatious if it has little to no chance of succeeding in law and it is instituted only to annoy another party.[12]

[32] A claim is frivolous if it is one that has no serious purpose or value. It is clear that mootness has nothing to do with the merits or demerits of a claim. Like in a prescription situation, even a good claim in-law is capable of being incapacitated by prescription if it sets in. Thus, the conclusion to reach is that the *Biowatch* principle finds application in so far as the failure or dismissal part is concerned. Due to the claim being overtaken by events, Dynamic was *en route* to having the review application dismissed on the ground of mootness. It matters not, in my view, the basis of the dismissal of the claim, as confirmed in *Biowatch*, a Court must be loath to turn its back against applying the general principle in *Affordable Medicines*.

Conclusions

[33] In summary, Dynamic is liable to pay the costs associated with the review application after 31 March 2023. With regard to the costs prior thereto, on application of the *Biowatch* principle, Dynamic is not liable to pay costs. On that score, the appropriate order to make is one of each party paying its own costs.

Order

1 The applicant is to pay the litigation costs occasioned after 31 March 2023 and those costs must be taxed or settled on a scale of attorney and client which costs must include the costs of employing two counsel.

2 With regard to the costs associated with the litigation prior to 31 March 2023, each party must bear its own costs.

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[12] *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1339E-F.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Mr Johan De Waal SC
Instructed by:	Bowman Gilfillan Inc, Cape Town
For 1st Respondent:	Mr T Manchu SC and Ms Z Ngwenya
Instructed by:	Madhlopa & Thenga Inc Parktown
For the 2nd Respondent:	Mr DB Du Preez SC and Mr J Vorster
Date of the hearing:	28 August 2024
Date of judgment:	06 September 2024

6/9/24

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 51825/2021

BEFORE THE HONOURABLE JUSTICE: MOSHOANA J

On this 28th day of August 2024 (Open Court GB)

In the matter between:

DYNAMIC RECOVERY SERVICES (PTY) LTD Applicant

and

STATE INFORMATION TECHNOLOGY AGENCY SOC LIMITED First Respondent

CYBERLINX SECURITY (PTY) LTD Second Respondent

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her Secretary. The date of this Order is deemed to be 28 August 2024.

COURT ORDER

HAVING heard Counsel and considered the matter, by agreement between the parties, the following order is made:

IT IS ORDERED THAT:

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1. It is recorded that the second respondent's de *bonis propriis* application has been resolved, it will not be proceeded with, and it is removed from the roll;

2. Each party to pay its own cost in the *de bonis propriis application.*