The personal liability of public officials for constitutional litigation costs

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DEDICATION

This dissertation is dedicated to the South African Parliament and the Constitutional Court to help preserve the fiscus and to vindicate the Constitution.

KEYWORDS

Public Protector, costs *de bonis propriis*, frivolous litigation, and constitutional litigation.

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LIST OF ACCRONYMS AND ABBREVIATIONS

ABSA	Amalgamated Banks of South Africa
AJPA	Australian Journal of Public Administration
CCR	Constitutional Court Review
CLJ	Cambridge Law Journal
ELJ	European Law Journal
Geo LJ	Georgetown Law Journal
Griffith Law Rev.	Griffith Law Review
Harv.L.Rev.	Harvard Law Review
Hong Kong LawJ	Hong Kong Law Journal
Insur. Couns.J	Insurance Counsel Journal
IRAS	International Reviews of Administrative Science
JEL	Journal of Environmental Law
MLR	Mizan Law Report
PAJA	Public Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
PER	Potchefstroomse Elecktroniese Regsblad
SAAJ	South African Attorney's Journal
SALJ	South African Law Journal
SALJELP	South African Law Journal of Environmental Law and Policy

SAMJ	South African Medical Journal
SCR	Supreme Court Review
SSA	State Security Agency
SUI	Special Investigating Unit

ABSTRACT

The central theme in this dissertation is a discussion on the imposition of personal costs orders on public officials in constitutional litigation. The issue of costs in litigation involving state functionaries (public officials) has been an issue of long topical standing. Over the years there has been emerging judicial trends where public officials have been embroiled in litigation on behalf of the state and have been ordered by the courts to pick up the litigation costs. The norm has always been where a public official is involved in litigation, in representative capacity, the State picks up the legal costs. Over the years this has been changing. The courts have recently begun to hold public officials responsible for their negligent, reckless and incompetent acts. The judicial wheel has been turning slowly and changing. Despite this welcome change, the courts have not yet provided clear precedence to justify these developments.

This dissertation therefore investigates the foundation of what constitutional litigation entails, more specifically the issue of costs. Case law where public officials have been found personally liable for litigation costs lack uniformity. The courts use the already developed principles such as negligence, bad faith, *ultra vires* amongst other principles to impose personal liabilities but there is a lack of uniform guidelines to help courts in conclusively holding that the principles were fully complied with to warrant such imposition.

This study contains a step by step discussion of the principles at play in imposing personal costs liability on public officials. It discusses cases where these principles have been used to weigh in on the loopholes that need to be attended to in order to conclusively develop the issue of personal costs on public officials in constitutional litigation. Hence after a detailed discussion the final chapter proposes guidelines that may be considered and adopted by the courts to justify personal costs orders.

In coming up with guidelines this study is intended to contribute to the vindication of the Constitution, to alleviate unwarranted demands on the fiscus, to promote just administrative action and to contribute to the efforts to bring errant public officials to

book. The Constitution provides for just administrative action, accountability and responsiveness of state functionaries and this study is designed at promoting just that.

Chapter 1

Introduction

1.1 Title

The personal liability of public officials for constitutional litigation costs.

1.2 Research question

What is the basis for the imposition of personal liability on public officials for legal costs awarded against the state in constitutional litigation against the government?

1.3 Problem Statement

1.3.1 Background to study

The *Constitution of the Republic of South Africa*, 1996 (the *Constitution*),[1] is built on a foundation of constitutionalism. It enshrines constitutional supremacy, the rule of law and the protection of fundamental rights and freedoms.[2] Its founding provisions envision a government that is accountable, responsive and open to the people.[3] Public officials must exercise authority within the framework of a democratic state founded on human dignity, equality, and freedom.[4] Public officials and institutions, inclusive of Parliament and the Cabinet, are required to provide just administrative action.[5] Any person adversely affected by government conduct is entitled to the protection of the courts.[6] The courts exercise inherent jurisdiction and may make any order that is just, equitable and appropriate to remedy a constitutional violation.[7]

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1 Constitution of the Republic of South Africa, 1996.
2 Section 1 of the Constitution of the Republic of South Africa, 1996.
3 Section 1*(d)* of the Constitution of the Republic of South Africa, 1996.
4 *United Democratic Alliance v Speaker of the National Assembly* 2017 5 SA 300 (CC). See also the preamble and s 1 of the Constitution of the Republic of South Africa, 1996.
5 Section 33 of the Constitution of the Republic of South Africa, 1996.
6 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (A) para 14.
7 Sections 172 and 173 of the Constitution of the Republic of South Africa, 1996.

Judicial review of the executive and legislative action is topical in constitutional discourse in South Africa.[8] When the government fails to perform its functions constitutionally and when all processes to obtain redress have failed, the courts can step in to provide direction and protect the rights of citizens.[9] The supremacy clause[10] provides the courts with the springboard from which to review and set aside government conduct that fails to pass constitutional muster.[11] However, it is often said that the wheels of justice turn slowly. This is compounded by the fact that litigation is expensive and time-consuming. There have been circumstances where public officials persisted in pointless litigation. In several cases, the courts have found public officials personally responsible for needless and wasteful litigation.[12] This negatively affects taxpayers. When public officials engage in litigation, they do not do so in their personal capacities. They do so in the capacity of agents or organs of the state.[13] The general rule is that the state must bear the costs of constitutional litigation, whether it wins or loses a case.[14] At times the costs are punitive and tend to drain the public budget.[15]

A new trend is developing in the courts to protect the public purse against abuse by public officials who engage in needless and wasteful litigation. The courts have begun to impose personal liability on public officials who engage in unnecessary and wasteful litigation. Former President Jacob Zuma[16] and the Public Protector, Busisiwe Mkhwebane,[17] have been ordered by the courts in different cases to personally pay

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8 Davis 2016 *SALJ* 133.

9 *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (CC) para14.

10 Section 2 of the Constitution of the Republic of South Africa, 1996.

11 *Speaker of the National Assembly v De Lille* 1998 3 SA 430 (CC) para 14.

12 See, for example, *Absa Bank v Robb* 2013 3 SA 619 (GSJ); *President of the Republic of South Africa v Office of the Public Protector* 2018 2 SA 100 (GP).

13 This is apparent from all court decisions in which the government has been engaged in litigation. It is also apparent because the public officials are not cited in their personal capacities, but in their official capacities. See, for instance, *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) in which the Minister was cited in his official capacity.

14 See *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) and *Thint Holdings (Southern Afrca) (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 1 (CC); *Zuma v National Director of Public Prosecutions* 2009 1 SA 141 (CC) for a comprehensive analysis of costs in constitutional litigation.

15 See *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) for an analysis of considerations to be taken by the court in awarding punitive costs against the state.

16 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP).

17 *South African Reserve Bank v Public Protector* 2017 6 SA 198 (GP).

costs incurred by the state in constitutional litigation.[18] The courts have found them to have acted with a recklessness that borders on malice and abuse of the courts by knowingly acting unconstitutionally or by defending the indefensible.

However, there are no specific guidelines for the imposition of personal liability on public officials for costs awarded against the government in constitutional litigation. This study examines the theoretical basis and the constitutional framework for the imposition of personal liability on public officials for costs awarded against the state in constitutional litigation. The study is limited to costs incurred by private persons in constitutional litigation against the state bearing in mind the exorbitant legal fees.

1.3.2 Literature Review

The *Constitution* has set guidelines for the exercise of public power by public officials. It sets the limits for government authority and prescribes how public powers must be exercised.[19] Essential to the exercise of public power are the principles of legality, reasonableness, rationality, and justification.[20] Where public administration is involved the government must be governed by the democratic values and principles enshrined in the *Constitution* which are based on impartiality, fairness, and accountability.[21] Laxity and reckless disregard for constitutional provisions and legislation have caused fruitless litigation. In most cases, the cost of unnecessary litigation has run into millions of Rands.[22] Public officials do not suffer any harm from adverse costs orders as the state picks up the legal bill. This is a concern because the public purse is subjected to hefty costs when litigation could have been avoided if the public officials did their work diligently and constitutionally.[23]

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18 In *Black Sash Trust v Minister of Social Development* 2017 9 BCLR 1089 (CC), the Court ordered the then Minister of Social Development, Bathabile Dlamini, to show cause why she should not be personally held liable for the legal costs.

19 Plasket 2000 *SALJ* 151.

20 Mureinik 1994 *SAJHR* 32.

21 Section 195 of the Constitution of the Republic of South Africa, 1996.

22 For instance, former President Zuma's legal costs paid by the state are said to be in excess of R15 million - Staff Reporter 2018 https://mg.co.za/article/2018-04-19.

23 *Lushaba v MEC for Health, Gauteng* 2015 3 SA 616 (GJ) para 71.

Plasket[24] argues that, given the exorbitant cost of litigation, the prospect of costs orders against public officials in their personal capacity would serve as a potent inducement to administrative officials to perform their functions honestly and properly. This promotes efficient administration envisaged in section 195(1) of the *Constitution*. Gradidge[25] is of the view that the formalities for the imposition of personal liability on public officials in litigation as an appropriate relief are clearly laid out in the *Constitution*. This is despite the fact that there is no express constitutional provision to this effect. In *Black Sash Trust v Minister of Social Development*,[26] the court examined the law relating to personal liability of public officials for legal costs. It utilised the constitutional values for accountability and responsiveness in the *Constitution* and ordered the Minister to show cause why she should not be personally held liable for the costs. The Constitutional Court ruled that she had to pay 20% of the courts' costs in her capacity and further found that because she had misled it to protect herself. Herselman[27] submits that in *Lushaba v MEC of Health, Gauteng*,[28] the Court could not uphold the costs order against the public officials because they had not been joined to the litigation in their personal capacities. It is implicit in this judgment that before a court can impose personal liability on public officials for litigation costs, it must give a fair opportunity to defend themselves. This was done in *Black Sash Trust v Minister of Social Development.*[29]

In *Gauteng Gambling Board v MEC for Economic Development*,[30] the court observed that the

> …time has come for courts to seriously consider holding officials who behave in a high-handed manner…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.[31]

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24 Plasket 2000 *SALJ* 151.
25 Gradige 2017 http://www.mondaq.com.
26 *Black Sash Trust v Minister of Social Development* 2017 9 BCLR 1089 (CC).
27 Herselman 2017 http://www.dailymaverick.co.za.
28 *Lushaba v MEC for Health, Gauteng* 2015 3 SA 616 (GJ).
29 *Black Sash Trust v Minister of Social Development* 2017 9 BCLR 1089 (CC).
30 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA).
31 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA) para 54.

However, the court did not impose personal liability on the implicated public officials because the order was not prayed for. It is submitted that the court should have used its inherent jurisdiction to impose personal liability. It should have done so because

> ...the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person but impedes the fuller realization of our constitutional promise.[32]

As such, a failure by public officials to respect the *Constitution* undermines the *Constitution* as a whole. Since the *Constitution* is the supreme law of the Republic and it outlines the duties and responsibilities of public officials and how they should exercise those powers,[33] therefore, no part of South African law can be allowed to remain outside the Constitution's tent or beyond the Constitution's gaze.[34]

McQuiod-Mason submits that if personal accountability for public officials does not come naturally, it must be inculcated.[35] This is necessary to curb all propensity by public officials to act contrary to the spirit and provisions of the *Constitution*. This proposition finds support in Schuck who argues that:

> Any legal justice system aspires to remedy every significant wrong; those injured by officials violating established legal standards should be made whole. Officials obliged to pay for their transgressions and errors will be more law-abiding, advertent, and respectful for the citizenry. But the scale has another balance, for other social interests and values are at stake than those of holding officials accountable to the law, of remedying and compensating injury, and of deterring governmental wrongdoing, fundamental as those purposes are.[36]

Pillard[37] argues that to grant injunctive relief against state officials (which in the context of this study comes in the form of imposition of personal legal costs) is anchored on the proposition that officials who act unconstitutionally have exceeded their valid

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32 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 95.
33 See *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) paras 1-4.
34 Woolman *Constitutional Conversations* 46.
35 McQuoid-Mason 2016 *SAMJ* 106.
36 Shuck 1980 *SCR* 281.
37 Plillard 1999 *Geo LJ* 65-104.

authority and are therefore answerable in their capacity as private citizens, not as state agents.

1.3.3 Scope and limitations of the study

The study analyses the theoretical basis and the constitutional framework for the imposition of personal liability on public officials for costs awarded against the state in constitutional litigation. To this end, the study only focuses on the need to ensure that public officials are held liable for expensive litigation emanating from their negligent, reckless or malicious exercise of the powers bestowed upon them by the *Constitution* on behalf of the people. The study examines the costs of parties who have taken public officials, in their official capacities as state representatives, to court and have obtained adverse legal costs. It further examines costs incurred by public officials who bring reckless applications, unwarranted appeals, and in general, unnecessary litigation to the mercy of the court in their capacity as state agents. This study, however, will not examine the accountability of public officials for legal costs incurred in their own private capacity as joined parties to institute or defend fruitless constitutional litigation.

1.3.4 Rationale and justification

The prevalence of ineffectiveness and unresponsiveness in the public service undermines the ideals for accountable government envisaged in sections 1*(d)* and 195 of the *Constitution*. Public officials who are not held accountable for constitutional violations do so because they are not personally held accountable for wrongful acts. The people are negatively affected by fruitless litigation. This study contributes knowledge on how the judiciary, through the imposition of personal costs against public officials, may deter public officials from engaging in negligent, reckless or malicious litigation. The contribution is important because, at present, there are no clear-cut guidelines for the imposition of personal liability on public officials for instituting and defending unnecessary constitutional litigation. This study attempts to reduce uncertainties in this area of law.

1.4 Assumptions and hypotheses

1.4.1 Assumptions

a) Fruitless constitutional litigation diverts scarce public resources which may be used for more productive expenditure.

b) The institution and defence of fruitless litigation by the state must be curbed to protect the fiscus.

c) Public officials who involve the state in fruitless constitutional litigation exceed the boundaries of their lawful authority.

d) Fruitless constitutional litigation breaches the constitutional duty placed on government officials by section 195 of the *Constitution*.

1.4.2 Hypotheses

a) The imposition of personal costs liability on public officials for wasteful litigation is constitutionally justifiable.

b) The constitutional demand for accountable government requires public officials to justify the institution and defence of constitutional litigation by the state.

c) Uniform guidelines on the imposition of personal liability on public officials for fruitless constitutional litigation should be given.

1.5 Aims and objectives

1.5.1 Aims

This study examines the constitutional feasibility of the imposition of personal liability on public officials for fruitless constitutional litigation and to formulate constitutionally justified guidelines for the imposition of such costs.

1.5.2 Objectives

The objectives of the study are to:

a) Clarify the legal position regarding the personal liability of public officials for constitutional litigation costs.

b) Demonstrate that the demand for accountable government envisaged in sections 1*(d)* and 195 of the constitution requires public officials to justify the institution and defence of litigation by the state.

c) Contribute to the formulation of uniform guidelines for the imposition of personal liability on public officials for constitutional litigation costs to bring certainty.

1.6 Research Methodology

The study is carried out through a doctrinal review of primary and secondary sources. The primary sources are the *Constitution*, legislation and case law. Secondary sources comprise of literature such as books, journals and credible news reports.

1.7 Relevance to Research Unit theme

The clarification of the legal position regarding the personal liability of public officials for constitutional litigation costs will contribute to the fight against constitutional decay in South African governance. It will eliminate uncertainties and assist in the formulation of uniform criteria to be used by the courts in imposing personal liability on officials who undertake their responsibilities in negligent, reckless or malicious ways. The study adds to the development of knowledge and solutions to legal issues affecting South Africa. The study is relevant in that it advances solutions to this area of public law.

1.8 Statement regarding research ethics

The study is carried out in compliance with South African and international copyright laws regarding intellectual property. This requires, in part, the avoidance of plagiarism and the express acknowledgment of all sources used. The research ethics of the North-West University is adhered to in full. A sworn statement is hereby provided, stating that the study is the product of the candidate and that no intellectual property or ethical guidelines have been infringed.

Chapter 2

Overview of the law relating to costs orders in constitutional litigation

2.1 Introduction

Our legal system is based on the principle of constitutional supremacy. This legal system provides that the *Constitution* (hereafter referred to as the Constitution) is the supreme law[1] and any other law must comply with and promote its values. Accordingly, the *Constitution* places a duty on the judiciary to declare invalid or develop any law that is inconsistent with the *Constitution*.[2] Section 167 of the *Constitution* sets out the jurisdiction of the Constitutional Court and stipulates that the Constitutional Court is the highest court in constitutional matters.[3] It makes the final decision on whether a matter is within its jurisdiction or not.[4]

The *Constitution* has profoundly changed the structure of the courts in South Africa in a profound way. Hopkins and Franca are of the view that under the interim *Constitution of the Republic of South Africa 1993* the Constitutional Court had a monopoly on constitutional matters.[5] However contrary to Hopkins and Franca's view, section 101(3) of the 1993 *Constitution* also gave the High Court concurrent powers together with the Constitutional Court to hear constitutional matters, provided the parties to the adjudication agreed on its jurisdiction. It further shows that only the Appellate Division had no powers to hear any matter which the Constitutional Court had jurisdiction on.[6]

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1 Section 2 of the *Constitution of the Republic of South Africa,* 1996.
2 Hopkins and Franca 2004 De Rebus: South African Attorney's Journal.
3 Section 167(1)*(a)* of the *Constitution of the Republic of South Africa,* 1996.
4 Section 167(3)*(c)* of the *Constitution of the Republic of South Africa,* 1996.
5 Hopkins and Franca 2004 De Rebus: South African Attorney's Journal.
6 Section 101(3): 'Subject to this Constitution, a provincial or local division of the Supreme Court shall, within its area of jurisdiction, have jurisdiction in respect of the following additional matters, namely-
(a) alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
(b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;

The *Constitution Seventeenth Amendment Act 2012* brought about changes to the jurisdiction of the Constitutional Court. It added a provision that says the Constitutional Court is now the highest court in all constitutional matters of the Republic[7] and has jurisdiction to decide constitutional matters and any other matter[8] provided it grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that court.[9]

Hopkins and Franca held the view that the Constitutional Court is a specialised Court and has jurisdiction to decide only constitutional matters and issues that relate to decisions on constitutional matters. However, this has changed and the Supreme Court now has jurisdiction to adjudicate and/or preside over constitutional matters. Where the Constitutional Court or any other court with the jurisdiction to hear a constitutional matter adjudicates over a constitutional matter or issue, what arises is constitutional litigation. Constitutional litigation differs from ordinary civil litigation in a number of ways. It primarily deals with constitutional matters, which often involve the human rights of vulnerable sections of society, as well as safeguarding the rule of law and not just the discrete claims of litigants.[10]

One of the most vital principles of our law is that where there is a right to be upheld, there is a remedy. This means that the existence of a legal rule implies the existence of an authority given the power to grant a remedy if that rule is infringed.[11] The *Constitution* thus provides that a court hearing a case involving an alleged infringement

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(c) any inquiry into the constitutionality of any law applicable within its area of jurisdiction, other than an Act of Parliament, irrespective of whether such a law was passed or made before or after the commencement of this Constitution;
(d) any dispute of a constitutional nature between local governments or between a local and a provincial government;
(e) any dispute over the constitutionality of a Bill before a provincial legislature…'
(4) For purpose of exercising its jurisdiction under subsection (3), a provincial or local division of the Supreme Court shall have the powers of the Constitutional Court… relating to the interpretation, protection and enforcement of this Constitution.
(5) The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.

7 Section 167(3)*(a)* of the *Constitution of the Republic of South Africa*, 1996.
8 Section 167(3)*(b)*(i) of the *Constitution of the Republic of South Africa*, 1996.
9 Section 167(3)*(b)*(ii) of the *Constitution of the Republic of South Africa*, 1996.
10 Du Plessis, Penfold and Brickhill *Constitutional Litigation*.
11 Currie and de Waal *The Bill of Rights Handbook* 23.

of or a threat to a right in the Bill of Rights has the power to grant that remedy. Matters that have to do with the infringement of a right or a threat to the Bill of Rights fall under the jurisdiction of the Constitutional Court and other courts. However, before a matter can be heard in the Constitutional Court, the court must establish whether it has inherent jurisdiction in the matter. The 2012 constitutional amendment, which came into effect in 2013, increased the jurisdiction of the Constitutional Court to hear and decide on any matter which raises an arguable point of law which, in the view of the Constitutional Court, ought to be heard by that court. It appears, therefore, that the Constitutional Court can find a matter to be beyond its jurisdiction if, in its discretion, such matter does not raise an arguable point of law.[12] This wording is open to criticism for clumsiness. The Constitutional Court also seems to exclude its own jurisdiction when the only issue in a case is factual. In *Nekokwane v RAF*[13] the court dismissed the application brought before it mainly because such application was of a factual nature. Where the substance of the contest between parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does. Therefore, it held that it does not have jurisdiction to determine appeals of fact only. Although this is true in *Jacobs v S*[14] the minority court held that it is a well-established principle that if a constitutional issue is raised, the Constitutional Court will grant leave to appeal if it is in the interest of justice to do.

Where the Constitutional Court establishes its jurisdiction over a matter, it should hear the matter and grant a remedy. The *Constitution* says that the courts should do so by granting appropriate relief in each constitutional matter that seeks a remedy.[15] The *Constitution* gives courts the power to determine the validity of any action or any

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12 See for instance *Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited* 2019 5 BCLR 533 (CC).

13 *Nekokwane v RAF* 2019 6 BCLR 745 (CC) paras 3 and 7. See also *Conradie v S* 2018 7 BCLR 757para 12:' In essence the applicant is seeking an appeal on the facts, clothed in the garb of an infringement of his trial rights. The facts of the sexual assaults were largely common cause. The applicant's defence that the complainant consented to the sexual acts was rejected in the Regional Court and the rejection confirmed on appeal. In both instances extensive reasons were given for the finding in the judgments, including the overwhelming improbability of consensual sex in the circumstances. In these circumstances it is not in the interest of justice to gran leave to appeal. No fair trial rights have been infringed.'

14 *Jacobs v S 2019 BCLR 562 (CC)* paras 56-59.

15 Section 38 of the *Constitution of the Republic of South Africa*, 1996.

matter that is before it and to give an order that is just and equitable.[16] When the court grants a remedy it should be in the interest of justice[17] and must be the most appropriate relief given the circumstances. The court in *Fose v Minister of Safety and Security*[18] defined appropriate relief as an order that is specifically fitting or suitable. The court went further to elaborate on the test, or the measure used to define the term suitability. Kriegler J held that suitability is measured by the extent to which a particular form of relief vindicates the *Constitution*. This relief must act as a deterrent against further violations of rights provided for in the *Constitution*.[19] Therefore when deciding a constitutional matter, the court must declare any law or conduct that is inconsistent with the *Constitution* invalid. The court may then make an order that is just and equitable, given the circumstances.[20]

As a general principle, a court deciding a constitutional matter within its jurisdiction may grant an order that is just and equitable. Such a court must have due regard for all the circumstances of the case before it.[21] This principle also determines how the courts handle the issue of costs in constitutional litigation. The issue of costs in constitutional litigation is as important as any other issue with which litigation is concerned, if not more. Of note is that it is not in the interests of constitutional justice for persons to be deterred from litigating in an attempt to enforce and protect their fundamental rights resulting from the fear of adverse costs orders against them.[22]

The general rule on costs awards in constitutional litigation is not to award costs against unsuccessful litigants when they are litigating against State parties, provided the matter is of genuine constitutional import. This general rule is nevertheless not immune to flexibility, diversion and/or exceptions. In *Biowatch Trust v Registrar Genetic Resources*[23] (hereafter the *Biowatch* case) the court held that in constitutional litigation an unsuccessful litigant in proceedings against the State should not be

16 Section 172 of the *Constitution of the Republic of South Africa*, 1996.
17 Section 173 of the *Constitution of the Republic of South Africa*, 1996.
18 *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC).
19 *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) para 97.
20 Section 172(1) of the *Constitution of the Republic of South Africa*, 1996.
21 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 12.
22 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 1.
23 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC).

ordered to pay costs. The Constitutional Court went on to set a limit to this general rule and laid out the extent to which this rule can be deviated from.[24]

Disputes arise following, for example, the failure of the State to realise its regulatory roles, disputes between the State and private parties, disputes between organs of State, coupled with several other disputes that this chapter discusses. This chapter, therefore, gives a general overview of constitutional litigation. It discusses the general rules adopted in the award of costs in different constitutional matters that arise in an attempt by different litigants to vindicate their constitutional rights. It looks at the court's strict approach in applying these rules, the extent of the court's flexibility and deviations, if any, that warrant an exception to each general rule.

2.2 The nature of constitutional litigation

As a point of departure, a distinction between a constitutional and non-constitutional matter has to be made. Woolman and Bishop are of the view that although standard rules and principles of litigation in both common law and statutory law apply to constitutional litigation, constitutional litigation is subject to constitutional scrutiny. They continue to say that in as much as constitutional litigation has a lot in common with conventional litigation, it has several special rules that justify its treatment as a distinct discipline.[25] They provide a thorough distinction of what sets constitutional litigation apart from conventional litigation. Woolman and Bishop are of the view that,

> …[c]onstitutional matters embrace challenges to law or to conduct that is allegedly inconsistent with the Final Constitution, issues concerning the status, powers and functions of an organ of state, the interpretation, the application, and the upholding of the Final Constitution, the judicial review of administrative action, and the question as to whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.[26]

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24 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 21: 'There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The goal is to do that which is just having due regard to the facts and the circumstances of the case.'

25 Woolman and Bishop 2013 *CCR* 3-1.

26 Woolman and Bishop 2013 *CCR* 3-3.

The *Constitution* defines a constitutional matter as a matter that includes any issue involving the interpretation, protection or enforcement of the *Constitution*.[27] Langa DP in the *Boesak case* held that in addition to the definition provided for in Section 167(7) of the *Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers, and functions of an organ of State.[28] The *Constitution* provides that the Constitutional Court may, amongst other matters, decide constitutional matters and issues connected with decisions on constitutional matters.[29] The *Constitution*, therefore, leaves it to the discretion of the courts to define what a constitutional matter is without setting subsequent limitations on the courts. By giving the High Court the power to hear constitutional matters[30] the *Constitution* therefore inherently extends a similar discretion on both the High Court and the Constitutional Court to define what a constitutional matter is. Of note is that there is no distinction between a constitutional matter as defined under section 169 and a constitutional matter as mentioned under section 167(7). It, therefore, should be presumed that a constitutional matter as mentioned in both sections means the same thing. Eastwood is of the view that for a matter brought before the Constitutional Court to be considered constitutional, the litigants must genuinely raise constitutional considerations relevant to the issues seeking adjudication.[31] In the *Boesak case,* the court used its discretion to define what a constitutional matter is. It stated that constitutional matters must include disputes over conduct or law that is inconsistent with the *Constitution*, as well as issues pertaining to the status, powers, and functions of an organ of state.[32] The definition

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27 Section 167(7) of the *Constitution of the Republic of South Africa*, 1996.

28 *S v Boesak 2001 1 SA 912 (CC)* para 14: ` If regard is had to the provisions of sections 172 (1) (a) and 167(4)*(a)* of the *Constitution of the Republic of South Africa*, 1996, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the constitution, as well as issues concerning the status, powers and functions of an organ of State.'

29 Sections 167(3)*(a)* and *(b)* of *the Constitution of the Republic of South Africa*, 1996.

30 Section 169 of the *Constitution of the Republic of South Africa*, 1996.

31 Eastwood 2012 *Biowatch Research Papers* 14.

32 *S v Boesak* 2001 1 SA 912 (CC) para 1: 'If regard is had to the provisions of s172(1)*(a)* and s167(4)*(a)* of the *Constitution of the Republic of South Africa*, 1996, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under s 167 (7) of the *Republic of South Africa*, 1996, the interpretation application and upholding of the Constitution are also constitutional matters.'

given in the *Boesak* case outlines the importance placed on the actions of the organs of the state. The courts must make sure that whatever their conduct, it must be in line with the *Constitution*. The *Constitution* provides that the organs of the state must be accountable, transparent, impartial, fair, and without bias.[33]

2.3 Costs orders in constitutional litigation

The issues raised by costs and funding in litigation are as crucial to litigants as they are essential to the State and other intermediaries involved in litigation. The enforcement of constitutionally protected rights is often inhibited by the costs of litigation. Hodges, Tulibanka, and Vogenouer are of the view that costs are essential to the parties taking part in the litigation. This is because costs determine the claimant's election to pursue litigation or not. A decision not to pursue litigation because of the risk of very high costs denies the claimant access to justice and potential wrongs will be left unremedied or uncompensated. On the other hand, costs are essential to the defendant, as they affect the decision to defend or admit a claim. In litigation that involves the State, there should be a balance in each case. In circumstances where the State is found to have violated fundamental rights, the costs should be sufficiently low. This will allow potential litigants to vindicate their rights in courts against the State. Where litigants approach courts with baseless claims, the costs should then be sufficiently high to deter frivolous or vexatious litigants. The State must promote the rule of law and provide enough access to justice. Low to no costs at all will, therefore, afford individuals the ability to vindicate their rights.[34]

Constitutional litigation is vital in a democracy. Du Plessis[35] is of the view that since the advent of constitutional democracy, South Africa has fortunately seen an increase in public interest litigation. Non-governmental organisations and private persons have been prepared to take on cases in the interest of protecting those who cannot afford to litigate for themselves or to defend or establish essential principles. In view of

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33 Sections 195(1)*(a)*, *(d)*, *(f)*, and *(g)* of the *Republic of South Africa*, 1996 read with s 2 *(b)* of the *Constitution of the Republic of South Africa*, 1996.

34 Hodges, Vogenouer and Tulibanka *The Oxford Study on Costs and Funding of the Civil Litigation: A Comparative Perspective* 5.

35 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 129.

numerous constitutional violations giving rise to constitutional litigation, costs should not evoke fear in potential litigants to enforce and protect their fundamental rights.

Costs awards, although, they come at the tail-end of judgments as appendages to decisions on the merits,[36] when a party is successful, such costs awards serve a useful purpose in society. Mphahlwa[37] is of the view that a successful party would have secured a benefit for the rest of the public who have no part in the litigation. He, however, warns litigants always to be mindful that any litigation against the state that is found to be frivolous and vexatious may be met with adverse costs orders.

The way in which courts distribute the burden of costs in constitutional litigation is vital to the health of constitutional democracy. The costs of litigation should not deter potential litigants from seeking redress, because constitutional violations will be left unremedied, and the courts will settle fewer constitutional disputes. Woolman and Bishop are of the view that an errant approach to constitutional matters could leave essential questions about the content of our basic law undecided.[38] Du Plessis cautions that this should not open a legal floodgate for unnecessary litigation. Any person who is considering litigation will first need to assess the pros and cons of going ahead with such litigation. Assessing the pros and cons of the litigation will act as a deterrent to unwarranted litigation.[39]

Costs in constitutional litigation, just like any other conventional litigation, call for general principles or rules that the court must apply on a case-to-case basis. In the *Biowatch* case,[40] Sachs J held that,

> During the 13 years that have passed since *Ferreira v Levin* was heard, the courts have indeed gained considerable experience of costs awards made on a case-by-case basis. A number of signposts have emerged without departing from the general principle that a court's discretion should not be straitjacketed by inflexible rules, it is now both possible and desirable, at least, to develop some general points of departure with regard to costs in constitutional litigation.

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36 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 1.
37 Mpahlwa and Lubuma 2017 https://www.cliffdekkerhofmeyr.com.
38 Woolman and Bishop 2013 *CCR* 6-1.
39 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 130.
40 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 9.

There are cases that have brought about reforms and have helped courts in deciding on costs awards in constitutional litigation matters. General principles have been formulated over the years, which have come to the aid of courts when dealing with the issue of costs in constitutional litigation. Humby is of the view that the Constitutional Court has made remarkable efforts to establish clarity on the question of costs in constitutional litigation.[41] In the *Biowatch case,* the Court laid down a general rule relating to costs in constitutional matters. The Court held that if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.[42] Following the Court's decision, Humby has no doubt that the principle articulated in the *Biowatch* case constitutes the 'proper starting point' regarding costs in constitutional litigation. He proposes that this principle should not be departed from lightly and that where this does occur, it should be fully justified in the judgment.[43]

In general terms, costs awards in constitutional litigation matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims.[44] Constitutional litigation frequently goes through many courts and the costs involved can be high. This can weigh in on the pockets of the private litigants if they have to pay the State's costs. This principle is therefore clearly set to protect the successful private litigants. The principle prevents the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights.[45] Mabuza[46] in his report is of the view that the principle held in the *Biowatch* case must be applied in every

41 Humby 2010 *JEL* 132.
42 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 22.
43 Humby 2010 *JEL* 132.
44 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 28.
45 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 23: 'This rationale diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed, they will be deprived of their costs because of some inadvertent procedural or technical lapse.'
46 Mabuza 2017 https://www.timeslive.co.za/news/south-africa/2017-10-31.

constitutional litigation matter involving the organs of State. South African courts should apply this principle and restrict it to genuine constitutional litigation matters.

2.4 General principles underlying costs orders in constitutional litigation

The underlying principle in civil litigation is that costs should be awarded to a successful party. The purpose is to indemnify the said party for the expenses incurred by being unjustly compelled either to initiate or to defend the litigation.[47] This guiding principle is termed the "loser pays" principle, and it is the foundation of all costs awards save for constitutional litigation matters.[48] In constitutional litigation, an unsuccessful party against the State is spared from paying the State's costs.[49] Only *bona fide* constitutional litigation between individuals and organs of state should be encouraged without fear of "chilling" legal costs where the individuals lose the case against an organ of the state.[50]

The "loser pays" principle is not applied by courts in constitutional litigation. Woolman and Bishop are of the view that what lies behind the deviation from the "loser pays" principle in constitutional litigation matters is the idea that there are other competing rationales that often outweigh this principle.[51] Ackerman J held that the award of costs is within the discretion of the judiciary and that a successful litigant should ordinarily receive his costs.[52] He highlighted that these two principles are competing rationales when dealing with costs orders in constitutional litigation matters involving the State. They were formulated in the *Ferreira* case when the court had to deal with the question of costs orders where the State was involved as a party in the matter.[53]

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47 Woolman and Bishop 2013 *CCR* 6-1.
48 Woolman and Bishop 2013 *CCR* 6-2.
49 Ntikinca 2018 www.derebus.org.za.
50 Mpahlwa and Lubuma 2017 https://www.cliffdekkerhofmeyr.com.
51 Woolman and Bishop 2013 *CCR* 6-2.
52 *Ferreira v Levin* 1992 2 SA 621 (CC) para 3:'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her own costs. Even the second rule is subject to the first. The second principle is subject to a larger number of exceptions where the successful party is deprived of his or her costs.'
53 *Ferreira v Levin* 1992 2 SA 621 (CC).

The courts should recognise that although there is a possibility that these principles might have to be adapted, if necessary, this will have to be done on a case-by-case basis. Ackerman J, in *Rudolph v Commissioner for Inland Revenue,*[54] held that in coming up with a decision on costs, the court must consider whether these flexible and adaptable principles developed by the supreme courts in relation to the award of costs offer a useful point of departure for dealing with costs in regard to constitutional litigation.

2.4.1 Exercising judicial discretion

The award of costs in legal matters is at the discretion of the court. This discretion should be exercised in a flexible and purposive manner. Due regard for access to justice as an ongoing concern should be taken to avoid the future development of constitutional litigation being unnecessarily stifled. There are clear principles that govern judicial discretion. Makhalemele and Sorensen are of the view that the Constitutional Court should recognise the general principle that costs should be at the discretion of the court.[55] Judicial decisions taken by the Constitutional Court must clearly reflect the exercise of judicial discretion. Despite the general rules that are applied in constitutional litigation the courts through the exercise of their discretion deviate from these rules from time to time. These deviations form an exception and an exception can be said to be what warrants a deviation from a general rule or principle. This study, therefore, discusses the general principle on the exercise of judicial discretion and the deviations that may affect such exercise when dealing with costs orders in constitutional litigation.

Courts need to be guided by well-established principles when exercising their discretion. In *JT Publishing (Pty) Ltd v Minister of Safety and Security*[56] the court held that there is a well-established principle that directs courts to exercise judicial

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54 *Rudolph v Commissioner for Inland Revenue* 1996 4 SA 552 (CC).

55 Makhalemele and Sorensen 2005 *SAAJ*.

56 *J T Publishing (Pty) Ltd v Minister of Safety and Security* 1996 12 BCLR 15(CC) para 15: 'A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court should not adhere in turn to a rule that sounds so sensible.'

discretion when making decisions. It directs them not to exercise their jurisdiction in favour of deciding points that are merely abstract, academic or hypothetic. The point that should influence judicial discretion in constitutional matters, as held in *President of the Ordinary Court Marshal v Freedom of Expression Institute*[57], is that the court's discretion to exercise its powers must be used with due regard to section 172(2) of the Constitution in its entirety. The court held that the question that clearly arises for a decision is whether the court is obliged or has the discretion to decide whether to hear the matter brought before it and the answer to such a question depends upon a proper interpretation of section 172(2).[58] In exercising such discretion, the court must consider whether any order it gives would have any practical effect on either the parties or the general public.[59] Makhalemele and Sorensen are of the view that if a court fails to consider the effects of the exercise of its discretion, other courts hearing matters related to constitutional rights may make costs decisions without also taking into account and making reference to the effects that such discretion has on rights.[60]

It is the judicial practice that litigants who are not satisfied with the judgment of the trial court (that being the court of first instance) take their matter to an appeal court. This also applies to issues regarding costs awards in litigation. Litigants can take up their matters to courts as high as the Constitutional Court to decide on costs issues. When a trial court is exercising its judicial discretion, there are several factors that it may consider. Such due consideration may lead to an order that is different from that of the court on appeal.

As a general rule, the court of appeal is not entitled to interfere with the decision of the trial court even though it may probably have given a different order.[61] There is, however, an exception to this general rule, as revealed in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal.*[62] In this

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57 *President of the Ordinary Court Marshal v Freedom of Expression Institute* 1998 2 SA 1136 (SCA).

58 *President of the Ordinary Court Marshal v Freedom of Expression Institute* 1998 2 SA 1136 (SCA) paras 14 and 16.

59 Heleba 2012 *PELJ* 575.

60 Makhalemele and Sorensen 2005 *SAAJ*.

61 *Nayler v Jansen* 2007 1 SA 18 (SCA) para 14.

62 *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 50.

judgment, it was held that the general principle applies in our common law that the courts will be reluctant to substitute the decision for that of the original decision-maker. However, the courts have recognised that there are circumstances where it is appropriate for a court to substitute the original decision. In *Swartbooi v Brink*[63] the Court set aside and substituted a punitive costs order awarded by a court of first instance. The Court held that the decision of the court of first instance was an improper approach, which reflected an improper purpose. A court hearing a matter on appeal, therefore, may deviate from the general principle and set aside a decision made by the trial court if it comes to a decision that the trial court's decision is inconsistent with the *Constitution*.

Hiemstra J in *Johannesburg City Council v Administrator Transvaal* [64] highlighted some principles that warrant the substitution of an original decision and held that,

1. The ordinary course is to refer back because the court is slow to assume a discretion which has by the statute been entrusted to another tribunal or functionary.

2. The Court will only depart from the ordinary course in the circumstances;

   (i) Where the end result is, in any event, a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstance valuable, and the further delay which would be caused by referring back is significant in the context.

   (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

Power to interfere with an appeal is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially. This can be done by showing that the court of first instance failed to consistently exercise its powers in

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63 *Swartbooi v Brink* 2006 1 SA 203 (CC) para 25: 'The High Court was also motivated by the perception that the costs order against the appellants might serve to ensure that members of the council would consider their decisions more carefully in the future. This reasoning evinces an intention to teach municipal councillors a lesson. It says to them 'You must be punished appropriately for your wrongdoing so that you may learn a lesson and not do it again.' This is an improper approach and reflects an improper purpose.'

64 *Johannesburg City Council v Administrator, Transvaal* 1969 2 SA 72 (T).

answering the question before it, or its judgment is found to have been biased, or it applied a wrong principle.[65] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs,* it was held that an appellate court can interfere with the exercise of judicial discretion. The lower court must have failed to exercise its discretion judicially or must have been influenced by wrong principles or misdirection on the facts. The appeal court can also interfere where the lower court reached a decision that in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[66] Therefore, on the issue of exercising judicial discretion, different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts.[67]

The most frequently employed descriptor of the nature of the discretion is that it must be exercised judicially, which essentially means not arbitrarily. With reference to costs, De Villiers JP in *Fripp v Gibbon*[68] held that the presiding officer should take into consideration the circumstances of each case. The presiding officer must carefully weigh the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs. Upon exercising the latter, such an order as to costs can then be made. Such an order should consequently be fair and just between the parties.[69] In exercising judicial discretion, the end result and main purpose in any litigation matter should, therefore, lead to the apportionment of appropriate relief that is fair on all litigants.

2.4.2 Basic Principles on costs in constitutional litigation

Constitutional matters are divided into different categories, with different rules for costs awards in each case. This section discusses the five major categories of costs in constitutional litigation. These categories deal with the principles applied in a dispute between a private party and the State, a dispute where the State plays a regulatory

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65 *Benson v South Africa Mutual Life Assurance Society* 1986 1 SA 776 (A).

66 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 11.

67 Humby 2009 *PER/PELJ* 101.

68 *Fripp v Gibbon* 1913 AD 354.

69 Humby 2009 *PER/PELJ* 100.

role, a true private dispute, an inter-governmental dispute, and criminal litigation. Furthermore, this section discusses deviations from the general rule, which may be applied and have in certain circumstances been applied. In numerous cases, matters have been heard where disputes between private parties and the State, disputes between organs of state, disputes between true private parties amongst other disputes to arise and this section further discusses the principles applied in such disputes in constitutional litigation, referring to relevant cases.

2.4.2.1 Disputes between a private party and the State

When a matter does not involve constitutional litigation between a private party and the State, the general rule, subject to exceptions, is that the successful party should have its costs. Where a private party and the State are involved in constitutional litigation, as a general rule the State should pay the successful private party's costs. Where the State wins, no costs awards should be made and one of the cases where this general principle was laid down was in *Tebeila Institute of Leadership, Education, Governance, and Training v Limpopo College of Nursing*[70]. The Court held that where the Constitutional Court upholds the general principle, the State will be responsible for the payment of the costs of both parties. However, where the private party is unsuccessful in litigation, each party bears its own costs.[71] This principle was also laid down in *Affordable Medicines Trust v Minister of Health,* where the Court held that if the State loses in constitutional litigation against a private party, the State should pay the other party's costs, and, if the State wins, each party should bear its own costs.[72]

This study will not do justice to the issue of costs in constitutional litigation if it does not look at the *Biowatch* case,[73] which is a *locus classicus* in the award of costs in constitutional litigation between private parties and the State. Woolman and Bishop[74]are of the view that the *Biowatch* case brought together old principles that had

70 *Tebeila Institute of Leadership, Education, Governance, and Training v Limpopo College of Nursing* 2015 4 BCLR 396 (CC).
71 Sibanda 2015 www.cfcr.org.za.
72 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 138.
73 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC).
74 Woolman and Bishop 2013 *CCR* 6-4.

already been developed and the rationales supporting those principles to the Court's existing jurisprudence. This subsequently led to the formulation of the most coherent statement on the law of costs in constitutional cases.

The Court in the *Biowatch* case analysed the general principle in disputes involving organs of state and private parties and came up with a rationale for the establishment of such a principle. Sachs J[75] held that this general rule that says that the State should pay the successful private party's costs diminishes the chilling effect that an adverse costs order may have on a party who is genuinely seeking to assert a constitutional right. The Court further held that constitutional litigation has a broader application, which goes beyond the litigants. This is because constitutional litigation is not only about the parties involved. Whatever decision the Court makes in constitutional litigation will always benefit others who are in similar situations. This general rule recognises that in such matters of constitutional violations, the State bears primary responsibility and thus should bear the costs, provided the matter before the Court poses a genuine challenge to the constitutionality of the State conduct or legislation.[76]

In the *Biowatch* case, the Court started by first establishing the main point of departure when deciding on costs awards in constitutional litigation. It looked at what should determine costs awards and came to the decision that a costs award should not be determined by the litigant's status or by the issue. It held that it is not judicially correct to begin an inquiry by the characterisation of the parties. Costs awards must promote the advancement of constitutional justice; therefore, the crux of the matter must be to distinguish the nature of the issue or issues before the Court. The Constitution advocates equal protection under the law. Therefore, in granting costs awards the Courts should not look at whose interests the parties in question are pursuing as a deciding factor. Whether it is the interests of the public official or it is the interests of the private party should not determine whom the law should protect, or be determined by whether the parties are financially well endowed or indigent. The foundation in constitutional litigation is to determine the extent of the effect which a particular costs

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75 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 23.

76 Eastwood 2012 *Biowatch Research Papers* 14.

order will have on the parties and on the public. The question of whether such costs orders will promote or hinder the advancement of constitutional justice should also be considered.[77]

The public should not be discouraged from trying to vindicate their constitutional rights. In *Ex parte Gauteng Provincial Legislature* Mohamed DP warned the courts against discouraging persons trying to vindicate their constitutional rights from doing so because of the risk of attracting adverse costs orders if they lost the case on the merits.[78] Mohamed DP stated that

> …[p]ersons seeking to ventilate an important issue of constitutional principle … should not be discouraged from doing so by the risk of having to pay the costs of their adversaries if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversities if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.[79]

As a cautionary rule, it is pivotal for private parties seeking one redress or another to be aware that this general principle in constitutional litigation is subject to exceptions. The general rule is not absolute. There are exceptional circumstances that would prompt the courts to deviate from the general principle when making costs awards. In situations where the applicant or private party places a frivolous or vexatious or clearly inappropriate application at the mercy of the courts, this may expose the private party

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77 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 16: 'In my view it is not correct to start an enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in a public interest. Nor should they be determined by whether the parties are financially well endowed or indigent…The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'

78 *Ex Parte Gauteng Provincial Legislaure: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995.*

79 *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 36.

to an adverse costs award[80] and the courts will not confer protection on the applicant against such an order in disputes where the State plays a regulatory role.[81]

2.4.2.2 Disputes where the State fails to play a regulatory role between private parties

The second principle is when a dispute arises where multiple private parties are drawn into litigation against the State by competing claims.[82] It is noteworthy that private parties do often find themselves involved in litigation that involves the State and another private party.[83] Eastwood[84] is of the view that generally in this type of dispute, a constitutional issue may arise where the State is required to perform a regulating role between two or more private parties who have competing interests. One may be of the view that having two or more private parties involved in litigation means that such litigation is between private parties. However, Du Plessis explains that the fact that other private parties are involved does not mean that such litigation should be characterised as being between private parties. He is of the view that such a matter rather involves litigation between a private party and the State and exerts a radiating impact on other private parties.[85]

The general principle applied by courts in constitutional litigation involving the State and private parties with competing claims remains the same as in litigation between the State and a single private party.[86] Du Plessis breaks down how the courts approach the issue of costs orders in constitutional matters. He says that the general approaches are that,

i) the State bears the costs of litigants who succeed against it;

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80 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 24.

81 Mpahlwa and Lubuma 2017 https://www.cliffdekkerhofmeyr.com.

82 Eastwood 2012 *Biowatch Research Papers* 14.

83 *Fuel Retailers Association of South Africa (Pty) Ltd v Director General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC) para 107.

84 Eastwood 2012 *Biowatch Research Papers* 14.

85 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 133.

86 The general rule on costs in constitutional litigation between the State and a private party is that if the State loses it should bear the victor's costs, and if the State wins, each party should pay its own costs. There should be no costs order as between private parties.

ii) the State may also bear the costs of private litigants, regardless of the outcome as between those litigants, where the State's conduct has contributed to the litigation arising;

iii) ordinarily, there should be no orders against any private litigants who become involved;

iv) an unsuccessful private party who initiates the litigation against the State on constitutional grounds may depending on the circumstances be liable for the costs of private parties who oppose that litigation.

In the *Biowatch* case, the Court came up with a rationale for the application of this general rule in this kind of constitutional litigation. The Court held that in general terms, costs awards in these matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims. Such claims should be encouraged irrespective of the number of private parties seeking to support or oppose the State's posture in the litigation.[87] The number of private parties seeking redress against the State should not be a deterrent; however, the courts must hear all matters in a judicially fair manner.

Sachs J[88] laid down the general rules to be applied to costs orders in these kinds of cases, and held that,

> …[the] state bears the costs of litigants who succeed against it; the state may also bear the costs of private litigants regardless of the outcome as between those litigants, where the state's conduct has contributed to the litigation arising; ordinarily, there should be no costs orders against any private litigants who become involved; and an unsuccessful private party who initiates the litigation against the state on constitutional grounds may depending on the circumstances be liable for the costs of private parties who oppose that litigation.[89]

Of note is that this kind of litigation is not free from deviations. There are cases where the courts have deviated from the general rule or principles discussed above and held a private party liable for the costs of other private parties. In *Omar v Government, RSA*[90] the Court held that one of the applicants (also a private party) should pay the costs of one of the private parties after it did not succeed in its application. The Court further held that though the applicant attempted to enforce fundamental rights, the

87 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 28.
88 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 43.
89 Du Plessis, Penfold and Brickhill *Constitutional Litigation*.
90 *Omar v Government, RSA* 2006 2 SA 289 (CC).

application was to a considerable extent ill-conceived.[91] The sentiments of frivolity and vexatiousness of an application by private parties are still grounds for deviation in this type of constitutional litigation. Where the Court upon applying its judicial discretion comes to a decision that the private party or parties wasted the Court's time by bringing a baseless, vexatious or frivolous matter before the Court, such parties will be made liable for costs.

2.4.2.3 True private disputes

The third principle is when a dispute arises between true private parties. Contractual disputes, arguments over intellectual property, private delictual disputes and defamation claims readily fall into this category.[92] As with any award of costs, the award of costs in litigation between private parties where constitutional issues are raised is a matter that is within the discretion of the court that is considering that issue. The general principle as far as private litigation is concerned is that costs will ordinarily follow the result. Therefore, parties instituting legal proceedings run the risk of paying their opponent's costs if they are unsuccessful.[93]

In constitutional litigation in which the State is not involved, the successful litigants are ordinarily awarded their costs. The general principle applied in a constitutional matter involving private parties is the same as in any ordinary or conventional litigation. In *Khumalo v Holomisa* the court-ordered costs against the unsuccessful private party. The Court held that the case before it was disputed between private parties and did not involve the State or an organ of the state. Therefore, the applicant's failure in the appeal implied that it would only be fair that the respondent is awarded costs.[94] The dispute between the private parties must be a *bona fide* private constitutional dispute for the parties to bear their own costs.[95]

There are exceptional cases where the court might refuse to make costs orders. Where an unsuccessful litigant brings a claim that raises important constitutional issues, a

91 *Omar v Government, RSA* 2006 2 SA 289 (CC) para 64.
92 Woolman and Bishop 2013 *CCR* 6-6.
93 *Bothma v Els* 2010 2 SA 622 (CC) para 91.
94 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 46.
95 Woolman and Bishop 2013 *CCR* 6-7.

court might, depending on the circumstances, refuse to make a costs order. The important factor that may justify the court's departure from the general principle is the extent to which public interest litigation could be unduly chilled if the court handed down an adverse costs order.[96] In *Barkhuizen v Napier* the court did not make a costs order but instead, each party bore its own costs. Judge Ngcobo held that,

> The applicant has raised important constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties … but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order of costs. To order costs … may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and in the Courts below.[97]

Woolman and Bishop are of the view that *Bothma v Els*[98] provides a clear statement of principle and reconciles the general rule and the deviation from the general rule. Private litigants that raise constitutional claims solely to achieve commercial or private ends should be treated like litigants in common non-constitutional disputes. However, private litigants that raise constitutional claims for non-commercial reasons (those who litigate in the public interest) should not be mulcted in costs for raising constitutional claims.[99]

2.4.2.4 Inter-governmental disputes

This fourth type of dispute is mainly regulated by both the *Constitution of the Republic of South Africa 1996*[100] and the *Inter-governmental Relations Framework Act 2005*[101]. An organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose. It must exhaust all other internal remedies before it

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96 Du Plessis, Penfold and Brickhill *Constitutional Litigation*.

97 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 90.

98 *Bothma v Els* 2010 2 SA 622 (CC) para 93: 'There have, however, been exceptional cases where no order as to costs has been made. A factor that has loomed large in justifying this departure from the general rule has been the extent to which the pursuit of public interest litigation could be unduly chilled by an adverse costs order.'

99 Woolman and Bishop 2013 *CCR* 6-7.

100 *Constitution of the Republic of South Africa Act* 108 of 1996.

101 *Intergovernmental Relations Framework Act* 13 of 2005.

approaches a court to resolve the dispute.[102] This duty imposed on organs of the state is used as a reasoning platform by the court to prevent litigation. In *National Gambling Board v Premier of Kwa Zulu Natal,* the court held that organs of state must try to resolve their disputes amicably before seeking the indulgence of the Court.[103]

The Constitutional Court has taken compliance with this duty seriously. On a number of occasions, the courts have refused to entertain a matter mainly because the parties involved failed or refused to comply with their constitutional obligation.[104] In *Uthukela District Municipality v President of the Republic of South Africa,*[105] the Court held that any court will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve the dispute internally. In *Ngqushwa Local Municipality v MEC for Housing, Local Government and Traditional Affairs*[106] the injunction against rushing off to court is aimed at ensuring that there is an effective flow of communication and co-operation between the different spheres of government. This is done to enhance service delivery and to prevent the squandering of taxpayers' money on avoidable litigation.[107]

Of note is that the provisions of these statutes do not stop the existence of inter-government litigation. The issue of costs in these instances although unclear,[108] Woolman and Bishop are of the view that in constitutional litigation between organs of State, the general principle should be that each entity bears its own costs.[109] In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal,* the Court held that it was wise that no parties asked for costs because all parties to the hearing

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102 Section 41(3) of the Constitution of the Republic of South Africa, 1996.

103 *National Gambling Board v Premier of Kwa-Zulu-Natal* 2002 2 BCLR 156 (CC) para 41.

104 *National Gambling Board v Premier of Kwa-Zulu-Natal* 2002 2 BCLR 156 (CC) judgment and also *Uthukela District Municipality v President of the Republic of South Africa* 2002 11 BCLR 1220 (CC) .

105 *Uthukela District Municipality v President of the Republic of South Africa* 2002 11 BCLR 1220 (CC) para 14.

106 *Ngqutshwa Local Municipality v MEC for Housing, Local Government and Traditional Affairs* 2005 JOL 14776 (Ck).

107 *Ngqutshwa Local Municipality v MEC for Housing, Local Government and Traditional Affairs* 2005 JOL 14776 (Ck) para 49.

108 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 135.

109 Woolman and Bishop 2013 *CCR* 6-9.

of the matter were organs of state and the matter raised constitutional issues of some considerable importance and therefore there was no need for a costs order.[110]

Although the courts may adopt the same approach adopted in the *City of Johannesburg case*, Du Plessis is of the view that there are circumstances that may dictate that, despite the general rule, one of the parties pays the other party's costs. The court should consider factors such as the nature of the organs of state involved in the litigation, the constitutional issues raised and the attempts made to resolve the disputes without recourse to litigation before diverting from the general rule.[111] Wolman and Bishop concur with Du Plessis that the conduct of the parties, or the nature of the issue involved, may require a different result. The role that the parties play in failing to find a non-judicial solution to the dispute will, quite likely, be relevant in deciding whether the courts should deviate from the general rule or not.[112]

The Court in *MEC for Local Government, Housing and Traditional Affairs, Kwa-Zulu-Natal v Yengwa* deviated from the general rule and ordered one state entity to pay the costs of another state entity.[113] Mthiyane JA held that,

> … one is confronted with a head-to-head contest between two State entities; the costs payable by both are drawn from the public purse. In such a case, the court has cautioned that organs of State must 'avoid legal proceedings against one another' and must make every reasonable effort to resolve intergovernmental disputes before having recourse to the courts. For that reason, it seems that a fair decision would be that each party pays its own costs. In my view, however, such an order would not be appropriate. There is a need for the court to show its disapproval of the conduct of the appellant in brazenly embarking on a futile mission. The appellant's obduracy led to considerable costs being incurred. There is no reason why this court should not depart from the normal rule, and, by way of marking its disapproval of the appellant's conduct, make an order that he should pay the second respondent's costs. Accordingly, that order will issue.[114]

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110 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 94.

111 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 135.

112 Woolman and Bishop 2013 *CCR* 6-9.

113 *MEC for Local Government, Housing and Traditional Affairs, Kwa-Zulu-Natal v Yengwa* 2010 5 SA 494 (SCA).

114 *MEC for Local Government, Housing and Traditional Affairs, Kwa-Zulu-Natal v Yengwa* 2010 5 SA 494 (SCA) para 14.

2.4.2.5 Constitutional litigation arising from criminal matters

The fifth principle discussed in this section is costs orders in relation to constitutional litigation that emanates from criminal matters. The general principle in constitutional litigation that arises from a criminal matter is that where the state has breached an accused's constitutional right, the litigant should not pay costs. In *Motsepe v Commissioner of Inland Revenue,* it was held that one should exercise caution in awarding costs against a litigant who seeks to enforce their constitutional rights against the state. The court further held that where a statutory provision is attacked the court should be cautious lest an adverse costs order brings an unduly inhibiting effect on the litigants.[115]

Of note is that in constitutional litigation that arises from criminal matters, the principle that a litigant who successfully argues the unconstitutionality of an administrative procedure that might have led to his conviction is not entitled to his costs. Costs orders are, however, awarded to litigants who successfully argue for the recognition of their constitutional rights. This is a principle that was held in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)*.

> The respondent sought an interdict to vindicate its intellectual property rights in the form of trademarks but is unsuccessful in this Court. On the other hand, the applicant has invoked the right to free expression under the Constitution and has been upheld by this Court. There is no doubt that the respondent launched proceedings to safeguard its commercial interests. The applicant is asserting a constitutional right vital to his life view and relatively tiny and virtually dormant enterprise. I know no reason why the applicant should forfeit costs in this Court and other Courts that heard the matter before us. It is just and equitable to order that the respondent pay the costs of the applicant, in the High Court, SCA and in this Court.[116]

Woolman and Bishop are of the view that this general rule allows the accused criminal the constitutional right to raise all constitutional claims without fear of an adverse costs order. The general rule is upheld even where the applicant is successful; and exceptions to this principle may be applied at the discretion of the courts. In the

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115 *Motsepe v Commissioner of Inland Revenue* 1997 2 SA 898 (CC) para 30.

116 *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)* 2006 1 SA 144 (CC) para 68.

Motsepe case, Judge Ackerman held that the cautious approach that the courts must exercise cannot be allowed to develop into an inflexible rule. If such is allowed the litigants will be induced into believing that they are free to challenge the constitutionality of statutory provisions no matter how unreasonable the grounds of bringing an action against the state may be.[117] Therefore, there is an exception to the principle applied in such matters where the litigants have been ordered to pay adverse costs orders against the state. Such an exception was held in *Thint Holdings (Southern African) (Pty) Ltd v National Director of Public Prosecutions* where the Court deviated from the general rule and held that the unsuccessful party should pay the costs of the State.[118]

2.5 Punitive Costs Orders

Punitive costs orders are usually ordered by the court when it is not satisfied with the conduct of a litigant. Du Plessis is of the view that the Constitutional Court has emphasised that it will rarely make punitive costs orders to inhibit litigants to exercise the right to appeal.[119] This view does not nullify the fact that the Constitutional Court does award punitive costs orders. The Constitutional Court can and may order punitive costs orders in matters that require such an order. The rules that need to be followed by the courts before awarding of punitive costs orders are stringent.

Woolman and Bishop are of the view that despite the strict application that follows when giving punitive costs orders, at times the courts make such orders based on the deplorable conduct displayed by litigants. Therefore in such situations, punitive costs orders can be justified.[120] He continues to express the view that at times courts can and should use the threat of adverse and punitive costs orders to influence not only private litigants but also government officials and their conduct.[121] Courts have specifically endorsed the use of costs to encourage the State to properly defend

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117 *Motsepe v Commissioner of Inland Revenue* 1997 2 SA 898 (CC) para 30.

118 Woolman and Bishop 2013 *CCR* 6-10.

119 Du Plessis, Penfold and Brickhill *Constitutional Litigation*, see also *Preimier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) at para 55 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

120 Woolman and Bishop 2013 *CCR* 6-34.

121 Woolman and Bishop 2013 *CCR* 6-33.

legislation it believes is constitutional, prompt the government to remove unconstitutional laws from the books before these are litigated, and dissuade the State from raising cynical defences to avoid its constitutional responsibilities.[122] Therefore, the award of punitive costs orders can be seen as a valid mechanism the courts can use to encourage public officials to perform their duties effectively and avoid engaging in baseless or frivolous litigation.

The award of punitive costs orders come in the form of costs orders handed down by the court either by costs to be paid on an attorney and client scale or as costs *de bonis propriis.*

2.5.1 Costs on an attorney and client scale

Attorney and client costs include all the costs in respect of which the client is indebted for professional services rendered by the attorney in legal proceedings to which the attorney has been formally mandated to act.[123]Though the courts have openly discouraged punitive costs orders; that has not stopped the courts from awarding such orders. There are several cases where the courts have given punitive costs orders by ordering the unsuccessful party to tender costs on an attorney and client scale.

The Court in *President of the Republic of South Africa v Quagliani* held that given the circumstances, to say that the application brought before it was remarkable would be a gross understatement.[124] The Court's reasoning in giving a punitive costs order against the President in the *President of the Republic of South Africa v Quagliani* case was that the application tendered to the Court was inappropriate. Legal representatives are entitled, or obliged, to defend the interests of their clients with vigor and panache; however, this should be done reasonably. There must be limits to their ingenuity. It is not permissible to stretch the bounds of appropriate forensic procedures beyond breaking point. Given such sentiments, the Court held that the delays and inconveniences in the case were unacceptable and were enough to warrant a punitive costs order.[125]

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122 Woolman and Bishop 2013 *CCR* 6-33.
123 Nel https://www.gertnelincattorneys.co.za/fee/attorney-client-fees-explained/.
124 Kong 2009 *Hong Kong Law J* para 70.
125 Kong 2009 *Hong Kong Law J* para 73.

In *Alexkor Ltd v The Richtersveld Community*[126] the Court held that the State's delay of the Court processes was unacceptable and had not been adequately explained. It reached the conclusion that there was no question that the costs incurred by the respondent regarding the application had to be paid by the State. To mark its displeasure at the delay, the Court ordered those costs to be paid on an attorney and client scale.[127] The Court is permitted to make such decisions when after applying its judicial discretion it comes to the conclusion that the State could have avoided litigation if it did not embark on fruitless litigation, whether as a respondent or an applicant.

There have been situations where the courts have ordered costs *de bonis propriis* on a scale as between attorney and client against litigants. Such an order was given in *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board.*[128] The Court held that an order of costs *de bonis propriis* is made against attorneys whose negligence is of a serious degree. Where the Court is satisfied with such negligence, an order of costs *de bonis propriis* on an attorney and client scale may be made as a mark of the Court's displeasure. An attorney is an officer of the Court and owes the Court an appropriate level of professionalism and courtesy, hence the office of the State attorney was held liable for the punitive costs award.[129]

The rationale for awarding attorney and client costs was held in *Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging.*[130] Something more underlies an order of costs on an attorney and client scale than the mere punishment of the party asking for indulgence for the losing party.[131]The court must take a closer look at the circumstances concerning the matter in question before it reaches the conclusion that the circumstances giving rise to the said matter or the conduct of the losing party warrants an adverse costs order. This order ensures more effectually that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.[132]

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126 *Alexkor Ltd v Richterveld Community* 2004 5 SA 460 (CC).
127 *Alexkor Ltd v Richterveld Community* 2004 5 SA 460 (CC) para 17.
128 *South African Liquor Trader's Association v Chairperson, Gauteng Liquor Board* 2009 1 SA 565 (CC).
129 *South African Liquor Trader's Association v Chairperson, Gauteng Liquor Board* 2009 1 SA 565 (CC) para 54.
130 *Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging* 1946 AD 597.
131 *Ahmed v Minister of Home Affairs* 2019 1 SA 1 (CC) para 7.
132 Woolman and Bishop 2013 *CCR* 6-35.

Usually, an award of costs on an attorney and client scale will not be lightly granted. The courts look upon such orders with disfavour and are loath to penalise a person who has exercised his right to obtain a judicial decision on any complaint he may have. In general, it can be stated that the court does not order a litigant to pay the costs of another litigant based on an attorney and client scale. This is only done in exceptional cases where special grounds are present, for example where the motives have been vexatious, reckless and malicious or frivolous or a party has acted unreasonably in the conduct of the case or that the conduct is in some way reprehensible.[133]

2.5.2 Costs de bonis propriis

Costs *de bonis propriis* entail another specific type of punitive costs order, which is awarded against a person acting in a representative capacity. According to the Merriam Webster Dictionary,[134] the term *de bonis propriis* means out of own pocket; it is used of a judgment against an administrator or executor to be satisfied out of his or her own pocket. Costs *de bonis propriis* are a penalty for improper conduct and the representing person must pay from his pocket.[135] The principle of awarding costs *de bonis propriis* is applicable only where a person acts or litigates in a representative capacity. Such orders require either the members or representatives of an institutional defendant or an attorney to pay the costs of an application personally, generally on a punitive scale. Cilliers is of the view that it is unusual to order an unsuccessful litigant in a fiduciary position to pay costs *de bonis propriis*. There must be good reasons for such an order, such as improper or unreasonable conduct or lack of *bona fides.*[136] Woolman and Bishop propose that to flesh out the true meaning of costs *de bonis propriis*, one will have to look at the attorney's conduct and the actions of the government officials involved.[137]

133 Woolman and Bishop 2013 CCR 6-36.
134 Merriam Webster Dictionary.
135 De Villiers 2017 www.wylie.co.za/articles.
136 Cilliers, Cilliers and Cilliers *Law of Costs* 10.22.
137 Woolman and Bishop 2013 *CCR* 6-38.

In *Cooper v First National Bank of South Africa Ltd* it was held that according to the common law principles, the general principle is that a party acting in the representative capacity of another party in litigation cannot be ordered to pay the costs out of his or her own pocket. An exception will only be applied where the party acting in a representative capacity is found to be guilty of improper conduct. Therefore, in exceptional cases, such a party may be ordered to pay such costs where he or she is suspected of acting *mala fide* or where he or she acted with gross negligence.[138]

The principle and the general rule of awarding costs *de bonis propriis* were formulated to the effect that in order to justify a personal order of costs in litigation, the litigant occupying a fiduciary capacity, his subsequent actions in connection with the litigant in question must have been *mala fide*, negligent or unreasonable.[139] In *South African Liquor Trader's Association v Chairperson, Gauteng Liquor Board*, O'Regan J held that when an order *de bonis propriis* is made against attorneys, the court must be satisfied that there has been negligence of a serious degree. The gravity of the seriousness will then warrant an order of costs being made to mark the courts' displeasure.[140] The litmus test formulated in *Head of Department, Mpumalanga Department of Education v Hoeërskool Ermelo* said that in awarding costs *de bonis propriis* the court must see whether considerations of justice and equity in a particular case dictate that the order be made, in other words, the order must be fair and just in the context of a particular dispute.[141] The court cannot give such an order just because it is within its discretion to give such an order. For such an order to be given the courts must be in line with the relevant statutes and promote the healthy and proper turning of the wheels of justice coupled with fairness and justiciability.

It may seem that costs *de bonis propriis* will also be awarded against a person who, in his or her representative capacity, institutes an action without making provision for the defendant's costs and then loses the case, where he or she had no certainty or could

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138 *Cooper v First National Bank of South Africa Ltd* 2001 3 SA 705 (SCA) para 37.

139 *Visser v Cryopreservation Technologies CC* 2003 6 SA 607 (T) para 6.

140 *South African Liquor Trader's Association v Chairperson, Gauteng Liquor Board* 2009 1 SA 565 (CC) para 54.

141 *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 2 SA 415 (CC).

not have had any certainty of being successful.[142] In *re Estate Potgieter* a general rule was formulated to the effect that for a court to justify a personal order for costs against a litigant occupying a fiduciary capacity, his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable. In *Makhaya NO v Goede Williams Boerdery (Pty) Ltd*[143] it was held that in exercising its discretion to make costs orders that it deems fit, a court retains the right to make a costs order where an official's actions are *mala fide* or grossly negligent. It further held that proof of *mala fides* or grossly unreasonable conduct is necessary.

Gracie is of the view that the distinction between the requirements as to negligence (negligence being the failure to do something that a reasonable man would do or doing something that a reasonable man would not do)[144] and those as to reasonableness is not quite clear.[145] The power to award or disallow costs is one of the strongest weapons in the court's armory by which it can show its displeasure of any conduct of the litigant, and the courts have always exercised the power of awarding costs personally against any persons acting in a representative capacity.[146]

It is significant to note that courts have come up with different views and raised different sentiments regarding granting costs *de bonis propriis*. Some courts have found it appropriate to award costs *de bonis propriis* against parties acting in a representative capacity where they acted *mala fides*. In *Swartbooi v Brink*, the Court, however, did not agree to the court of first instance's decision of awarding costs *de bonis propriis.* The Court held that the rationale following the order by the court of the first instance was motivated by the perception that the costs order against the appellants might serve to ensure that members acting in a representative capacity should consider their decisions more carefully in the future. It went further and held that such an order evidenced an intention to teach those acting in representative capacity a lesson, as such a judgment says people must be punished appropriately for their wrongdoing so that they may learn a lesson and not do it again.[147] This rationale

142 *Venter v Scott* 1980 3 SA 988 (O).
143 *Makhaya v Goede Wellington Boerdery (Pty) Ltd* 2013 1 All SA 526 (SCA) para 51.
144 See *Kruger v Coetzee* 1966 2 SA 428 (A) p 431-432.
145 Gracie 1946 *SALJ* 207.
146 Gracie 1946 *SALJ* 206.
147 *Swartbooi v Brink* 2006 1 SA 203 (CC) para 25.

for awarding of costs *de bonis propriis* is against the punishment of those in a representative capacity who act *mala fides*. Despite such a contradiction tightening the realms of costs orders, the courts will be able to hold those acting in a representative capacity (more specifically government officials) accountable for their actions.

2.6 Frivolous or vexatious constitutional claims

A court has flexible discretion in deciding on costs orders and may deviate from the general principles in appropriate circumstances, as discussed above. Du Plessis notes categorically cases in which our courts have deviated from the general principles in constitutional litigation. He is of the view that the courts have deviated from the general principles where the litigation has been found to be frivolous, vexatious, or manifestly inappropriate and where the litigant's conduct deserves the court's censure through an adverse costs order.[148]

The inherent power mentioned by Du Plessis is given effect by section 2 of the *Vexatious Proceedings Act*.[149] Section 2(1)*(b)* states that,

> If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in an inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.[150]

Steenkamp is of the view that,

> The effect of s 2(1)*(b)* of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with s 34 of the Constitution, which protects the right of access for everyone and does not

148 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 136.
149 *Vexatious Proceedings Act* 3 of 1956.
150 Section 2 (1) (b) of the *Vexatious Proceedings Act* 3 of 1956.

> contain any internal limitation of the right. The barrier which may be imposed under s 2(1)*(b)* therefore does limit the right of access to court protected in s 34 of the Constitution. But, in my view, such a limitation is reasonable and justifiable.[151]

In *Beinash v Ernst & Young* the Constitutional Court summarised that the purpose of the *Vexatious Proceedings Act* is,

> … to put a stop to the persistent and ungrounded institution of legal proceedings, the Act does so by allowing a court to screen (as opposed to absolutely bar) a 'person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court'. This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment, and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.[152]

Cilliers and Cilliers[153] are of the view that the word vexatious has two facets. They state that in one facet outside the legislative parameters, a vexatious action for the purposes of finally dismissing an action can be equated to an action standing outside the region of probability altogether, which is incapable of succeeding because of its certain impossibility. Nothing but certainty is required to satisfy the court that the main action has virtually no prospect of success at all. The other facet of the word vexatious, outside the legislative framework, is that a vexatious action for the purposes of seeking security must be equated to one standing within the domain of probability and is therefore well capable of succeeding, though its chances appear slim. They are of the view that although it is not certainly impossible, it is obviously unlikely to survive the trial.[154]

In the *Biowatch* case, it was held that if an application is frivolous or vexatious or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.[155] Sachs J further held that mere labeling of litigation as constitutional and referring to the Constitution is not enough in itself to invoke the general rule as referred to in *Affordable*

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151 Steenkamp 2016 https://www.gilesfiles.co.za.
152 *Beinash v Ernst and Young* 1999 2 SA 116 (CC) para 15.
153 Cilliers and Cilliers *Law of Costs*.
154 Cilliers and Cilliers *Law of Costs*.
155 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC) para 24.

Medicines Trust v Minister of Health.[156] Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent.[157] The court has an inherent power to strike out claims that are vexatious. This power to strike out is one that must be exercised with very great caution. The courts of law are freely available to all and only in very exceptional circumstances will the courts refuse access to anyone with a desire to prosecute an action.[158] The court in *Bisset v Boland Bank Ltd* further defined vexatious to mean frivolous, improper, instituted without sufficient ground and to serve solely as an annoyance to the defendant.[159] In *Lawyers for Human Rights v Minister in the Presidency,* a frivolous complaint was defined to mean a complaint with no serious purpose or value.[160]

Of note, however, is Woolman and Bishop's view on frivolous litigation where they state that when it comes to frivolity, it is difficult to find examples of cases where courts discuss the issue of frivolous litigation. The Constitutional Court ordinarily dismisses frivolous constitutional claims without a judgment. Occasionally an unsuccessful applicant raises an important constitutional matter but does so in the context of vexatious and unmeritorious litigation.[161] In *Beinash v Ernst and Young*[162], it was held that parties to litigation on a constitutional issue are often required to bear their own costs in relation to the proceedings. The rationale is that by litigating persistently and vexatiously, the applicants place respondents in the untenable position where they must respond to unmeritorious litigation, resulting in unnecessary costs. It is unfair for the harassed respondents to bear the costs.[163]

Over recent years the courts have seen applicants asking and having punitive costs orders granted to deter litigants from bringing matters frivolously and vexatiously.[164]

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156 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 138.
157 Birlie 2017 *MLR* para 19.
158 *Bisset v Boland Bank Ltd* 1991 4 SA 603 (D).
159 *Bisset v Boland Bank Ltd* 1991 4 SA 603 (D).
160 Birlie 2017 *MLR* para 19.
161 Woolman and Bishop 2013 *CCR 6-18*.
162 *Beinash v Ernst and Young* 1999 2 SA 116 (CC).
163 *Beinash v Ernst and Young* 1999 2 SA 116 (CC) para 30.
164 See *Christensen v Ritcher 2017 ZAGPPH 647* paras 19, 23, 71 and 71.

Du Plessis is of the view that the Constitutional Court has censured applicants through adverse costs orders where an applicant fails to explain his or her reason for pursuing non-constitutional remedies, or when an applicant brings an unmeritorious application to postpone the Court's delivery of a judgment, when an applicant fails to initiate an urgent application or when an applicant fails to exhaust internal remedies.[165] Of note is that it is not only applicants who have felt the sting of an adverse costs order for improper conduct, as shown by Chaskalson CJ's ruling on involving the State as a party. He held that courts are entitled to expect assistance and not obstruction from litigants in the discharge of their difficult duties.[166] Where litigants bring matters to the courts which only seek to waste the court's time, the Court must award adverse costs orders to deter such frivolous and vexatious litigation.

2.7 General inappropriate conduct

The inquiry on the appropriateness of legal proceedings requires a close and careful examination of all the circumstances. Whether an application is manifestly inappropriate depends on whether the application is so unreasonable or out of line that it constitutes an abuse of the process of the court.[167] There is no all-encompassing definition of the term abuse of process. Defined in general terms, abuse of process can be said to have occurred where the set rules and procedures permitted by the Rules of the Court in facilitating the pursuit of truth are used for a purpose extraneous to that object.[168]

In *President of the Republic of South Africa v Quagliani,* appropriateness was dealt with in such a way that the Court held that an application for the postponement of a judgment delivery as it was about to be handed down was inappropriate. The Court did recognise that legal representatives are entitled, or even obliged, to defend the interests of their clients with vigor and confidence; however, limits should be imposed to curb their ingenuity. Stretching the bounds of the appropriate forensic procedure

165 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 137.
166 *Minister of Health v Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) para 82.
167 Birlie 2017 *MLR* para 20.
168 *Beinash v Ernst and Young* 1999 2 SA 116 (CC) para 13.

beyond the breaking point is not permissible. The delays and inconveniences that were caused in this matter were unacceptable.[169]

In *Chonco v President of the Republic of South Africa,* Khampepe J aired his learned views on the matter at hand when he recognised that despite the applicant's urgent wish to vindicate their rights, they also intended to use the proceedings as a 'bargaining chip' to their advantage. The learned judge held that,

> … the court would not wish to deprive the litigants of a necessary weapon to use in order to vindicate their rights. But in the circumstances, it is difficult not to conclude that the institution of these proceedings was hasty. At the very least, it behoved the applicants to put the Presidency on terms before resorting to litigation. A simple letter to the President putting him on terms or making inquiries in regard to the processing of their application for a pardon, …, would have sufficed. The conduct of the applicants in the circumstances was therefore plainly precipitate.[170]

In *President of the Republic of South Africa v Public Protector*,[171] the court held that the President was ill-advised and reckless in launching the challenge against the remedial action of the Public Prosecutor. The court then decided that there was no justifiable basis for the President's actions given the circumstances of the matter before it. An act of recklessness and unreasonableness being one of the main reasons behind a court's punitive costs order, the court held that a personal costs order was justified and thus should be granted.

2.8 Conclusion

The different general rules that apply in the different facets of constitutional litigation and the awards of costs orders are not free from deviations or exceptions. This chapter discussed the deviations and the associated rationales. Of note is that the courts are open to *bona fide* constitutional litigation. This encourages individuals to approach the courts without the fear of exorbitant legal costs if they should lose the case and applies in all categories in which constitutional litigation may take place. The fear of having to pay the costs may deter people from bringing matters to court and enforcing their

169 *President of the Republic of South Africa v Quagliani* 2009 8 BCLR 785 (CC) para 73.
170 *Chonco v President of the Republic of South Africa* 2010 6 BCLR 511 (CC) para 13.
171 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) paras 189 and 190.

rights. However, constitutional litigation is important in a democracy and when a private party is successful, it serves a good purpose in society in that the organisations or private parties who institute litigation secure a benefit for the rest of the public who had no part in the litigation.[172]

[172] Mpahlwa and Lubuma 2017 https://www.cliffdekkerhofmeyr.com.

Chapter 3

Theoretical basis for the imposition on public officials of personal liability for costs awarded against the state

3.1 Introduction

In constitutional litigation involving the State (as discussed in the previous chapter), it is usually the State and not the public official involved in litigation who often pays the litigation costs. In situations where a private litigant sues a minister of the State or a director-general of a certain department and the Court awards costs against such a public official, it is not the latter who will pay the costs but the State. The common law principle of vicarious liability comes into play in the usual outcome of costs orders. Vicarious liability can be defined in law as the liability of one person for the wrongfulness of another.[1] Therefore, the State is found to be liable for the wrongfulness of the conduct of public officials based on their employer-employee relationship.

Based on the vast number of cases that arise from the negligent behaviour of public officials, the State constantly finds itself liable for exorbitant legal costs. These costs are paid from the state's money, yet this can be avoided and the State's fiscus can be protected if only public officials were to be held personally liable for their wrongfulness. This can be achieved if the common law principle of vicarious liability can be limited or totally set aside and the courts could impose personal liability on public officials. Vicarious liability is one of the deterrents to the imposition of personal liability on errant public officials.

Public officials, are by law, in an employer-employee relationship and/or principal-agent relationship and as such, they work for the State. If the principle of vicarious liability is not limited or set aside, some public officials may act negligently and may

1 Neethling and Potgieter *Law of Delict* 6th ed 365.

choose to continue in their negligent acts, being fully aware of the protection that the common law affords them. McQuoid-Mason is of the view that if there is enough proof that a public official's conduct was either negligent or intentional then that is enough ground to impose personal liability. Therefore, he is of the view that public officials in South Africa who are incompetent, indifferent or negligent, and who cause harm to others have no immunity.[2]

The courts should impose personal liability on public officials either by applying the common law approach of *ultra vires,* negligence, bad faith (*mala fide*), and unreasonableness or the constitutional approach of promoting accountability and responsiveness. The courts are increasingly assuming the jurisdiction to impose personal costs on public officials as a means of holding them accountable for performing their constitutional obligations either below the standard that is expected of them to perform or below the constitutional standard that they ideally should perform. If public officials are going to act in bad faith, unreasonably, or illegally, they, rather than the State, should be held accountable and suffer personal harm from the adverse costs orders. The courts should then come up with uniform rules that will justify and mark the basis on which they may impose personal liability on public officials.[3]

Moskowitz and Fontana are of the view that as a result of rapid changes in the law, public officials must be acutely aware that in this litigious society they are more exposed than ever before to lawsuits and the imposition of a personal judgment against them.[4] Almost anything that public officials do or do not do, say or do not say, could

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2 McQuoid-Mason 2016 *SAMJ* 681.

3 See e.g. *Lushaba v MEC for Health, Gauteng* 2015 3 SA 616 (GJ) para 71: " The authorities caution that costs *de bonis propriis* should only be awarded in exceptional circumstances…But there is a limit. That limit is, to my mind, crossed when one encounters the degree of indifference and incompetence evidenced in this case. Erring when trying to do one's work well is one thing. Not even caring is quite another. The public should not have to suffer this complete indifference and incompetence at the hands of public servants. In 1902 Innes CJ thought that it would be detrimental to the public service to 'mulct that official in costs where his action or his attitude, though mistaken, was bona fide'. But circumstances appear to have changed, with not even censure from our highest courts being sufficient to induce public officials to public-minded service. Something is required to so induce them. Perhaps the answer lies in greater accountability."

4 Moskowitz and Fontana 1982 *Insur. Couns.J* 490.

lead to a lawsuit. Although it is not always guaranteed that it might lead to an adverse judgment, it may result in a suit and the incurring of legal fees.[5] Contemporary South Africa has been flooded by an increasing number of civil litigants attempting to hold public officials liable for their incompetent and/or dishonest acts.

In *Black Sash Trust v Minister of Social Development*,[6] the Court examined the law relating to the personal liability of public officials for legal costs. It applied the constitutional values of accountability and responsiveness and ordered the Minister to show cause why she should not be personally held liable for the costs. In *Gauteng Gambling Board v MEC for Economic Development*,[7] the Court observed that the time had come for courts to seriously consider holding officials who behave in a high-handed manner personally liable for costs incurred and in *Black Sash Trust and (Freedom Under Law Intervening) v Minister of Social Development*,[8] the court held that the common law rules for holding public officials personally responsible for costs are now buttressed by the *Constitution*. This might have a sobering effect on negligent public office bearers. Nevertheless, the courts have not yet set standard precedence for the basis on which personal liability may be imposed on public officials.

This chapter will, therefore, discuss the basis on which the courts should impose personal liability for costs on public officials. In a democracy where public officials are protected despite their negligent, unreasonable acts, this chapter discusses the principles that the courts can use to impose personal liability and the important role that such reform will bring in vindicating the *Constitution*. The *Constitution's* founding provisions envision a government that is accountable, responsive and open to the people,[9] and the courts may make any order that is just, equitable and appropriate to remedy a constitutional violation.[10] This chapter discusses the imposition of personal liability on public officials and how the courts can achieve this by using the common

5 Moskowitz and Fontana 1982 *Insur. Couns.J* 490.
6 *Black Sash Trust v Minister of Social Development* 2017 9 BCLR 1089 (CC).
7 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA) para 95.
8 *Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development* 2018 12 BCLR 1472 (C) 1473.
9 Section 1*(d)* of the *Constitution of the Republic of South Africa*, 1996.
10 Sections 172 and 173 of the *Constitution of the Republic of South Africa*, 1996.

law approach to promote the constitutional values of accountability and responsiveness.

3.2 Personal liability of public officials

The liability of governments and their employees is a vast and important area of law. As the role of the government has expanded over time, so too has the opportunity for official misconduct.[11] The need to impose personal liability on public officials has the effect of imposing less State liability but more personal liability on public officials. Schuck is of the view that the rule of law requires that officials be bound by the rules that a democratic society has imposed upon its public servants no less than upon its other members. He holds the view that decisions that seek to hold officials responsible inevitably advance social goals, such as,

> … compensating victims of official misconduct; discouraging official illegality; encouraging officials to execute their duties in a decisive, selfless, and socially beneficial manner; the shifting of loss to a larger number of people; the reinforcement of community sentiments concerning the morality of certain behaviour; and wealth redistribution.[12]

One of the mechanisms that can be used to hold public officials accountable is imposing personal liability under judicial review. The courts should jealously guard constitutional rights and act decisively upon the infringement thereof. Furthermore, it is important that those who act with impunity, and who think that they can do as they please, simply because they have the force of the whole law enforcement system behind them, should be brought to book and restrained. The whole wrath of the legal system, the rule of law, the courts and the public should be brought upon such officials.[13] The courts have presided over and continue to preside over cases where private persons have sued and continue to sue the State for damages caused by public officials.

McQuiod-Mason is of the view that the courts have observed that where the State has been sued vicariously for the wrongs of public officials, it has not obtained reimbursement from the offending official. For the purposes of this study which looks

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11 Anonymous 1998 *Harv L Rev* 2009.

12 Shuck 1980 *SCR* 285.

13 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 45.

at private persons or any institutions which are aggrieved by any public officials acting under their portfolio, McQuoid-Mason suggests that those irresponsible public servants should be sued by the aggrieved persons or institutions in their personal capacity (in addition to the State), to prevent taxpayers always having to pay for their misdeeds.[14] In support of Mason's view, Du Plessis AJ sternly held that,

> "…the taxpayer should not be the liable party to pay for unlawful, in discriminatory and illegal actions committed by government officials. I have already referred to the extent of damages claims that are instituted yearly against the first and second respondents and the costs involved in respect thereof, which must be carried by the taxpayer. Government officials who act with impunity cannot simply, and should not be allowed to, do what they please, and thereafter be exonerated from their actions because of the fact that the relevant government institution is held responsible for payment of damages and the costs caused by their unlawful actions".[15]

A government official in a particular position can be ordered to pay costs *de bonis propriis*, under certain circumstances as a result of such an official's actions, and in particular where the actions of the official were unlawful and where it caused the litigation and the costs in respect thereof. That is particularly so where relief that is sought as a result of such actions by a government official is opposed by such individuals, which should never have been opposed.[16]

A violation of constitutional rights by public officials gives the Constitutional Court the jurisdiction to determine the occasions for holding public officials personally liable in constitutional litigation. McQuoid-Mason is of the view that holding public officials personally liable by the courts depends on three factors. These factors are whether such public officials have immunity against being personally sued for harm caused due to incompetence and negligence, whether the common law principle of vicarious liability by the State excuses public officials from personal liability and whether the courts are prepared to impose such personal liability on public servants acting within the course and scope of their employment.[17]

The Court in the *Swartbooi* case held that the common law rules for granting a personal costs order against persons acting in a representative capacity are based on conduct

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14 McQuoid-Mason 2016 *SAMJ* 681.
15 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 66.
16 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 65.
17 McQuoid-Mason 2016 *SAMJ* 681.

that is motivated by malice or amounts to improper conduct.[18] Malice is a motive that is distinct from a sense of duty, which incorporates any corrupt motive, any wrong motive or any departure from duty. It may refer to a litigant's recklessness and the impudent and discreet way in which he or she acts. The *Constitution* provides that anyone has the right to approach a competent court where their rights have been infringed or threatened, and the court will grant appropriate relief.[19]

It ought to be possible to avoid litigation that has been caused by an administrative failure, improper conduct or malicious conduct with adverse implications for the public purse. When a demand is made on the public office and is ignored, the aggrieved persons should have effective redress in a court of law. The usual outcome is that the public office is ordered to do what it ought to have done at the outset, leaving the Court merely to order the government to pay costs that were avoidable.[20] In the minority judgment handed down in *Public Protector v South African Reserve Bank*[21] by Mogoeng CJ courts were warned against making personal costs against State functionaries acting in their official capacities fashionable. He held that imposing personal liability on public officials must be done with extreme vigilance because such decisions are likely to have a chilling effect on the public officials' willingness to confront perceived or alleged wrongdoing.

The question of what would constitute improper conduct was answered in the *Swartbooi* case. The Court linked the issue of institutional competence and constitutional obligations. It held that from an institutional perspective, public officials

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18 *Swartbooi v Brink* 2006 1 SA 203 (CC) para 7.

19 Section 38 of the *Constitution of the Republic of South Africa*, 1996: " Anyone listed in this section has the right to approach a competent
court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members."

20 *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) para 6.

21 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 6.

occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position, yet where specific constitutional and statutory obligations exist, the proper foundation for personal costs orders may lie in the vindication of the *Constitution*. In the constitutional context, the test of bad faith and gross negligence is used when a public official's conduct of his or her duties, or resorting to litigation, may give rise to a costs order.[22] It is pivotal that the courts do not shun away from imposing such orders in case of institutional incompetence. When there is a need to guard against and eradicate abuse of state power, gross negligence and bad faith public officials may attract personal costs orders, even on a highly punitive scale, where appropriate.[23]

Institutional incompetence has seen a major rise in litigation against the state. The exorbitant legal costs that have to be paid by the state due to a public official's incompetence must be limited. In *York Timbers Ltd v Minister of Water Affairs and Forestry;*[24] the court held that an award of attorney and own client costs against a minister for institutional incompetence should be justified. The court held that the Department in question dismally failed to comply with its obligations and following up with unnecessary litigation was unacceptable. Where government officials act out of character while they are aware of their obligations and the necessity for complying with these obligations but simply ignore them was held to be a justification for ordering punitive costs. In this judgment personal costs orders as a punitive measure were not held against the public official(s) responsible for the institutional incompetence but they were held against the state and not the minister personally despite acting in bad faith.

Where public officials have been found to be guilty of acting in bad faith or have acted with gross negligence, the courts have not hesitated in some cases to order personal costs orders against them. One of the cases where this was held is in *Vermaak's* case[25]

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22 *Swartbooi v Brink* 2006 1 SA 203 (CC) para 7: "…the liability of members of the council should be determined according to our Common Law rules regarding costs. The Common Law rules, generally speaking, render an order for costs *de bonis propriis* by a person acting in representative capacity appropriate if their actions are motivated by malice or amount to imporper conduct."

23 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 6.

24 *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 2 All SA 710 (T) 738-739.

25 *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679; *Black Sash Trust v Minister of Social Development* 2017 9 BCLR 1089 (CC) para 691.

where the Court said that a representative's conduct in connection with the litigation must have been *mala fide*, grossly negligent or unreasonable for it to warrant a personal costs order. In *Potgieter's* case, the court applied three grounds to hold the litigants personally liable for costs. It was held that the litigants would be held personally liable for costs if it appeared that they acted *mala fides*, or they acted negligently, and/or they acted unreasonably.[26] The grounds of *mala fides* (bad faith), negligence and or unreasonableness have since been incorporated in recent cases[27] and are individually discussed in this Chapter to enable courts to find appropriate application. This part of the research seeks to discuss the test that should be used by courts to reach a verdict that a public official was negligent, acted *mala fides* and/or was unreasonable in his or her actions and that such costs order be awarded against the public official and not the State.

3.3 Vicarious liability

The principle or the doctrine of vicarious liability is used in the South African law of delict. It is described as the strict liability of one person for the delict (misconduct) of another. The former is thus found indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a specified relationship between the persons.[28] According to the law of delict, a person may be liable for damages caused to another in at least two circumstances. These circumstances are when the said person is directly liable or when he or she is vicariously liable. Direct liability is the liability imposed upon one who has personally committed a delict, whereas vicarious liability is the liability of one person for a delict committed by another. This latter

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26 *Re Estate Potgieter* 1908 TS 982-1002: "While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is, on the other hand, essential to recollect that mere *bona fides* is not the test." So I think as the result of the authorities we may lay down as a general rule in these cases that a trustee should not be ordered to pay the costs of unsuccessful litigation *de bonis propriis,* whether he is a plaintiff or defendant unless it appears that there was a want of *bona fides* on his part or that he acted negligently or unreasonably.

27 *Black Sash Trust v Minister of Social Development* 2017 9 BCLR 1089 (CC) para 5, see also *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 98 and *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 205.

28 Neethling and Potgieter *Law of Delict* 365.

imputation is a result of a relationship between the employer and the employee (wrongdoer) among others.

In litigation, an employer is vicariously liable to compensate the plaintiff for the wrongful acts committed by his or her employee(s). However, such compensation will only arise if there was an employer-employee relationship at the time when the wrongful act was committed, the employee committed the wrongful act and the wrongful act committed by the employee took place while the employee was acting within the course and scope of his or her employment.[29] Neethling and Potgieter discuss a few theories that justify the rationale behind the principle of vicarious liability and these are the interest or profit theory, identification theory, solvency theory, and risk or danger theories. They are, however, of the view that the most acceptable rationale for, or the basis of the employer's liability, controversial as it may be, is that of the risk or danger theory because it provides the true rationale for the employer's liability. This theory assumes that the work entrusted to the employee creates certain risks of harm for which the employer should be held liable on the grounds of fairness and justice as against injured third parties.[30]

The rationale of vicarious liability is based on the risk or danger theory. There is little or no available South African authority that discusses the rationale behind the principle of vicarious liability. An Australian article published by Prentice, is of the view that employees are not generally held liable for ordinary negligence or carelessness in the performance of their duties, the imposition of liability in such a case would be unjust and/or unfair, and an employer accepts the risk of employee fallibility and takes that into account in the costs of doing business, supervising the employee and insuring the enterprise.[31] There, however, have been cases where the employer has sued its own employee for damages caused. In the *Department of Transport v Tasima (Pty) Ltd,*[32] the plaintiff sued the state for the breach of a contract entered into between the state and the plaintiff. In so doing, the state under vicarious liability breached its service

29 Neethling and Potgieter *Law of Delict* 366 – 368.
30 Neethling and Potgieter *Law of Delict* 365.
31 Prentice 2013 https://www.blaney.com/articles/.
32 *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC).

contract causing damage to the plaintiff and a lawsuit against the state. The state, in this case, recognised the breach on the part of its employee (a public official) and sought to sue the public official for the breach of its constitutional duties as provided for by the *Constitution* under section 217. The court held that where a state employee fails to perform their constitutional duties, constitutionally mandated remedies must be afforded for violations of the *Constitution*. This means providing effective relief for infringements of constitutional rights.[33] Regrettably, this research paper does not explore the deviation of vicarious liability where employers sue their employees for damages.

The State being the employer of public officials, it may be argued that public officials should not be personally liable to pay any legal costs resulting from suits brought against the State. This argument may be justified by the view that under vicarious liability public officials are believed to be under an employer-employee relationship and acting within the scope of their employment, and they cannot be held personally liable. Therefore, according to this principle, public officials should not incur any costs for their wrongful acts.

One may also argue that the State should incur all the costs as established by the State Liability Act.[34] The State Liability Act provides that any claim that is made against the State that would, if that claim had risen against a person, be the ground of action in any competent court, shall be cognisable by such court. Such judicial cognisance should take place whether the claim arises out of any contract that is lawfully entered into on behalf of the State or arises out of any wrong that is committed by any servant of the State who is acting in his capacity and within the scope of his authority as such servant.[35] However, in *Harnischfeger Corporation v Appleton* it was held that if the respondent intentionally or negligently causes loss while acting in his or her scope of employment, he or she is personally liable to the employer. That is so even if the relationship between his employment and his employer renders the employer liable.

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33 *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) para 203.
34 *State Liability Act* 20 of 1957.
35 Section 1 of the *State Liability Act* 20 of 1957.

The court reasoned that the employee does not cease to be liable because the employer is liable. The employer is also liable but not exclusively liable. The following was said in this judgment at 487 D[36]:

> "The employer is also liable; he is not exclusively liable. The relationship between employer and the activity of his employee is a basis of holding an additional party liable and not a ground for absolving the person who actually committed the delict."[37]

Judicial officials must then use their discretion when presiding over matters that have to do with state liability. In as much as public officials are in an employer-employee relationship, the courts through the exercise of their judicial discretion can and may find public officials liable for their wrongful acts and impose personal liability on them to pay all the legal costs incurred in litigation, provided they were negligent and acted in bad faith and beyond their legal powers. The State may fulfil the obligations neglected by the public official and in certain cases may pay for damages caused by such neglect as prayed for by the plaintiff; and where gross negligence, malice and/or bad faith is evident the legal costs should be personally paid from the pocket of the public official at fault. The courts should not completely absolve public officials from liability, but they may find them directly liable to third parties for the damages caused.

The principle of vicarious liability must be limited in order to promote accountability and responsiveness in the public sector. Where public officials are aware of the implications of their wrongful acts, they will be more cautious and act diligently to serve the public as provided for by the *Constitution*. The courts must clearly develop the tests to be used to limit the principle of vicarious liability and allow public officials to pay for the legal costs incurred from their pockets where they have been found to have acted negligently, in bad faith and/or unreasonably. It is imperative to note that with regards to the issue of costs there are a number of possibilities in which costs may be imposed or the issue of costs may arise. There are costs orders that can be made against the state due to vicarious liability for its employees and other organs of state, punitive costs orders that can be made against public officials *de bonis propriis*,

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36 *Harnischfeger Corporation v Appleton* 1993 4 SA 479 (W).
37 *Harnischfeger Corporation v Appleton* 1993 4 SA 479 (W) 487.

and costs orders made for the direct liability of employees against third parties and the state causing damages. This research is limited to punitive costs orders that can be imposed against public officials *de bonis propriis* (from their own pocket) for their wrongful and/ or negligent acts.

The following section of this study will, therefore, discuss the common law approaches that the courts may use to limit vicarious liability and subsequently State liability to find public officials directly and/or personally liable for their wrongful acts.

3.4 Common law approach

The common law principles that previously provided grounds for judicial review of public power have been incorporated under the *Constitution* and that in so far as they might continue to be relevant to judicial review, these common law principles gain their force from the *Constitution*.[38] The *Constitution* gives the courts the right to place under judicial review any administrative acts that are unlawful, unreasonable and procedurally unfair. This is so that they can promote just administrative action by the State.[39] In *Pharmaceutical Manufacturers' Association of South Africa: In Re Ex Parte President of the Republic of South Africa* the Court held that judicial review under the *Constitution* and under the common law are similar concepts. The control of public power by the courts through judicial review is and always has been a constitutional matter.[40] The Court further held that it cannot accept the contention that treats common law as a body of law separate and distinct from the Constitution. It held that these are not two systems of law but one system of law. Chaskalson P held the view that common law is shaped by the Constitution, which is the supreme law, and all law,

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38 *Pharmaceutical Manufacturers Association of SA : In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 33:"The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

39 Section 33 of the *Constitution of the Republic of South Africa*, 1996.

40 *Pharmaceutical Manufacturers Association of SA : In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 33.

including the common law, derives its force from the *Constitution* and is subject to constitutional control.[41]

Courts in constitutional litigation can thus make use of common law principles to vindicate the *Constitution* and in this case incorporate common law principles to hold public officials personally liable for costs awarded against the State in constitutional litigation.

3.4.1 Ultra vires

The term *ultra vires* is a Latin phrase that means beyond their power. This phrase is used to describe acts that purport to be done by virtue of a certain authority, but which really exceeds such authority or acts that are otherwise unauthorised. Thus, public officials can be said to act *ultra vires* when they exceed their delegated power, or otherwise act in a manner that is not within the authority conferred upon them by the law. If a public official acts *ultra vires*, his or her action is void; however, it will always have an unfavourable effect that might result in a lawsuit against such public officials. Hoexter is of the view that *ultra vires* is a principle that plays an important role and is tied to constitutional fundamentals like the separation of powers, parliamentary sovereignty and the rule of law. She further states that,

> "It's essence is that the legislature, in conferring power (*vires*) on administrators, sets statutory boundaries for the exercise of those powers. The legislature is the supreme lawmaker, while the function of the courts is to apply the law made by it. The courts are thus required to see that the intention of the legislature is carried out and that administrators act *intra vires* – that they remain within the boundaries of the powers granted to them. Conversely, the courts are entitled to set aside administrative action that is *ultra vires*, or beyond the power granted to administrators."[42]

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41 *Pharmaceutical Manufacturers Association of SA : In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44: "I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law dealing,
each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution
which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."

42 Hoexter *Administrative Law in South Africa* 115.

The *ultra vires* principle is the basis of judicial review in relation to those bodies that derive their powers from statute.[43] The *Constitution* prescribes how public officials must exercise their powers and sets limits to such exercise. When public officials act outside their statutory powers, such use of power places the public involved in a disadvantaged position and results in the infringement of their constitutional rights and possible lawsuit(s) against the State. Continued failure by a public official to respect the *Constitution* regardless of that public official's portfolio or rank undermines the *Constitution*, which is the supreme law of the Republic. In *Coetzee v National Commissioner of Police,* it was held that it is essential that the courts should protect these rights in the most effective way possible. The level of crime in South Africa should not justify a departure from the democratic and constitutional principles enshrined in our *Constitution*, safeguarding the population from any excessive use of power and deprivation of freedom by government institutions and authorities.[44] In *President of the Republic of South Africa v Hugo*[45] the court held that the President, as the supreme upholder and protector of the *Constitution*, is its servant and like all other organs of State, the President is obliged to obey each one of its commands. Therefore, no organ or public official can escape adhering to the *Constitution* when exercising their powers.

In *Ahmed v Minister of Home Affairs,*[46] the Court held that if a directive from a public official overrides, amends, or conflicts with the provisions of a statute, then such directive is unlawful. Similarly, the directive may not be in conflict or inconsistent with the *Constitution*. The making of a directive is the exercise of public power, and all public power must be exercised lawfully. A directive must fall within the four corners of the empowering legislation and for the public official (in this case the director-general) to issue a directive that contradicts or extends beyond the powers given to him by the relevant statute would be to act without legal authority and in violation of the rule of law.[47]

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43 Craig 1998 *CLJ* 70.
44 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 43.
45 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 65.
46 *Ahmed v Minister of Home Affairs* 2019 1 SA 1 (CC).
47 *Ahmed v Minister of Home Affairs* 2019 1 SA 1 (CC) para 38.

It is not enough for the courts only to recognise and hold legal opinions in cases where public officials have acted *ultra vires*. The courts must exercise their inherent jurisdiction and apply the law to the extent that constitutionally approved remedies to put public officials in check are developed, exercised and used as precedents in similar matters. Public officials should be held personally liable in such circumstances as a remedy to curb further negligent acts of *ultra vires.* The State must not continue to pay legal costs incurred through lawsuits caused by the incompetence of public officials who make decisions that are outside their powers.[48]

It is a requirement that for a public power to be exercised lawfully it may not be exercised *ultra vires*. The holder of the power must act in good faith and must not have misconstrued the power conferred, nor may the power be exercised arbitrarily or irrationally.[49] What makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim.[50]

In *Home Talks Development (Pty) Ltd v Ekurhuleni Metropolitan Municipality*, the court held that the abuse of power is antithetical to the principle of public accountability. When public officials act for a private purpose, whether out of spite, revenge, malice or simply self-advancement, they abuse their powers. It is immaterial whether they derive any personal gain from their conduct; it remains abuse of power. Once abuse of power is established, liability would usually follow. In the language of wrongfulness, considerations of public or legal policy will generally compel the imposition of delictual liability to loss resulting from the abuse of power. Moreover, liability cannot be avoided

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48 See *South African Social Security Agency v Minister of Social Development* 2018 10 BCLR 1291 (CC) paras 37 and 38:"… 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. 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. public officials may be ordered to pay costs out of their own pockets…The source of that power is the Constitution itself which mandates courts to uphold and enforce the Constitution."

49 *Airports Company South Africa v Tswelokgosto Trading Enterprise* 2019 1 SA 204 (GJ) para 7.

50 *POPCRU v Minster of Correctional Services* 2011 10 BLLR 996 LC) para 27.

by showing that the official acted not for his personal purposes but for the benefit of the public.[51]

Regrettably, in most cases where public officials have been found to have acted beyond their powers leading to a claim against the State, in many instances the State has been ordered to pay the litigation costs. Courts must grant appropriate relief against public officials in the form of imposition of personal liability of constitutional litigation costs. Plasket is of the view that:

> "This type of costs order is, however, probably best suited to, and more easily justifiable for, the vindication of constitutional rights where the public interest in relief such as this is often obvious and apparent: such an order may amount to appropriate relief for the purposes of s 38 of the Constitution. When unconstitutional administrative conduct is of such an order of bad faith that it does not only harm the individual against whom it is primarily directed but also 'impede the fuller realisation of our constitutional promise'. In other words, if administrative conduct is motivated by bad faith of a sufficiently gross degree, it may be appropriate for a court to make an order that the administrative official concerned repay the state for the costs incurred by it in defending his or her actions, in addition to paying the costs of the applicant *de bonis propriis*. Such an order would be appropriate if it was suitable to vindicate the Constitution and deter further violations of constitutional rights."[52]

3.4.2 Negligence

Negligence is a mere failure to use reasonable care.[53] Neethling and Potgieter are of the view that in the case of negligence a person may be blamed for an attitude or conduct of carelessness, thoughtlessness or impudence because, by giving insufficient attention to his or her actions, he or she would have failed to adhere to the standard of care legally required of him or her.[54] In the minority judgment of Mogoeng CJ,[55] it was held that where litigation involves a public official it is highly imperative that:

> "…gross negligence and bad faith or the plain intention to prejudice anyone being investigated, or abuse of power must be strongly guarded against and appropriately sanctioned. These are the tests for awarding personal costs against those litigating in their official capacity."[56]

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51 *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 1 SA 391 (SCA) para 205.

52 Plasket 2000 *SALJ* 158.

53 Jooste www.seesa.co.za.

54 Neethling and Potgieter *Law of Delict* 131.

55 *Public Protector v South African Reserve Bank* 2019 ZACC 29.

56 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 50.

There are times where courts may limit liability based on the type of negligence exhibited by the party in question. The courts tend to differentiate between normal negligence and gross negligence, yet their impact may be the same. For the purposes of this study, as held in *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas,* negligence and gross negligence is viewed to have the same impact and ordinary negligence will not limit liability compared to gross negligence. The court thus held that for a conduct to qualify as gross negligence, it must involve a departure from the standard of the reasonable person to such an extent that it may be properly categorised as extreme. Such conduct must demonstrate, where there is found to be a conscious risk-taking, a complete obstuteness of mind, or where there is no conscious risk-taking, a total failure to take care.[57]

Before the *Constitution*, the courts as the prime and ultimate determinants were not in favour of imposing liability on public authorities or extending the legal duty to take care in the field of public administration.[58] Okpaluba is of the view that when the *Constitution* came into effect and entrenched the Bill of Rights, it empowered the courts to grant 'appropriate relief'[59] and to make 'just and equitable' orders[60] for the enforcement of the guaranteed rights. The then South African perspective on public law remedies in general, and the recovery of damages for governmental wrongs, was destined to change. The Constitutional Court hence brought about transformative change, progressive development of the common law and upholding governmental accountability.[61]

Under South African law, Okpaluba is of the view that in the courts a way of recognising a duty to care should arise where the necessary proximity exists between the public

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57 *Transnet Ltd t/a Portnet v The Owners of the Mv "Stella Tingas"* 2003 1 All SA 286 (SCA) para 7.

58 Okpaluba 2006 *Acta Juridica* 117.

59 Section 38 of the *Constitution of the Republic of South Africa*, 1996:" Anyone… has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

60 Section 172(1)*(b)* of the Constitution of the Republic of South Africa, 1996:" 1. When deciding a constitutional matter within its power, a court-

(b) may make an order that is just and equitable, …."

61 Okpaluba 2006 *Acta Juridica* 118.

authority and the individual.[62] According to this approach, the court must establish whether the public official owed the individual in question a duty of care and whether there was a breach of such duty. Neethling and Potgieter hold the view that if the courts establish this proximity between the public official and the individual in the affirmative, then negligence is said to be present.[63] However, regarding the duty to care, in *Premier of Western Cape v Fair Cape Property Developers (Pty) Ltd* the court held that,

> The dictum must be qualified in the light, now, of the duties imposed on all organs of government by the Constitution, and in particular in the light of the positive obligations imposed by s 7[64] and s 41 (1).[65] In determining the accountability of an official or member of government towards a plaintiff, it is necessary to have regard to his or her specific statutory duties, and to the nature of the function involved. It will seldom be that the merely incorrect exercise of a discretion will be considered to be wrongful.[66]

In *Minister of Safety and Security v Carmichelle,*[67] the question of the validity of imputing a duty of care on an errant public official was discussed. The court held that where the State finds itself under litigation for the wrongful acts of its employees there should be a departure from the norm of State accountability in the absence of any proximity between the state and the individuals to whom a duty of care may be owed to.

Harms J further held that,

> Proximity is a requirement for establishing a duty of care in English law in order to ground liability under the tort of negligence and was adopted by Scots law. But proximity, in our law, is not a self-standing requirement for wrongfulness. Likewise, the requirement of a special relationship is not essential for wrongfulness. However, if there is, in fact, some connecting factor between the plaintiff and the defendant, it is more likely that in the case where the plaintiff is an individual the breach of a duty might arise; and in the case where the defendant is the State it is less likely that there will be any deviation from the norm of accountability that the Constitution imposes.[68]

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62 Okpaluba 2006 *Acta Juridica* 119.

63 Neethling and Potgieter *Law of Delict* 152.

64 Section 7(2) of the *Constitution of the Republic of South Africa*, 1996:
"(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights."

65 Section41(1)*(c)* of the Constitution of the Republic of South Africa, 1996:
"(1) All spheres of government and all organs of state within each sphere must-
(c) provide effective, transparent, accountable, and coherent government for the Republic as a whole."

66 *Premier of Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 2 All SA 465 (SCA) para 37.

67 *Minister of Safety and Security v Carmichelle* 2004 2 BCLR 133 (SCA) para 40.

68 *Minister of Safety and Security v Carmichelle* 2004 2 BCLR 133 (SCA) para 41.

In its judgment, the Constitutional Court furthermore found that the State owed a duty of care to the plaintiff.[69] The court held that according to the general norm of accountability the State is liable for the failure to perform the duties imposed upon it by the *Constitution* unless it can be shown that there is a compelling reason to deviate from that norm.[70] Where there is no reason to depart from the general principle that the State will be liable for its failure to comply with its constitutional duty to protect the public, the State, therefore, will incur the costs of litigation.[71]

The essential elements to be met are that an unlawful act or omission must occur in the exercise of power by the public officer, the act or omission must have been done or made with the required mental element, the act or omission must have occurred in bad faith, the claimants must demonstrate that they have a sufficient interest to sue the defendant and the act or omission must have caused the claimants' loss.[72]

3.4.3 Bad faith (mala fide)

When we look at the everyday dictionary meaning of bad faith it is defined as an intent to deceive.[73] The meaning of bad faith or malicious intent is generally accepted as extending to fraudulent, dishonest or perverse conduct; it is also known to extend to gross illegality.[74] Acting in bad faith suggests an ulterior motive or ulterior purpose other than the one that should be intended. Hoexter is of the view that ulterior motive and ulterior purpose are two terms that are distinct from each other. She views ulterior purpose as an objective concept, whereas an ulterior motive suggests the presence of hidden, subjective and possibly sinister aims.[75] Therefore, an ulterior purpose exists when power given for one purpose is used for another purpose. The organ must have intended the act and, if it was aware that the purpose was not authorised, it will have acted in bad faith. Though these terms are used distinctly they overlap.

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69 *Minister of Safety and Security v Carmichelle* 2004 2 BCLR 133 (SCA) para 2.
70 *Minister of Safety and Security v Carmichelle* 2004 2 BCLR 133 (SCA) para 43.
71 *Minister of Safety and Security v Carmichelle* 2004 2 BCLR 133 (SCA) para 44.
72 *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 1 SA 391 (SCA) para 26.
73 Collins English Law Dictionary Complete and Unabridged (2018).
74 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 71.
75 Hoexter *Administrative Law in South Africa*.

In *Public Protector v South African Reserve Bank,* it was held that for bad faith to qualify as one of the accompanying tests to impose personal liability on a public official a link between serious dishonesty or malicious conduct must be found. The deciding factor should not merely be related to the seniority of the person or high office occupied, but also with the seriousness of the actual or reasonably foreseeable consequences of that conduct.[76]

The *Promotion of Administrative Justice Act 2000*[77] (PAJA) provides for the judicial review of actions that are taken for an ulterior purpose or an ulterior motive and in bad faith.[78] Bad faith exists if an organ of state claims to be acting for one purpose but knowingly acts for another private or public interest out of say, spite or ill will, or to benefit the organ or its relations.[79] Where a public official has acted in bad faith in the past, the courts have found him or her personally liable and has been ordered to pay legal costs from his or her own pocket. In the recent minority judgment in *Public Protector v South African Reserve Bank*, Mogoeng CJ's reasoning gave a detailed approach to bad faith. He held that the correct approach to determining the existence of bad faith is one that should recognise that bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed. He reasons that the mischief sought to be rooted out by rendering bad faith so severely punishable, particularly within the public sector space, is to curb abuse of office which invariably has prejudicial consequences for others. Abuse of office undermines the efficacy of State machinery and denies justice and fairness to all people and institutions.[80] Of note is that the majority judgment did not contradict these sentiments as held by the minority judgment.

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76 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 71.

77 *Promotion of Administrative Justice Act* 3 of 2000.

78 Sections 6 (2) *(e)* (ii) and *(v)* of the *Promotion of Administrative Justice Act* 3 of 2000: "2. A court or tribunal has the power to judicially review an administrative action if-

(e) the action was taken-

(ii) for an ulterior purpose or motive;

(vi) in bad faith;"

79 *Heyneke v Umhlatuze Municipality* 2010 JOL 25625 (LC) para 56.

80 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 72.

Courts have been reluctant over the years to hold public officials personally liable, however where a public official acts in bad faith hoping to get away with the surreptitious connivance to harm the unsuspecting other,[81] that undoubtedly justifies personal costs orders against the public official. In one of the most recent cases of *Black Sash Trust and (Freedom Under Law Intervening), v Minister of Social Development* the court held that,

> The Inquiry Report's finding that the Minister's failure to disclose this information was her fear of being joined in her personal capacity and being mulcted personally in costs has not been and cannot be faulted. The inference that she did not act in good faith in doing so is irresistible. At best for her, her conduct was reckless and grossly negligent. All that is sufficient reason for a personal costs order.[82]

Bad faith in most cases accompanies other grounds of review before a court can make a judgment. There are tests that can be applied to validate a court's finding of bad faith and impose personal liability for legal costs incurred by the State. One of the tests that the courts can adopt comes from a view expressed by Wiechers, cited in the *Heyneke* case. He is of the view that it is a serious dereliction of duty for an organ of state to blatantly fail to comply with a requirement for validity when carrying out its duties to the extent that such failure suggests that the organ of state must have known that its act was invalid. The act under judicial review should clearly indicate that the organ of state not only misconceived its powers and misjudged the facts, but should have also realised or did, in fact, realise that it was performing an invalid act.[83] Furthermore, in *Black Sash Trust and (Freedom Under Law Intervening) v Minister of Social Development* it was held that the tests of bad faith and negligence in connection with the litigation, applied on a case-by-case basis, remained well-founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, might give rise to a costs order.[84]

The considerations of justice and equity dictate that the legal basis for awarding personal costs on public officials and appreciating their disastrous consequences must

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81 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 73.

82 *Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development* 2018 12 BCLR 1472 (C) para 12.

83 *Heyneke v Umhlatuze Municipality* 2010 JOL 25625 (LC) para 56.

84 *Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development* 2018 12 BCLR 1472 (C) para 10.

not only be correctly identified but however as they find application in each case must also be properly explained. It is not enough just to identify the principles in question but also these principles must be developed, explained and applied accordingly. The *PAJA* further provides that a court or tribunal has the power to judicially review actions taken in bad faith.[85] This provision therefore clearly establishes that while bad faith is a ground of review, it will often overlap with other grounds of review. It will rarely be used as an independent ground for an invalid action. Although the basis of the bad faith is irrelevant; its mere existence is enough to validate an abuse of power.[86]

In its majority judgment in *Public Protector v South African Reserve Bank*, the Constitutional Court recognized that more than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.[87] Usually the State is sued by aggrieved persons because of the abuse of power by public officials and the State gets costs orders against it. However, in view of various recent judgments where the courts held or considered holding public officials personally liable either in full or in part for litigation costs incurred due to their dishonest acts, this study holds the view that the State should not be liable for costs incurred owing to an act that was taken in bad faith by a public official.[88] Where the court finds that a public official acted in bad faith with or without the existence of other accompanying grounds and acted with an ulterior

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85 Sections 6(2)*(e)*(ii) and *(v)* of the *Promotion of Administrative Justice Act* 3 of 2000: "2. A court or tribunal has the power to judicially review an
administrative action if-
(e) the action was taken-
(ii) for an ulterior purpose or motive;
(vi) in bad faith;"

86 *Heyneke v Umhlatuze Municipality* 2010 JOL 25625 (LC) para 58.

87 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 223.

88 See *Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development* 2018 12 BCLR 1472 (C) para 14; *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 226 and *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 102.

purpose or motive, it must hold such official personally liable to pay for the costs of the suit.

In *Coetzee v National Commissioner of Police* Plasket J held that, the time has come to consider costs orders *de bonis propriis* against public officials acting in bad faith and causing unnecessary legal costs and litigation, for their opponents, for the general public and for taxpayers.[89] The Court in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* further held that public officials who act improperly and in flagrant disregard of constitutional norms should be personally liable for legal costs incurred by the State. It was reasoned that the imposition of personal liability might have a sobering effect on truant public office bearers and would avoid the taxpayer ultimately having to bear those costs.[90] Such imposition of a personal costs order on a public official whose bad faith or grossly negligent conduct falls short of what is required and vindicates the *Constitution*.[91]

3.5 Constitutional approach

The spirit of the *Constitution*, the recognition of basic human rights, and the right to freedom, enshrined in the *Constitution*,[92] should not be compromised in any way whatsoever through the actions of government officials.[93]

The subsequent discussion provides authoritative references to substantiate the view that constitutional approach can be viewed as a means to an end. If the courts use the common law approach together with the constitutional law approach for holding public officials accountable for their actions, this will limit state liability and promote direct liability by imposing personal liability on public officials. This approach can also be a way of promoting responsiveness within the public sector.[94] Where constitutional

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89 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 76.

90 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA) para 54.

91 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 158.

92 Section 1 of the *Constitution of the Republic of South Africa*, 1996.

93 Section 2 of the *Constitution of the Republic of South Africa*, 1996.

94 See Shuck 1980 *SCR* 282: "Any legal justice system aspires to remedy every significant wrong; those injured by officials violating established legal standards should be made whole. Officials obliged to pay for their transgressions and errors will be more law-abiding, advertent, and respectful for the citizenry."

litigation arises, the courts must strictly use the common law and constitutional approach to hold public officials personally liable. If public officials feel the pain of paying legal costs from their pockets owing to litigation resulting from their own negligence and/or abuse of power, among other reasons, and are held accountable for their actions, they will see the need to be more responsive towards their duties.[95]

3.5.1 Accountability and Responsiveness

The accountability of public officials in a democratic society is a topic of long-standing interest. Bovens practicalises accountability and likens accountability to a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct; the forum can pose questions and pass judgment, and the actor may face consequences.[96] The principle of accountability therefore, permits the public through judicial processes to question the actions of public officials and seek relief for damage caused. When the government fails to perform its functions constitutionally and when all processes to obtain redress have failed, the courts can step in to provide direction and protect the rights of citizens.[97] Cooper[98] is of the view that the Consitutional Court has maintained that litigation regarding positive obligations is an important element of government accountability, concomittant with the founding provisions of the *Constitution*, 'to ensure accountability, responsiveness and openness'.[99] Mulgan holds the view that calling for accountability seeks answers and rectification; thus, those who are accountable must in turn respond and accept the sanctions imposed on them for their wrongful actions.[100] He further holds that among other core issues, accountability covers how legislators can scrutinise the actions of public servants and make them answerable for their mistakes, and how members of

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95 See Plasket 2000 *SALJ* 158: " Given the exorbitant cost of High Court litigation, the prospect of costs orders of this type would probably serve as a particularly potent inducement to administrative officials to do their jobs honestly and properly and, in this way, promote efficient administration and contribute to the attainment of the basic values and principles for public administration set out in s 195(1) of the Constitution."

96 Bovens 2007 *ELJ* 450.

97 *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (CC).

98 Cooper 2017 *SAJELP* 59.

99 Section 1 of the *Constitution of the Republic of South Africa*, 1996.

100 Mulgan 2000 *Public Administration* 555.

the public can seek redress from government agencies and officials.[101] In a democratic society, effective accountability to the public is the indispensable check to be imposed on those entrusted with public power.[102]

Rosenbaum is of the view that there is no issue that is more central to good governance than accountability, particularly the accountability of those in government to their citizenry. Therefore, there is no issue more essential to any discussion of the challenges facing government than the matter of commitment to a high degree of accountability. Indeed, issues of accountability to the citizenry are quite simply the most important elements of contemporary governance and need to be at the very centre of any discussion on remedial mechanisms.[103] Treating accountability as a mechanism, on its own, allows for developing a picture of who is accountable to whom, for what and how.[104] Jarvis concurs with Rosenbaum and is of the view that those who exercise the privilege of delegated authority have to be accountable for their actions and decisions to ensure that authority is discharged in a manner that is just and equitable.[105] He holds the notion that the focus of accountability studies should not be whether the agents acted in an accountable way, but whether they should and can be held accountable *ex post facto* by a court of law.[106]

The rightful institutions to hold executives or administrative officers accountable to the citizenry are the courts. The purposes that accountability is meant to serve are essentially threefold, although they overlap in several ways. These are to control the abuse and misuse of public authority, to provide assurance in respect of the use of public resources and adherence to the law and public service values, and to encourage and promote learning in pursuit of continuous improvement in governance and public management.[107]

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101 Mulgan 2000 *Public Administration* 556.
102 Finn 1994 *Griffith Law Rev.* 224.
103 Rosenbaum www.nipsa.org/news/rosen.rtf.
104 Jarvis 2015 *AJPA* 450.
105 Jarvis 2015 *AJPA* 450.
106 Jarvis 2015 *AJPA* 451.
107 Aucoin and Heintmzman 2000 *IRAS* 45.

This study seeks to explore judicial and legislative mechanisms to curb negligence in public administration and promote accountability and responsiveness to the vindication of the *Constitution*.

The *Constitution* under section 195 provides for basic values and principles that should govern public officials in their pursuit of providing public administration. Section 195, specifically section 195*(f)*, provides that public administration must be accountable.[108] The *Constitution*, more importantly, provides that public officials in South Africa have a duty to account collectively and individually for the exercise of their executive powers.[109]

The public should be vindicated, and a deterrence should be available to force public officials to comply with their duties and obligations, to act constitutionally and to act within their authority, and without trampling upon the rights of citizens, who are free men and women in a modern, democratic society, and who are entitled to demand of public officials that they act in such a fashion.[110] Du Plessis AJ held that the court had ample justification and authority to grant appropriate relief which would act as a deterrent for those responsible, and for others, to act within their constitutional obligations, and to serve the country and its people, rather than to serve themselves. Any public official who knows that he would be ordered personally to pay costs of any court application or litigation flowing from his unlawful actions, instead of the taxpayer having to carry such a burden and such an official not suffering any consequences there from, will think twice before acting in the manner and fashion that is less than what the constitution requires of them.[111]

In *Khumalo v MEC of Education KwaZulu Natal* [112] the court held that,

> S195 provides for a number of important values to guide decision makers in the context of publi-sector employment. When, as in this case, a responsible functionary

[108] Section 195*(f)* of the *Constitution of the Republic of South Africa*, 1996.
[109] Section 92(2) of the *Constitution of the Republic of South Africa*, 1996.
[110] *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 96.
[111] *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 97.
[112] *Khumalo v MEC of Education KwaZulu Natal* 2014 5 SA 579 (CC).

> is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded in the emphasis on accountability and transparency in s 195(1)*(f)* and *(g)* and the requirement of a high standard of professional ethics in s 195(1)*(a)*.[113]

Further in *Hunter v Financial Sector Conduct Authority* it was held that the values of accountability, responsiveness and openness are pervasive in all spheres of public life. It is therefore the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power.[114]

In *Mlatsheni v Road Accident Fund* [115]Plasket J raised his concerns on section 195 violations by public officials. He held that the public official in this particular litigation had fallen short of what is expected of public administrators by section 195 of the Constitution. It cannot be said that the irresponsible raising of a frivolous defence promotes and maintains a high standard of professional ethics or that it promotes the efficient, economic and effective use of resources. It cannot similarly be said that he or she has performed the constitutional obligations owed to the plaintiff diligently.[116] Plasket J further held that it is expected of organs of State to treat the members of the public with whom they deal with dignity, honestly, openly and fairly. However, in his view if this type of conduct continues, the time may well have arrived for orders of costs *de bonis propriis* to be awarded against employees of the defendant who give instructions that have the effect of frivolously frustrating legitimate claims.[117]

In *Coetzee v Commissioner of Police,*[118] it was held that the *Constitution* created certain rights for the public and placed certain obligations on public officials. A reference to section 195(1) of the *Constitution* is made which sets out the basic values and principles governing public administration, and which requires, *inter alia*, a high standard of professional ethics that must be promoted and maintained. Furthermore, efficient, economical and effective use of resources must be promoted. Services must

113 *Khumalo v MEC of Education KwaZulu Natal* 2014 5 SA 579 (CC) para 35.
114 *Hunter v Financial Sector Conduct Authority* 2018 12 BCLR 1481 (CC) para 87.
115 *Mlatsheni v Road Accident Fund* 2009 2 SA 401 (E) para 16.
116 *Mlatsheni v Road Accident Fund* 2009 2 SA 401 (E) para 15.
117 *Mlatsheni v Road Accident Fund* 2009 2 SA 401 (E) para 18.
118 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP).

be provided impartially, fairly, equitably and without bias. These principles must be applied throughout government at all levels.[119]

In most cases the courts do recognise the need for accountability and the danger that lack of such accountability brings, however the courts continue to hold the state vicariously liable for negligent wrongs committed by its employees. In *Waters v Khayalami Metropolitan Council*[120] the court held that in Chapter 10 of the *Constitution*, where public administration is dealt with, section 195 of the Constitution provides that public administration should be accountable. Despite the court's recognition of the cruciality of this provision it did not apply its judicial discretion by developing the law to find a solution to the continued disregard of finding state employees accountable. The public officials have to personally come to grips with how an open and accountable society ought to operate and also to recognise that in a democratic society those who hold power and are responsible for public administration ought to be open to criticism.[121] When exposed to criticism in form of litigation the courts ought to take up a role where they ensure that personal accountability is nurtured and fostered through personal costs orders on the criticised public official. The standard rules and tests that were discussed under the common law approach in the early stages of this chapter ought to be developed and used by courts as precedent in making sure that public officials are accountable and stay accountable.

In the recent case of *Public Protector v South African Reserve Bank*[122] Kampepe J and Theron J referred to section 195 of the *Constitution* and held that,

> … the source of a court's power to impose personal costs orders against public official is the Constitution itself. The Constitution requires public officials to be accountable… Public officials must not mislead or obfuscate. They must do right, and they must do it properly. They are required to be candid and place a fair and full account of the facts before a court.[123]

Where public officials have dismally failed to act diligently, act right and where their actions have been found to be negligent and in bad faith, public officials must be held personally liable. One of the main purposes of personal costs orders is to vindicate the

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119 *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP) para 81.
120 *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W).
121 *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W) 24.
122 *Public Protector v South African Reserve Bank* 2019 ZACC 29.
123 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 152.

Constitution.[124] The Court held that such orders are not inconsistent with the *Constitution* but are necessary for the protection of the constitution because public officials who flout their constitutional obligations must be held to account.[125] Notably is that, when their defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer as held in *Gauteng Gambling Board v MEC for Economic Development, Gauteng*.[126]

One of the rationales highlighted by Lewis is that accountability is to ensure that there is proper, prudent use of public funds. She enunciates that along with the need to demonstrate value for money comes the rise of performance measurement in the public sector.[127] Public officials should, therefore, be held personally liable for legal costs incurred in litigation resulting from their negligence and/or misconduct. By so doing they will be held accountable for their actions and this will remedy the problem faced by the public where their rights are continuously infringed together with vindicating the *Constitution*. The *Constitution* provides for an accountable government and the courts must come up with measures necessary to realise this provision. The conduct of public officials must be closely scrutinised to close any gap for public officials being absolved of negligent, unreasonable and *ultra vires* actions that would bring the *Constitution* into disrepute while mulcting the State of its funds. For every negligent, unreasonable, *mala fide*, and *ultra vires* act committed or omitted by public officials, they should be answerable and if found to be guilty of the last-mentioned should be made to pay their own legal costs personally.

3.6 Conclusion

This review of the case law has shown that the State has often faced costs orders against it for damages caused by its employees. The courts have until recently been reluctant to hold public officials personally liable for litigation costs. Moreover, in most cases where the courts have imposed personal liability on public officials, the guidelines

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124 *Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development* 2018 12 BCLR 1472 (C) para 8.

125 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 153.

126 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA) para 54.

127 Lewis 2015 *AJPA* 408.

used have not been thoroughly unpacked and explained in detail to an extent that they set out convincing and formidable reasons to hold public officials personally liable for similar case purposes. The study holds that the principle of vicarious liability that protects public officials must be limited or done away with if the *Constitution* is to be vindicated and the public fiscus saved from exorbitant litigation costs orders paid by the State. The courts, as discussed in this study, can make use of both the common law approach and the constitutional approach to hold public officials personally liable. The courts may test the negligence, bad faith, *ultra vires* and unreasonableness of a public official's act to reach a *de bonis propriis* costs order, coupled by the constitutional approach of accountability and responsiveness. Where public officials feel the pain of paying litigation costs from their own pockets, they will act more diligently and with due and reasonable care while providing just administrative action.

Chapter 4

Emerging trends regarding the imposition of personal liability of public officials for legal costs

4.1 Introduction

This research has discussed a number of issues concerning the imposition of personal liability on public officials for legal costs in constitutional litigation. Through a detailed exposition, the preceding chapters have revealed that courts have, through the exercise of their discretion, been somewhat reluctant in the past to impose personal costs on public officials. Notwithstanding such reluctance, further analysis has shown that there have been exceptional cases. The courts have in the past found public officials personally liable for litigation costs, and there have been a few recent cases where the courts have seen it fit to hold public officials personally liable. This chapter, therefore, discusses recent cases where the courts have imposed personal liability on public officials.

The case law in this part of the research plays an important if not pivotal role in the development of the law of costs in constitutional litigation involving public officials, vindicating and upholding constitutional values, betterment of public administration and salvaging the fiscus that can be redirected or channelled into other public service developments. These cases reveal that when the powers entrusted to public officials by the *Constitution* are abused and in one way or another affect the proper channels of public administration, the courts, through the exercise of their discretion, can and may punish such errant public officials. The punishment has come in the form of punitive costs orders to make the public officials feel the pinch of their negligence and disregard of the *Constitution*.

The analysis of the case law in this section also proves that although the courts are beginning to set a trend by finding public officials personally liable, some courts have loosely ordered public officials to pay litigation costs *de bonis propriis.* In most cases

there has been a lack of detailed discussions and significant development of the law regarding deviation principles warranting personal costs orders on public officials. The courts still follow the same principles and tests discussed and applied in cases such as *Ferreira v Levin*[1] and *Biowatch Trust v Registrar Genetic Resources.*[2] It may not be fair to conclude that there has not been any development, however, at the rate at which cases are brought before the courts against public officials, further development of the principles, tests and stricter application may well curb such negligence and abuse of power.

The most notable cases in this regard are those of the *District Six Committee v Minister of Rural Development and Land Reform,*[3] *Absa Bank Limited v Public Protector,*[4] *President of the Republic of South Africa v Public Protector*[5] *and Public Protector v South African Reserve Bank*.[6] There are not many reported cases against public officials by aggrieved private parties for the infringement of their constitutional rights. The aim of this research is to explore the issue of costs in constitutional litigation against public officials and try to come up with ways on how the justice system may develop the law of costs in constitutional litigation and help curb the negligence and abuse of power that in the infringement of constitutional rights of third parties, among other aims. Therefore, if the courts are open to making public officials pay by imposing personal costs liability, aggrieved private parties may also seek justice and contribute to a changed public administrative system, vindicate the *constitution* and save the fiscus.

Although the cases discussed below do not include private parties, they may represent a new era and trend that may turnaround public administration. These cases outline the tests that the courts may use to impose personal liability on public officials, they do not provide in depth and detailed exposure of these tests, their unfettered application or a standard test. Therefore, the subsequent discussion will show that there is still a need for further development and improvement in the adjudication of

1 *Ferreira v Levin* 1992 2 SA 621 (CC).
2 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC).
3 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC).
4 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP).
5 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP).
6 *Public Protector v South African Reserve Bank* 2019 ZACC 29.

the law of costs in constitutional litigation against public officials if all the aims to formulate constitutionally justified guidelines for the imposition of such costs are to be fully realised.

4.2 District Six Committee and Others v Minister of Rural Development and Land Reform and Others 2019 JOL 45258 (LCC)

4.2.1 Background

The applicants (District Six Committee) in this matter brought their first application before Kollapen J in 2018 in the Land Claims Court. The Land Claims Court was established in 1996 and specialises in dealing with disputes that arise out of laws that underpin South Africa's land reform initiative which include the Restitution of Land Rights Act, 1994, the *Land Reform (Labour Tenants) Act, 1996* and the *Extension of Security of Tenure Act, 1997*. The Land Claims Court has the same status as the High Court. Any appeal against a decision of the Land Claims Court lie with the Supreme Court of Appeal, and if appropriate, to the Constitutional Court.[7] Therefore, the claim before Judge Kollapen was against the then Minister of Rural Development and Land Reform (Maite Nkoana-Mashabane). Their application was founded on the Restitution of Land Rights Act.[8] This Act gives effect to section 25(7) of the *Constitution*, which states that " a person or community dispossessed of property after 19 June 1913 as a result of past racial discriminatory laws or practices, to the extent provided for by an Act of Parliament, is entitled either to restitution of that property or to equitable redress".[9]

The applicants were aggrieved by their displacement from their original homes in 1972 and thus approached the court claiming restitution, which was never satisfactorily done. An attempt of restitution was undertaken in three phases, but never conclusively

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7 Anonymous 2019 http://www.justice.gov.za/lcc/.

8 *Restitution of Land Rights Act* 22 of 1994.

9 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 28.

brought about the much-needed relief.[10] When the matter was brought before Kollapen J he ordered that,

> The Minister is required to formulate, without delay and in consultation with the body of claimants, a reasonable plan and program which she will implement to satisfy the claims of the claimants.
>
> 8.2 The plan must include:
>
> 8.2.1 An indicative conceptual layout for the redevelopment of District Six with enough detail to determine the number and layout of the residential units to be allocated to claimants.
>
> 8.2.2 Specific details of how the plan is to be funded including the budget to be allocated by the respondents for the execution of the plan.
>
> 8.2.3 Estimate timeframes for the implementation of the plan, broken into appropriate intermediate milestones.
>
> 8.2.4 The methodology that will be applied in allocating residential units among the claimants.
>
> 8.3 The plan should be delivered within three months of the order, thereafter at three monthly intervals, until such time as the redevelopment of District Six is complete.[11]

The Minister failed to comply with these orders. Thus, this second application was brought before the court on 17 April 2019. This followed a request for a postponement, which was dismissed with costs on the scale of attorney and own client. The court convened a month later and this part of the chapter seeks to focus its discussion on those proceedings.[12]

4.2.2 Legal questions

In this hearing, three questions were put before the court:[13]

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10 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 34.

11 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 8.

12 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 9.

13 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 1.

1. Whether to issue a declaratory order against the then Minister of Rural Development (first respondent) for her failure to comply with the court order granted in the first application;

2. Whether the then Minister was guilty of contempt of court; and

3. Whether the Minister should pay the costs of this hearing in her personal capacity.

4.2.3 Legal principles (arguments)

In its judgment, as a point of departure, the Land Claims Court referred to the Constitution which is the supreme law of the country.[14] The Constitution provides for how the state institutions should be run,[15] outlines the public officials' duties and obligations[16] and more importantly public officials are bound by these constitutional provisions. The *Constitution* states that a court of law must declare any law or conduct that is inconsistent with the *Constitution* invalid.[17] Kollapen J held that it would be an injustice not to issue a declaratory order against the Minister because she had transparently failed to comply with the court order. He based this argument on section 165(5) of the *Constitution*.[18] The Minister in question was found to be in breach of her constitutional obligations. The Constitution places a duty on public officials (in this case the former Minister of Rural Development and Land Reform) to comply with the *Constitution*, comply with court orders, and to account for any failure to comply with court orders.[19]

The court further referred to the judgment held in *Zulu v eThekwini Municipality*. The court, in this case, held that a failure to fulfil constitutional obligations falls short of the constitutional mandate and government officials have a duty not only to discharge their

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14 Section 2 of the *Constitution of the Republic of South Africa*, 1996.
15 See Chapter 9 of the *Constitution of the Republic of South Africa*, 1996.
16 Section 195 of the *Constitution of the Republic of South Africa*, 1996.
17 Section 172(1)*(a)* of the *Constitution of the Republic of South Africa*, 1996.
18 Section 165(5) of the *Constitution of the Republic of South Africa*, 1996:" An order or decision issued by a court binds all persons to whom and organs of state to which it applies."
19 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 78.

functions but also to account for their failure to discharge such duties.[20] Kollapen J put forward the abovementioned sentiments to lay the constitutional foundation of the matter brought before him. He relied solely on the Constitution to answer the question of whether the Minister was indeed in contempt of court. The concluding remarks suggested that the standard of proof to be used in answering the question of contempt of court, in this case, was the difference between a finding of contempt for purposes of committal and a finding of contempt for the imposition of civil remedies intended to ensure compliance, among other legal principles that are not relevant for present purposes.[21]

Building an answer to the legal question whether the Minister should pay the costs of the hearing in her personal capacity, the court discussed several principles that should be taken into consideration. The court held that:

> Personal costs orders against state functionaries are part and parcel of the tools available to courts to prevent abuse of court processes. So, for example, where there is 'flagrant disregard of constitutional norms' personal costs should be considered…'bad faith and gross negligence' are factors that may legitimately be taken into account in awarding personal costs against state officials. Most recently, personal costs were awarded where the conduct of a holder of a public office was in 'bad faith' and 'grossly negligent.[22]

Considering the reasons given by the Minister why she had failed to comply with the court order, Kollapen J came to the conclusion that the Minister by consenting to the

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20 *Zulu v eThekwini Municipality* 2014 4 SA 590 (CC) paras 70-71:" Proper and reliable instruction from clients is indispensable for a counsel to fulfil their ethical and legal duty to the court. All this rings with even greater resonance when an organ of state is one of the litigating parties. The Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness. S 165(4) of the Constitution of the Republic of South Africa, 1996 provides: 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.' This duty echoes obligations of organs of state under s 7(2) of the Constitution of the Republic of South Africa, 1996 to respect, protect, promote, and fulfil the rights in the Bill of Rights, including 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing'. Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not. A court should be able to rely on the submissions of organs of state. Otherwise our very constitutional order would be undermined."

21 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) paras 80-82.

22 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 102.

order of court to comply with the rest of the order, knowing she was incapable or unwilling to do so was an act of recklessness and carelessness on the Minister's part. Her failure to ensure that compliance would be possible before consenting to the order proved her grossly negligent. She did not take adequate and reasonable steps to ensure that the matter was attended to, nor did she seem to appreciate the consequences of the failures of the government for the claimants.[23]

The Judge reasoned that a member of Cabinet (public official), who was acting reasonably, and in good faith and in the discharge of their constitutional obligations could not have agreed to a court order when they were fully aware that it would not be possible to comply with it. As a concluding remark, Kollapen J stated that it is reckless to agree to a court order when proper, due and meaningful attention has not been paid to whether the terms of the order can be met.[24] It was reckless of the Minister to consent to an order of the court without satisfying herself that compliance could realistically be achieved.[25]

Upon giving an account on how the Minister intended to comply with the order, the court concluded that such steps were wholly inadequate. These sentiments led to a discussion on the principle of acting *bona fide* (in good faith); in this case, the court failed to comprehend how the Minister's intended steps to comply with the court order could be acting *bona fide*. The court held that the Minister did not display a serious, meaningful and *bona fide* attempt to comply with the order. The extent to which the Minister's *mala fide* actions contributed to the imposition of personal costs, however, could not be said to have been caused by malice.[26] Regrettably the court did not go as further as to differentiate between *mala fides* and malice. The court explained and treated the two principles separately without weighing one against the other to come up with a differentiation of the two.

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23 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 98.

24 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 87.

25 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 96.

26 *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 92.

4.2.4 Judgment and observations

The court held that based on the above reasoning, it was enough to conclude that the Minister's conduct should be declared a violation of the court order and that she had been grossly unreasonable in the discharge of her constitutional duties (breached section 165(5) of the *Constitution*). The Minister was consequently ordered to pay the costs of the application on the attorney and own client scale in her personal capacity.

The court did acknowledge that a public official must be found to have acted in a negligent manner for the courts to impose personal costs. However, the court did not discuss gross negligence as a principle in depth. It further neglected to discuss the test the courts must use to determine that there has been a degree of gross negligence to warrant personal liability of public officials. The court merely held that the Minister was reckless and grossly negligent in her failure to comply with a court order.[27]

No detailed analysis of the principles was made. The court did not build up a legal argument that would undoubtedly secure a water-tight standard test for the imposition of personal liability of public officials for future similar cases. A number of issues were not considered, such as the core definition of the principles the court may use to justify a personal costs order, what may be said to constitute gross negligence and acting *bona fides* and the standard the courts may use as a guideline to hold that the courts have extensively exhausted all the legal tests for the imposition of personal liability on the Minister, given the circumstances of the case before it. The test for gross negligence or acting *bona fides* should have been examined and applied with much greater clarity. In this case, this was overlooked.

[27] *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 98.

4.3 Absa Bank Limited and Others v Public Protector and Others (2018) 2 All SA 1 (GP)

4.3.1 Background

The Public Protector was charged with an alleged failure to recover misappropriated state funds in a hearing brought before the court in June 2017. A series of events led to the Public Protector drawing up factual findings and conclusions in a report (Public Protector's Report 8 of 2017/2018). In this report the Public Protector concluded that the South African Government had improperly failed to deal with the CIEX report (prepared by a UK-based asset recovery agency with which the South African government had entered into an agreement to investigate and assist in recovering assets that had allegedly been misappropriated prior to 1994),[28] dealing with allegedly stolen state funds. In her report the Public Protector further found and held that the government and the Reserve Bank had improperly failed to recover an amount of 3.2 billion Rand from ABSA and that the South African public had been prejudiced by the conduct of the South African Government and the Reserve Bank.[29]

Based on the above-mentioned findings, the Public Protector prescribed several remedial actions in her report on which this application was founded. The Reserve Bank, Minister of Finance and Treasury and ABSA instituted legal proceedings challenging the Public Protector's remedial actions recommended in her report and requested the court to review and set aside certain paragraphs of the report.[30] The basis of this application is reflected in the arguments brought before the court by the applicants, who held that the remedial actions were materially influenced by an error of law under section 6(2)*(d)* of the *PAJA*,[31] that the Public Protector's remedial actions were for an ulterior purpose or motive, that the Public Protector acted arbitrarily, that the remedial actions were unreasonable, failing the reasonable man test, and that the

28 Dalsen 2019 https://hsf.org.za/publications/hsf-briefs/.
29 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 1.
30 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 3.
31 *Promotion of Administrative Justice Act* 3 of 2000.

Public Protector was biased, amidst other grounds connected with failure to adhere to *PAJA*.[32]

4.3.2 Legal questions

The legal questions that had to be considered were:

(a) Whether the remedial action in the Public Protector's report was unlawful;

(b) Whether the Public Protector followed the correct procedure in her investigation leading to her findings and subsequent report; and

(c) Whether the Public Protector should be ordered to pay the costs *de bonis propriis* i.e. from personal funds.

4.3.3 Legal principles (arguments)

The court, before dealing with the legal principles involved in this matter, discussed the legal and constitutional framework applicable to the public office, more specifically that of the Public Protector. The court referred to sections 181[33] and 182[34] of the Constitution. The sections clearly pronounce the duties, obligations, and limitations of

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32 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 7.

33 Section 181(1) of the Constitution of the Republic of South Africa, 1996: " The following state institutions strengthen constitutional Democracy in the Republic:
(a) the Public Protector.
(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
(4) No person or organ of state may interfere with the functioning of these institutions.

34 Section 182(1) of the Constitution of the Republic of South Africa, 1996:" The Public Protector has the power, as regulated by national legislation:
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

the duties and obligations of the Public Protector. To give the full effect and clarity on the importance of sections 181 and 182, the court held that:

> the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation. In appreciation of the high sensitivity and importance of its role, regard being had to the kind of complaints, institutions, and personalities likely to be investigated, as with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity, and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of State. And the Public Protector is one of those deserving of this constitutionally imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood.[35]

In addressing the question of the unlawfulness of the Public Protector's remedial actions the court discussed the *ultra vires* principle. The court held that the remedial action was *ultra vires* and based its argument on section 6(2)*(a)*(i) of *PAJA*.[36] In light of the matter at hand, the court reasoned that when the Public Protector referred or recommended a matter under investigation to the Special Investigating Unit (SIU), her power would have been exhausted in terms of the *Public Protector Act*.[37] The Public Protector by decisions on how the matter had to be handled, acted in a manner inconsistent with the provisions of the Constitution and the *Public Protector Act*. The court further held that by placing a duty on the SIU to re-open the investigation and

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35 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 15.

36 Section 6(2)*(a)*(i) of the *Promotion of Administration Act* 3 of 2000:
"(2) A court or tribunal has the power to judicially review an administrative action if:
(a) the administrator who took it-
(i) was not authorised to do so by the empowering provision…"

37 Section 6(4)*(c)* of the *Public Protector Act* 23 of 1994:
"(4) The Public Protector shall, be competent:
(c) at a time prior to, during or after an investigation-
(i) if he/she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
(ii) if he or she deem it advisable, to refer any matter which has a bearing to an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority; …"

to recover the misappropriated public funds from ABSA, she exceeded the powers entrusted to her by the Constitution and the *Public Protector Act*.[38]

The applicants, as part of their reason for a review of the Public Protector's report, claimed that the Public Protector had failed to conduct a fair and unbiased investigation.[39] The court hence discussed the principle of procedural fairness. The court referred to Hoexter[40] to define and put into perspective the importance of the principle of procedural fairness. It held that:

> … [the] importance of procedural fairness is well described by Hoexter:
>
> 'Procedural fairness … is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'[41]

The Public Protector, while conducting her investigation conducted meetings with the Presidency and the State Security Agency (SSA) but failed to afford the parties seeking the redress a similar opportunity. It was contended, therefore, that the Public Protector's conduct violated her constitutional obligation under section 181(2) of the *Constitution* to be independent and to perform her functions without favour or prejudice.[42] By so doing the Public Protector violated the other parties' right to procedural fairness and showed further one-sided conduct.[43] In light of addressing procedural unfairness (bias, prejudice, and/or one-sided conduct) the court held that:

> Although the rule against bias finds application essentially in judicial and "*quasijudicial*" contexts, the Constitutional Court has made it clear that the rule against bias applies in all types of decisions. It should immediately be pointed out that absolute neutrality on the part of a judicial or administrative officer can hardly if ever, be achieved and a reasonable person should expect that triers of fact will probably be influenced in their deliberations by their individual perspectives. It would be a mistake to assume that a fundamental breach of administrative justice necessarily indicates bias on the part of the administrator. The mere fact that a party

38 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) paras 69 and 70.
39 Absa Bank Limited v Public Protector 2018 2 All SA 1 (GP) para 83.
40 Hoexter *Administrative Law in South Africa* 358-359.
41 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 99.
42 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 84.
43 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 87.

> considers that the decisionmaker erred at the level of substance or procedure to their prejudice does not necessarily amount to bias.

The court then had to discuss the test for bias. The court referred to *President of the Republic of South Africa v South African Rugby Football Union*. The test applied in this case was, "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case." The court reasoned that this test as applied in the case mentioned similarly found application in the case being discussed herein, as the Public Protector is a functionary performing an administrative action.[44] The Public Protector, therefore, is subject to a higher duty and higher standards than ordinary administrators taking administrative action. This differentiation should still be read subject to the requirement of reasonableness, in that both the person who apprehends bias and the apprehension itself must be reasonable.[45] The court thus holding the view that a reasonable, objective and informed person, taking into account all these facts, would reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her, concluded that it had been proven that the Public Protector was reasonably suspected of bias.[46]

4.3.4 Judgment and observations

The court's judgment followed that the remedial action in dispute in the Public Protector's report be set aside and that the Public Protector pay the litigation costs of ABSA on an attorney-client scale in her official capacity, including the costs of the counsel, to further pay 85% of the costs of the South African Reserve Bank on an attorney and client scale, including the costs of the counsel, and the Public Protector to pay 15% of the costs of the Reserve Bank of South Africa in her personal capacity on an attorney and client scale, including the costs of the counsel.[47]

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44 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 97.
45 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 98
46 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 101.
47 *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) para 131.

The court concluded that imposing a punitive costs order against the Public Protector was not appropriate. The appropriate costs order was that she pays a smaller part of the costs on a punitive scale from her own pocket while the larger part of the costs order is paid by the State. The court therefore ordered a split costs order in this matter. As appropriate as this order may be according to this judgment, it is very important to note that when discussing the issue of costs, the court did not broadly discuss the reasoning behind ordering a split costs order between the State and the Public Prosecutor. When the court discussed the tests and principles to be considered when imposing personal costs on public officials, it did not mention nor discuss how a court may determine the extent to which a public official may be liable for a full personal costs order or a split costs order. Furthermore, the court, similar to the above case, did not broadly discuss the standard tests and the extent to which the court saw it fit to impose personal costs on a punitive scale on the public official. The common law principles of negligence, bad faith, unreasonableness or *ultra vires* were not discussed by the court. The principles that are imperative to the limit of vicarious liability were not explored, yet the principle was limited to a lesser extent through a partial split on the costs order. Where the State picks up the bill in part, the court should have developed the law and provide the extent to which the principles of negligence, bad faith, and/or unreasonableness should be met to justify such an order.

4.4 President of the Republic of South Africa v Public Protector and Others 2018 (2) SA 100 (GP)

4.4.1 Background

This application ensued from numerous complaints that were made against the President, certain State functionaries and the Gupta family in 2016. The complaints alleged that there had been unethical and improper conduct by these parties. These unethical and improper conducts were in relation to the appointment of Cabinet Ministers and directors of state-owned entities, corruption in the awarding of state contracts and other benefits extended to the Gupta family's many businesses.[48]

[48] *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 2.

Following these complaints, the Public Protector launched and conducted a series of investigations into the allegations. This resulted in a report[49] which was made by the Public Protector after conducting her investigations. The investigations conducted by the Public Protector revealed that the President's conduct was in conflict between his duties as the head of the state and his private interests, which was a violation of the Constitution[50] and the Code of Conduct.[51] Both these instruments advocate for and require the head of the state to act in a high level of professional ethics in issues regarding public administration.[52] Based on the analysis of the complaints the Public Protector identified issues relevant to her investigation. These issues were whether the President had acted improperly and violated the code of ethics, and whether the President allowed members of the Gupta family to be involved in the removal and appointment of various cabinet members,[53] among other issues.

The Public Protector, certain of her findings after meeting with the President and the other parties in this matter[54] issued a report in terms of section 182(1)*(b)* of the Constitution,[55] section 3(1) of the *Executive Member's Ethics Act 82 of 1998* (the Code of Conduct),[56] and section 8(1) of the *Public Protector Act 23 of 1994*.[57] In her report, she provided for some remedial action[58] on which the application brought before the court, is hereby discussed in this section. The President brought an application before

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49 Public Protector's Report 6 of 2016/2017 2017 .

50 Section 195 of the *Constitution of the Republic of South Africa*, 1996.

51 *Executive Member's Ethics Act* 82 of 1998 items 2.3 (c) and (e).

52 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP)

53 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) paras 15-16.

54 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) paras 22 and 28.

55 Section 182(1)*(b)* of the *Constitution of the Republic of South Africa*, 1996:

"(1) The Public Protector has the power, as regulated by national legislation:

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

56 *Public Protector Act* 23 of 1994 3.(1) The Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in s 4.

57 *Public Protector Act* 23 of 1994 3.(1) The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

58 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 58.

the court to review and set aside the remedial actions proposed in the State Capture report released on 2 November 2016 by the Public Protector.

4.4.2 Legal questions

The relevant legal questions to be answered were:

(a) Whether the remedial action was appropriate, lawful and rational;

(b) Whether the President's powers could be limited by the Public Protector's remedial action;

(c) Whether the President had justiciable grounds for review; and

(d) Whether the President had to pay the costs of the application in his own personal capacity (*de bonis propriis*).

4.4.3 Legal principles (arguments)

One of the points of contention on which the President based his ground for review was that the Public Protector's remedial action was inappropriate. The President alleged that the Public Prosecutor acted outside her constitutional powers in her proposals made on remedial action. In other words, the President accused the Public protector of acting *ultra vires*. The court, therefore, discussed the powers of the Public Protector at length. Furthermore, the court inferred the Public Protector's powers as provided for under chapter 9 of the Constitution, more specifically in section 182. And with this in mind, the court referred to the *Economic Freedom Fighters v Speaker, National Assembly*[59] case. The court held that:

> The mandate of the Public Protector is to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety from any conduct in state affairs, unlawful enrichment, and corruption, to report on its investigations and take appropriate remedial action.[60]

[59] *Economic Freedom Fighters v Speaker, National Assembly* 2016 3 SA 50 (CC) paras 51 and 56.
[60] *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 74.

Further reference was made to the *Public Protector Act of 1994* to confirm the extent of the Public Protectors powers as provided for under sections 6(4) and 182(2). The court held that these sections are to the effect that the investigative powers of the Public Protector are of the widest ambit.[61] To explain how far the ambit of these powers can stretch, the court held that:

> All the powers set out in s 6 accord and are harmoniously co-existent with s 182. Powers and functions have thus either been added or regulated. Mediation, conciliation, negotiation and giving advice to a complainant regarding how best to secure an appropriate remedy; bringing what appears to be an offence to the attention of the prosecuting authority; referring the matter to an appropriate body or authority or making suitable recommendations to remedy the complaint; and reserving any complaint by any other means that may be expedient in the circumstances, are all regulatory and additional powers. And they are consistent with and flow from the constitutional power 'to take appropriate remedial action and provision for additional powers and functions.[62]

The Court's reasoning clearly brought to light the Public Protector's wide investigative powers, and as wide as these powers, they are not absolute nor are they unfettered. Of note is that remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational in that the appropriateness of remedial action in a particular case depends on the nature of the issues under investigation and the findings made. It is, therefore, context specific.[63] In this case, the court thus rejected the President's ground of review, as it was brought before the court without merit.

The Court discussed the principle of prejudice or impropriety as brought before it as a ground of review by the President. The President argued that the Pubic Protector's remedial action was unlawful because it failed to make findings of prejudice or impropriety against the President's conduct. He further argued that there must be an appropriate nexus between the finding of prejudice or impropriety and a remedy to correct the improper conduct found to have been committed.[64] This ground of review was proven to be baseless by the court in that a thorough and proper interpretation of section 182(1) of the *Constitution*, read together with relevant provisions of the *Public*

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61 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 76.
62 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 77.
63 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) paras 83 and 84.
64 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 99.

Protector Act, clearly revealed that the taking of remedial action by the Public Protector was not contingent or did not rely upon a finding of prejudice or impropriety.[65]

The Court held that none of the grounds of review brought before it by the President had any merit and that the President was not entitled to the relief that he sought. The remedial action taken by the Public Protector was lawful, appropriate, reasonable and rational and in these premises, the President's application was unsuccessful and was dismissed with costs. The court had the following to say about the issue of costs.

The President's application to set aside the Public Protector's remedial action was reckless. The President did not regard his constitutional duties and the court held that his conduct fell short of the high standard expressed in section 195 of the Constitution. The court held that:

> The overarching basis of the remedial actions challenged by the President is that he is personally implicated in the malfeasance and improper conduct investigated by the Public Protector. The personal conflict of the President presents an insurmountable obstacle for the President and lends credence to the conception of the remedial action by the Public Protector. Additionally, the statement by the President to the media and in Parliament expressing an unequivocal intention to establish a commission of inquiry and thereby pre-empting any justifiable basis to challenge the remedial action points to the reckless misconception underpinning the President's application seeking to review and set aside the remedial action. The review application was a clear non-starter and the President was seriously reckless in pursuing it as he has done. His conduct falls far short of the high standard expressed in s 195 of the Constitution.[66]

The court further referred to the *Gauteng Gambling Board v MEC for Economic Development, Gauteng*[67] as a precedent for the imposition of personal costs liability on public officials. The court made it clear that courts would not hesitate to hold public officials personally liable for costs where they have 'acted in flagrant disregard of constitutional norms' in a 'highhanded manner' and 'played the victim' in litigation. It further held that in such situations not granting a personal costs order would ultimately expose taxpayers to footing the bill for the actions of wayward officials. A personal

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65 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 100.
66 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 187.
67 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA).

costs order might have a sobering effect on truant office bearers.[68] Therefore in this matter, the President had no justifiable basis simply to ignore the impact of his actions, nor to launch the review application in the circumstances. The court revealed its disappointment when it held that the President's conduct had fallen short of the expectation of him as the head of state. In doing so he was reckless and acted unreasonably and a personal costs order was justified and should be granted.[69]

4.4.4 Judgment and observations

The court in this matter dismissed the President's application based on the principles and dictum discussed above. It held that the Public Protector's remedial action was appropriate and binding and was to be made into an order of the court. Regarding costs, the court held that the costs of the application were to be paid by the President, in his personal capacity, on the scale as between attorney and client, including the costs of the counsel.

This case is a perfect example of abuse of power. The President recklessly defended the indefensible. The court's time was wasted, and state funds would have been wasted resultant to an unnecessary application if the court had not deviated from the principle of vicarious liability. Despite the courts ordering the President to pay costs from his own pocket, there is still lack of clarity when it comes to developing the principles ancillary to costs *de bonis propriis.*

A gap still exists, and a trend is also formed based on the cases discussed above in which courts are quick to order personal costs but neglect to develop clear guidelines to be followed as a standard test for such orders. The fact that there is a principle (vicarious liability) that protects employees (including state employees) from being mulcted of litigation costs makes it all the more necessary to set up water-tight standard tests if their sole purpose is to limit such an established stand-alone principle

68 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 188.
69 *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP) para 190.

such as vicarious liability. It is judicially imperative, as many changes rely on this deviation.

4.5 Public Protector v South African Reserve Bank 2019 ZACC 29

4.5.1 Background

This application was brought by the Public Protector following a personal costs order made against her in *Absa Bank Limited v Public Protector.* [70] This chapter of the research (under 4.3.1) has already discussed the background leading to the application brought against the Public Protector and the criteria or legal principles the court used to find her partly personally liable for the litigation costs on an attorney and client scale. The Public Protector transversely brought an application to challenge the personal costs order made against her.

4.5.2 Legal questions

The legal questions to be answered in this regard were:

a) Whether the test of gross negligence or bad faith was relied on;

b) Whether the legal questions for awarding personal costs against a representative litigant was answered;

c) Whether correct legal principles for awarding costs on an attorney and client scale were relied on and complied with; and

d) Whether there was any basis for interfering with the costs order.

4.5.3 Legal principles (arguments)

The court in this application dealt in depth with the imposition of personal costs liability on public officials. The court was split into two where there was a minority judgment and a majority judgment. Both these judgments examined the principles that had

[70] *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP).

recently been used by the courts to find public officials personally liable for litigation costs. The principles of bad faith and negligence were discussed in depth.

4.5.3.1 Majority judgment

In this judgment the court began its legal arguments by discussing the exercise of a court's discretion in relation to costs orders as a standalone principle. The court examined the argumentation the courts need to follow where a lower court's decision is brought on appeal, as in this case. The general rule as held by the court was that:

> … it would be inappropriate for an appeal court to interfere in the exercise of true discretion unless it is satisfied that the discretion was not exercised judicially, was influenced by wrong principles, or there was a misdirection of facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must have been a material misdirection on the part of the lower court in order for an appeal court to interfere. It is not sufficient, on appeal against a court order, simply to show that the lower court's order was wrong. The appeal court should be slow to substitute its own decision simply because it does not agree with the permissible option chosen by the lower court.[71]

The fact that the Public Protector was not entirely happy or accepting of the costs order made against her did not warrant a deviation from the general rule. The court had to put into perspective the principle and exercise its discretion in the matter brought before it. The court held that the assessment of the gravity of the conduct by the Public Prosecutor was objective and lay within the discretion of the lower court. The court further held that through applying its constitutionally given right it had previously granted costs *de bonis propriis* against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner. Therefore, it would not change the lower court's decision because the Public Protector acted in bad faith and was grossly negligent.[72]

The court further in its legal arguments in relation to why the appeal should be set aside and the Public Protector should pay the costs from her own pocket acknowledged

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71 *Public Protector v South African Reserve Bank* 2019 ZACC 29 paras 144 and 145.
72 *Public Protector v South African Reserve Bank* 2019 ZACC 29 paras 146 and 147.

that the courts get their power to impose personal costs against public officials from the *Constitution*. The *Constitution* requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do the right thing and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.[73]

Regarding bad faith, the court did not spend much time on discussing much on it and indicating how bad faith must be tested. Though the court held that the Public Protector had acted in bad faith the decision was taken in a vacuum. The court did not explain its finding and test it against a definition of what bad faith is and the extent to which the Public Protector acted in bad faith. The court did not develop bad faith as a principle but merely held that:

> The High Court held that the Public Protector had acted in bad faith; did not fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice; had failed to produce a full and complete record of the proceedings under rule 53 of the Uniform Rules of Court; and had failed to fulfil her obligation to be frank and candid when dealing with the court. These findings are underpinned by various factual findings made by the High Court regarding the conduct of the Public Protector during the second review and in the performance of her constitutional duties.[74]

4.5.3.2 Minority judgment

In the minority judgment, it was held that the application before it did not raise an arguable point of law of general public importance. The matter before it related to when it is permissible to award personal costs, especially on a punitive scale, against a representative litigant.[75] With that being said, the minority court discussed the tests that ought to be followed for personal costs against representative litigants and held that

> There should be no hesitation in visiting a public office-bearer with costs even on a highly punitive or attorney and client scale in an official or personal capacity when circumstances plainly justify this extreme censure. But when that has been done, the reasons for doing so and the gravity of the underlying conduct should never be difficult to make out or understand. It is for this reason that gross negligence and bad faith or

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73 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 152.
74 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 172.
75 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 33.

> the plain intention to prejudice anyone being investigated, or abuse of power must be strongly guarded against and appropriately sanctioned. These are the tests for awarding personal costs against those litigating in their official capacities.[76]

Despite acknowledging the need for personal costs against public officials, the minority court reasoned that public officials must be allowed space to be human. Ignorance, limited competence in one's area of responsibility, poor judgment or incidental but harmless unfairness to others must not count as reason enough for the courts to order personal costs against an office-bearer litigating in a representative capacity.[77] It is, therefore, against these kinds of sentiments that compliance with the requirements of proving gross negligence and bad faith must be examined.[78]

In light of the principle of gross negligence, the minority court defined it as extreme carelessness that shows a wilful or reckless disregard for the consequences to the safety or property of another. Therefore, the Public Protector's conduct could have been said to be grossly negligent if the extent of the gross negligence, as opposed to ordinary negligence, was indeed implied or intended in the matter brought before the High Court. Negligence cannot be said to be gross purely because the High Court said so or because it linked it to the cardinal principles that apply to the way the Public Protector is required to execute her constitutional obligations. The grossness of the Public Protector's conduct must have been tied up or intimately connected to and or informed by the actual or potential consequences of a failure to do what was reasonably expected of her. Thus the conclusion that her negligence was gross must have been capable of being easily appreciated by the reasoning of the High Court.[79] The minority court held that there was nothing gross about the Public Protector's negligence or extremely opprobrious, clearly and indubitably vexatious or reprehensible about her conduct.[80] Following the High Court's failure to rely on gross negligence and to explain how it was proven the minority court held that the order to pay personal costs on a punitive scale had no basis.

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76 *Public Protector v South African Reserve Bank* 2019 ZACC 29 paras 49 and 50.
77 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 46.
78 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 55.
79 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 56.
80 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 59.

In discussing the test for bad faith to warrant the imposition of personal costs on public officials the minority court held that the correct approach to determining bad faith is one that recognises that bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness. Such proof must reveal a breakdown of the orderly exercise of authority so fundamental that the absence of good faith can be reasonably inferred, and bad faith presumed.[81] A person who acts in bad faith is one who hopes to get away with surreptitious connivance to harm an unsuspecting other. In the context of this case, the minority court held that:

> …the High Court would have had to be satisfied that the Public Protector sought to disadvantage the Reserve Bank, acting in cahoots with the Presidency or whoever else. Not only would the prejudice have had to be explained by the High Court, but the conspiracy or connivance insinuated would have had to be kept "classified" by the Public Protector for the devious scheme to succeed.[82]

However, in this case, the minority court held that all that the Public Prosecutor was guilty of was inability to explain some questions the High Court asked her. This inability, however, could not without more evidence serve as justification for concluding that bad faith had been established. The minority court held that to view it otherwise would amount to taking the matter too far, too easily. The need to examine all facts and issues in a detached and fairway cannot be obliterated by her wrongdoing.[83]

The minority court, regarding bad faith as a test for imposing personal costs, reasoned that in this case,

> Ordinary personal costs, worse still personal costs on an attorney and client scale, cannot be awarded merely because the Public Protector unwisely or in a manner that smacks of poor judgement, initially withheld information that she eventually disclosed. She deserves to be criticised for this. But absent proof or a reasoned explanation of deliberate wrongdoing designed to prejudice others, there can be no justification for any form of personal costs on grounds of bad faith. A court must work with what has been placed before it and in terms of the law. It is not open to it to read a lot more into or out of what is before it to arrive at a conclusion. It also cannot disregard what is favourable to a litigant because of her errors. Articulating legal or constitutional realities that spring out naturally and forcefully from the issues cannot amount to

81 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 72.
82 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 73.
83 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 81.

speculation. An injustice may not be left to survive because a party did not raise an obvious legal or constitutional reality or flaw.[84]

4.5.4 Judgment and observations

The court in its judgment dismissed the appeal and no order as to costs was held by the court. The court reasoned that the dictates of fairness and equity required that no order as to costs be made.

Basically, the court repeated more or less what the High Court held. One would have expected that the constitutional court would have developed the law further to have provided guidelines of reasoning as to why the appeal before it should not have been granted. Nevertheless, none of that was done in the majority judgment. Of note however is that the minority judgement unpacked and discussed the legal principles of negligence, gross negligence and bad faith as discussed above. It set a legal framework for the test of costs *de bonis propriis* on public officials. This can be in a way seen as a starting point for developing a solid guideline to assist the courts in imposing personal costs on public officials.

4.6 Summary of emerging trends

This chapter discussed emerging trends on the imposition of personal liability on public officials through the use of recent case law. The principles developed in the early cases that dealt with constitutional litigation involving public officials and costs thereof still find application, as evidenced in the above cases. The principles of bad faith, negligence or gross negligence and *ultra vires* seem to be the common law principles discussed in the case studies. If one looks at the cases heard over 10 years ago, which developed these principles, and compare these with the most recent cases, not much has been developed to provide firm guidelines and proper standard tests for the imposition of personal costs on public officials. The courts merely mention the principles and what in their view would constitute a gross negligence or bad faith in a certain matter but have no standard tests to use as guidelines. The extent of what should be met and what should be proven in a matter is still lacking. Although courts

84 *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 84.

still seem to be sceptical about imposing personal costs liability on public officials, these case studies reveal that the courts are now more open to doing it. Developing the law of costs on public officials by devising guidelines would contribute to certainty and the formulation of uniform guidelines for the imposition of personal liability on public officials for constitutional litigation costs.

Chapter 5

Findings and recommendations

5.1 Introduction

The previous chapters of this study examined several factors and concepts on the imposition of personal costs on public officials (representative litigants) to answer this question: what is the basis for the imposition of personal liability on public officials for legal costs awarded against the state in constitutional litigation? The chapters show that the imposition of personal costs on public officials is a departure from the general principle that in constitutional litigation, the state should always pick up the legal costs, regardless whether the state won or lost the case. The imposition of personal costs on public officials should therefore have substantive consequences on the conduct of public officials when state organs are involved in litigation as a result of the conduct of state functionaries. The imposition of personal costs on public officials is one of the new mechanisms devised by the judiciary to ensure that public officials are held to account for constitutional violations and for unnecessarily persisting in litigation at the expense of taxpayers. Hence, this chapter presents findings and proposes the criteria for when, how and why the courts should impose personal costs on public officials. This concluding chapter is intended to place punitive costs into context in constitutional litigation with specific reference to public officials.

The study defines constitutional litigation as court proceedings instituted against (or by) state organs and which involves constitutional matters.[1] Section 167(7) of the Constitution defines constitutional matters as matters which involve the "interpretation, protection and enforcement of the Constitution." Thus, when a citizen or a juristic person takes a state organ or a government department to court to enforce or secure constitutional rights, the matter is a constitutional one and thus falls under constitutional litigation. The President or a functionary of a Chapter 9 institution such as the Public Protector and all other organs of state become the representative litigants

1 See Section 2.2 above.

within the context of this study. When a public official is cited in court papers as a respondent, they are cited in their official capacity, as they do not engage in the litigation for their personal ends but in the interests of the offices they occupy and the state organs they represent. Hence, they are called 'representative litigants' in this study and in case law.

5.2 The general rule on costs in constitutional litigation – the Biowatch principle

The general principles on costs in constitutional litigation were laid down in *Biowatch,*[2] where the Court determined that in constitutional litigation, the state should pay the legal costs, except where the state has been successful in litigation,[3] in which case a deviation from this principle does apply in exceptional cases where special grounds are present, such as, where motives have been vexatious, reckless and malicious or frivolous.[4] However, the general principle is a safeguard to ensure that persons who unsuccessfully attempt to assert and safeguard their rights through litigation are not burdened with either exorbitant legal costs or any legal costs. In line with the *Biotwatch* principle, when the courts order costs against public functionaries (representative litigants), they do so against the state organs, not the functionaries of the state organs. Consequently, public officials, such as the President, Ministers and the Public Protector, among others, are not normally required to pay the costs of the litigation in their personal capacity.

5.3 Departing from the Biowatch principle

Recent case law demonstrates that judicial officers are fed up with public officials who unnecessarily persist with pointless litigation at the expense of taxpayers. Pointless litigation not only affects the state financially, but also compromises the time available to courts to deal with other matters of importance. It is submitted that it was only a matter of time before the courts began to punish errant and litigious public officials

2 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232(CC).
3 See Section 2.4.2 above.
4 See Section 2.1 above.

who unnecessarily involve the state in constitutional litigation. The imposition of personal costs serves two purposes: as a means to end impunity by public officials by holding them accountable for constitutional acts and omissions which spark litigation; and as a means of showing the court's displeasure at the improper conduct of a public official in the course of constitutional litigation. An instance is *Public Protector v South African Reserve Bank* in which the Court confirmed the imposition of personal costs on Public Protector Mkhwebane because she did not reveal important documents and information and persisted with an indefensible explanation for her conduct.[5]

The basis for the imposition of personal costs is that when a public official (representative litigant) acts unlawfully, unreasonably, recklessly or for selfish gain during the exercise of their public duties, he/she loses the immunity accorded by law in relation to the costs of the litigation under vicarious liability. It may be said[6] that a public official who acts with apparent malice or other ulterior motive acts against the interests of citizens and the state organ which he/she represents. Thus, such acts are not the acts of the state but personal acts of a public official using the state as a veil to pursue an agenda which is contrary to the interests of the public. Therefore, it is not in the interests of the citizens to make them pay (indirectly, as taxpayers) for the costs of constitutional litigation when the public official(s) have engaged in unnecessary litigation. It should follow that such a public official should pay for the costs incurred in the litigation.

5.4 The problem statement confirmed

The imposition of personal costs on public officials is a relatively new concept in constitutional litigation. There is an emerging judicial consensus, as evident in the case law as discussed above in chapter 4, that the imposition of personal costs on public officials is a measure of accountability that is necessary to limit abuse of the judicial

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5 See Section 4.3 above.

6 See Section 3.4.3 above; see also *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 36; *Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development* 2018 12 BCLR 1472 (C) para 14; *Public Protector v South African Reserve Bank* 2019 ZACC 29 para 226: and *District Six Committee v Minister of Rural Development and Land Reform* 2019 JOL 45258 (LCC) para 102.

process by public officials who persist with unnecessary litigation. Before *Black Sash II*, personal costs were confined to conduct relating to court proceedings but were then extended to the conduct of public officials in the performance of their constitutional obligations. Notably, imposition of personal costs in constitutional litigation is a recent judicial intervention that is not regulated by legislation. Personal costs liability in constitutional litigation was derived by the courts from the Constitution, thus leaving judicial officers with a wide discretion on when, why and to what extent to impose the personal costs. There is an inconsistency in cases on the criteria that the courts use to determine whether or not to impose personal costs.[7]

The case law discussed in this study[8] shows that in recent times, the legal errors and miscalculations of the incumbent Public Protector, Mkhwebane, have attracted several orders for personal costs against her. While the judicial attitude against abuse of office is to be praised, the case law has not shown that there were no *bona fide* reasons for investigation of, for instance, the Reserve Bank and Minister Pravin Gordhan. Instead, the Public Protector has been compelled by the courts to pay personal costs for the illegality of her remedial action, failure to adequately give affected parties opportunities to make submissions on the remedial action and, in the case of Minister Gordhan, opposing interdicts against her remedial action. The dissenting judgment of Mogoeng CJ in *Public Protector v South African Reserve Bank* set out his opinion on the implications of personal costs on the Public Protector and how the High Court had so misdirected itself on the criteria that no reasonable appeal court would uphold its judgment. Mogoeng CJ found himself in a very small minority (with only an acting judge, Goliath AJ, concurring with his dissent). Given the foregoing analysis concerning the basis for the imposition of personal costs, this study was intended to determine what could be the proper basis for the imposition of personal costs on public officials in constitutional litigation. The following summaries of recommendations seek to propose three guidelines. Firstly, *when* the courts should impose personal costs on

7 See Sections 2.3, 3.2 and 3.4 above.
8 See Sections 4.3 and 4.5 above.

public officials. Second, when the courts *should not* impose personal costs on public officials; and thirdly, *how* the courts should impose personal costs on public officials.

5.5 When should the courts impose personal costs on public officials?

Courts have been applying common law principles to justify grounds for judicial review where public powers or public officials have been concerned. These principles having been incorporated under the Constitution, thus make them the more relevant for courts to follow as guidelines when met with the question whether a public official should pay legal costs from his or her own pocket.[9] Therefore, it is proposed[10] that the following criteria should be met before a court can impose personal costs on a public official:

a) The existence of extraordinary circumstances, such as being in contempt of court.
b) Persistent failure of the public official to comply with constitutional obligations.[11]
c) Prejudice of the public and / or of the state by the public official in the performance of constitutional obligations.[12]
d) The public official unfairly and unjustly treats persons over whom public power is exercised in a manner which fundamentally infringes on their rights such that the only way to vindicate the Constitution (which prescribes just administrative action and fair treatment of all persons) is through personal costs against the state functionary.[13]
e) Gross negligence on the part of the public official.[14]
f) Bad faith on the part of the public official.[15]

5.6 When should the courts not impose personal costs on a public official?

It is proposed that personal costs should not be imposed on public officials brought before a court of law under the following circumstances:

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9 See Section 3.4 above.
10 See Section 3.4 above.
11 See Section 3.2 above.
12 See Section 4.3.3 above.
13 See Section 4.3.3 above.
14 See Sections 3.2 and more specifically 3.4.2 above.
15 See Sections 3.2 and and more specifically 3.4.3 above .

a) When the public official loses the case in the course of litigation in which no extraordinary circumstances existed when the disputed conduct took place.
b) *Bona fide* mistake regarding constitutional obligations in the performance of official functions. *Bona fides* should not merely be determined as a subjective attitude, especially if the official should, due to the nature and requirements of the office, have been aware of the relevant obligations and negligently failed to determine what they are.
c) Ignorance of the law on the part of the public official. An argument should be made that public officials in litigation (representing the state) must diligently do everything reasonably possible to ascertain the law that is applicable to their functions. This should be especially in view of the fact that their powers and functions are based on the law (including the Constitution) and that they would normally have access to the legal advisors in the employ of the state.[16]
d) A lapse in the competence of the public official while performing official duties. An official should be allowed to argue that the appointing authority failed to determine the prior existence of the relevant level of competence, or to provide the support needed for competent exercise of the relevant functions.
e) A lack of good judgement by the public official in a particular case. A lapse in judgment in a particular case must not necessarily attract personal costs.[17]

5.7 How should the courts impose personal costs against public officials?

Once the criteria for the imposition of personal costs against a public official has been met as discussed,[18] it is proposed that only superior courts i.e. the High Court, Supreme Court and Constitutional Court, should be able to impose personal costs. If imposed by a High Court or Supreme Court of Appeal, such order should be of no force unless it is confirmed by the Constitutional Court to guard against judicial error. The imposition of personal costs on state functionaries like the Public Protector, the President and the Cabinet Ministers has severe constitutional implications against the institutions they represent. It should, therefore, be left to the highest court in the land to confirm the

16 See Section 4.5.3.2 above.
17 See Section 3.4 above.
18 See Chapter 3 and Section 5.5 above.

desirability of such costs in all circumstances. The Constitutional Court already confirms the declaration of invalidity of legislation, the constitutionality of the conduct of the President and Parliament, and amendments to the Constitution.[19] Arguably, it should never be left to one or more persons outside the Constitutional Court, to inflict personal costs on a state functionary.

[19] See Sections 167(5) and 172(1)*(a)* of the Constitution of the Republic of South Africa, 1996.

BIBLIOGRAPHY

Literature

Anonymous "Government Tort Liability" 1998 *Harv L Rev* 2009-2026

Aucoin P and Heintmzman R "The Dialects of Accountability for Perfomance in the Public Management Reform" 2000 *IRAS* 45-54

Birlie Y "Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features." 2017 *MLR* 304-341

Woolman S and Bishop M "Constitutional Law of South Africa" 2013 *CCR* 391-436

Bovens M "Analysing and Assessing Accountability: A Conceptual Framework" 2007 *ELJ* 447-468

Cilliers A, Cilliers C and Cilliers M *Law of Costs* 3rd ed (LexisNexis 1997)

Collins English Law Dictionary Complete and Unabridged (2018)

Cooper N "Grassroots Responses to Water Poverty and the Limitations of a Right to Water in South Africa and Malawi " 2017 *SAJELP* 31-73

Craig P "Ultra Vires and the Foundations of Judicial Review" 1998 *CLJ* 63-90

Currie I and de Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2008)

Davis D "Separation of Powers: Juristocracy and Democracy?" 2016 *SALJ* 258-271

Du Plessis M, Penfold G and Brickhill J *Constitutional Litigation* 1st ed (Juta Cape Town 2013)

Eastwood J "The Biowatch Case: A victory for Access to Information and Landmark Decision on Costs Awards in Public Litigation" 2012 *Biowatch Research Papers* 1-25

Finn P "Public Trust and Accountability" 1994 *Griffith Law Rev.* 224-244

Gracie N "Costs De Bonis Propriis" 1946 *SALJ* 206-217

Heleba S "Mootness and the Approach to Costs Awards in Constitutional Litigation: A review of Christian Roberts v Minister of Social Development Case No 32838/05 (2010) (TPD)" 2012 *PELJ* 567-638

Hodges C, Vogenouer S and Tulibanka M *The Oxford Study on Costs and Funding of the Civil Litigation: A Comparative Perspective* (Hart Publishing Ltd United Kingdom 2010)

Hoexter C *Administrative Law in South Africa* 2nd ed (Juta Cape Town 2012)

Hopkins K and Franca L "In Which Forum to Litigate?" 2004 *De Rebus: SAAJ* 28-29

Humby T "Reflections on the Biowatch Dispute- Reviewing the Fundamental Rules on Costs in the Light of the Needs of Constitutional and/or Public Interest Litigation" 2009 *PER/PELJ* 95-131

Humby T "The "Biowatch" Case: Major Advance in South African Law of Costs and Access to Environmental Justice" 2010 *JEL* 125-134

Jarvis MD "The Black Box of Bureaucracy: Interrogating Accountability in the Public Service" 2015 *AJPA* 450-466

Kong K "Costs in Public Interest Litigation: Whose Pocket Should Be Picked" 2009 *Hong Kong LawJ* 767-781

Lewis JM "Individual and Institutional Accountability: The Case of Research Assessment " 2015 *AJPA* 408-416

Makhalemele and Sorensen "Costs in Public Interest Litigation: The Biowatch Case" 2005 *SAAJ*

McQuoid-Mason DJ "Public Health Officials and MECs Should Be Held Liable for Harm Caused to Patients Through Incompetence, Indifference, Maladministration or Negligence Regarding the Availability of Hospital Equipment" 2016 *SAMJ* 681-683

Moskowitz HJ and Fontana VR "Defending Suits against Public Officials" 1982 *Insur. Couns.J* 490

Mulgan R ""Accountability": An Ever-Expanding concept? Public Administration" 2000 *Public Administration* 555-574

Mulgan R "'Accountability': An Ever-Changing Concept?" 2000 *Public Administration* 555-673

Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 31-48

Neethling J and Potgieter J *Law of Delict* (Lexis Nexis Durban 2010)

Okpaluba C "The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective" 2006 *Acta Juridica* 117

Plasket C "Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials" 2000 *SALJ* 151-158

Plillard CT "Taking Fiction Seriously: The Strange Results of Public Officials Individual Liability under Bivens" 1999 *Geo LJ* 65-104

Shuck PH "Suing our Servants: The Court, Congress, and the Liability of Public Officials for Damages" 1980 *SCR* 281-368

Woolman SB, M. *Constitutional Conversations* (eds) ed (Pretoria University Law Press Pretoria 2008)

Cases

Absa Bank Limited v Public Protector 2018 2 All SA 1 (GP)

Absa Bank v Robb 2013 3 SA 619 (GSJ)

Affordable Medicines Trust v Minister of Health 2006 3 SA 247 (CC)

Ahmed v Minister of Home Affairs 2019 1 SA 1 (CC)

Alexkor Ltd v Richterveld Community 2004 5 SA 460 (CC)

Airports Company South Africa v Tswelokgosto Trading Enterprise 2019 1 SA 204 (GJ)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Beinash v Ernst and Young 1999 2 SA 116 (CC)

Benson v South Africa Mutual Life Assurance Society 1986 1 SA 776 (A)

Biowatch Trust v Registrar Genetic Resources 2009 6 SA 232(CC)

Bisset v Boland Bank Ltd 1991 4 SA 603 (D)

Black Sash Trust and (Freedom under Law Intervening) v Minister of Social Development 2018 12 BCLR 1472 (C)

Black Sash Trust v Minister of Social Development 2017 9 BCLR 1089 (CC)

Bothma v Els 2010 2 SA 622 (CC)

Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited 2019 5 BCLR 533 (CC)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 6 SA 182 (CC)

Coetzee v National Commissioner of Police 2011 1 SACR 132 (GNP)

Coetzee v National Commissioner of Police 2011 1 SACR 132 (GNP)

Conradie v S 2018 7 BCLR 757

Cooper v First National Bank of South Africa Ltd 2001 3 SA 705 (SCA)

Christensen v Ritcher 2017 ZAGPPHC 647

De Lille v Speaker of the National Assembly 1998 3 SA 430 (CC)

Department of Transport v Tasima (Pty) Ltd 2017 2 SA 622 (CC)

District Six Committee v Minister of Rural Development and Land Reform 2019 JOL 45258 (LCC)

Economic Freedom Fighters v Speaker, National Assembly 2016 3 SA 50 (CC)

Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 3 SA 165 (CC)

Ferreira v Levin 1992 2 SA 621 (CC)

Fose v Minister of Safety and Security 1997 7 BCLR 851 (CC)

Fripp v Gibbon 1913 AD 354

Fuel Retailers Association of South Africa (Pty) Ltd v Director General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others 2007 (6) SA 4 (CC)

Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 5 SA 24 (SCA)

Harnischfeger Corporation v Appleton 1993 4 SA 479 (W)

Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 2 SA 415 (CC)

Heyneke v Umhlatuze Municipality 2010 JOL 25625 (LC)

Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality 2018 1 SA 391 (SCA)

Hunter v Financial Sector Conduct Authority 2018 12 BCLR 1481 (CC)

Jacobs v S 2019 BCLR 562 (CC)

J T Publishing (Pty) Ltd v Minister of Safety and Security 1996 12 BCLR 15(CC)

Johannesburg City Council v Administrator, Transvaal 1969 2 SA 72 (T)

Khumalo v Holomisa 2002 5 SA 401 (CC)

Khumalo v MEC of Education KwaZulu Natal 2014 5 SA 579 (CC)

Kruger v Coetzee 1966 2 SA 428

Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae) 2006 1 SA 144 (CC)

Lushaba v MEC for Health, Gauteng 2015 3 SA 616 (GJ)

Makhaya NO v Goede Wellington Boerdery (Pty) Ltd 2013 1 All SA 526 (SCA)

MEC for Local Government, Housing and Traditional Affairs, Kwa-Zulu-Natal v Yengwa 2010 5 SA 494 (SCA)

MEC, Department of Welfare, Eastern Cape v Kate 2006 4 SA 478 (SCA)

Minister of Health v Clicks SA (Pty) Ltd 2006 2 SA 311 (CC)

Minister of Safety and Security v Carmichelle 2004 2 BCLR 133 (SCA)

Mlatsheni v Road Accident Fund 2009 2009 2 SA 401 (E)

Motsepe v Commissioner of Inland Revenue 1997 2 SA 898 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 2 SA 1 (CC)

National Gambling Board v Premier of Kwa-Zulu-Natal 2002 2 BCLR 156 (CC)

Nayler v Jansen 2007 1 SA 18 (SCA)

Nekokwane v RAF 2019 6 BCLR 745 (CC)

Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging 1946 AD 597

Ngqutshwa Local Municipality v MEC for Housing, Local Government and Traditional Affairs 2005 JOL 14776 (Ck)

Njongi v MEC, Department of Welfare, Eastern Cape 2008 4 SA 237 (CC)

Omar v Government, RSA 2006 2 SA 289 (CC)

Pharmaceutical Manufacturers Association of SA : In re Ex Parte President of the Republic of South Africa 2000 2 SA 674 (CC)

POPCRU v Minster of Correctional Services 2011 10 BLLR 996 (LC)

Premier of Western Cape v Fair Cape Property Developers (Pty) Ltd 2003 2 All SA 465 (SCA)

Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 2 SA 91 (CC)

President of the Ordinary Court Marshal v Freedom of Expression Institute 1998 2 SA 1136 (SCA)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

President of the Republic of South Africa v Office of the Public Protector 2018 5 BCLR 609 (GP)

President of the Republic of South Africa v Public Protector 2018 2 SA 100 (GP)

Public Protector v South African Reserve Bank 2019 6 SA 253 (CC)

Re Estate Potgieter 1908 TS 982

Rudolph v Commissioner for Inland Revenue 1996 4 SA 552 (CC)

S v Boesak 2001 1 SA 912 (CC)

South African Liquor Trader's Association v Chairperson, Gauteng Liquor Board 2009 1 SA 565 (CC)

South African Reserve Bank v Public Protector 2017 6 SA 198 (GP)

South African Social Security Agency v Minister of Social Development 2018 10 BCLR 1291 (CC)

Speaker of the National Assembly v De Lille [1999] 4 All SA 241 (A)

Swartbooi v Brink 2006 1 SA 203 (CC)

Thint Holdings (Southern Afrca) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions 2009 1 SA 141 (CC)

Transnet Ltd t/a Portnet v The Owners of the Mv "Stella Tingas" 2003 1 All SA 286 (SCA)

United Democratic Movement v Speaker of the National Assembly 2017 5 SA 300 (CC)

Uthukela District Municipality v President of the Republic of South Africa 2002 11 BCLR 1220 (CC)

Venter v Scott 1980 3 SA 988 (O)

Vermaak's Executor v Vermaak's Heirs 1909 TS 679

Visser v Cryopreservation Technologies CC 2003 6 SA 607 (T)

York Timbers Ltd v Minister of Water Affairs and Forestry 2003 2 All SA 710 (T)

Zulu v eThekwini Municipality 2014 4 SA 590 (CC)

Statutes

Constitution of the Republic of South Africa 1996

Executive Member's Ethics Act 82 of 1998

Intergovernmental Relations Framework Act 13 of 2005

Maintenance Act 9 of 2015

Promotion of Administrative Justice Act 2000

Promotion of Administrative Justice Act 3 of 2000

Public Protector Act 23 of 1994

Restitution of Land Rights Act 22 of 1994

State Liability Act 20 of 1957

Vexatious Proceedings Act 3 of 1956

Government publications

2016/2017 PPsRo 2017

Internet sources

Anonymous 2019 *The Land Claims Court of South Africa* http://www.justice.gov.za/lcc/ accessed 02 November 2019

Dalsen AV 2019 *The Importance of the Outstanding Constitutional Court Judgment on the Public Protector's Report on the ABSA/Bankorp Affair* https://hsf.org.za/publications/hsf-briefs/the-importance-of-the-outstanding-constitutional-court-judgment-on-the-public-protector2019s-report-on-the-absa-bankorp-affair accessed 12 July 2019

De Villiers D 2017 *Can Public Officials exercising a public duty be ordered to pay Litigation Costs out of their own pocket* www.wylie.co.za/articles/can-public-officials-exercising-public-duty-ordered-pay-litigation-costs-pocket/ accessed 7 April 2018

Gradidge M 2017 *Ministers can be held Liable for costs of Legal Proceedings* http://www.mondaq.com accessed 23 June 2017

Herselman I 2017 *Op-Ed: Personal legal cost orders against rogue Public Officials are the frontline in the war against impunity* http://www.dailymaverick.co.za accessed 7 April 2018

Jooste T *Negligence vs gross negligence* www.seesa.co.za/negligence-vs-gross-negligence/ accessed 30 January 2018

Mabuza E 2017 *Biowatch costs principle should be embraced by lower courts: Con-Court* https://www.timeslive.co.za/news/south-africa/2017-10-31-biowatch-costs-principle-should-be-embraced-by-lower-courts-concourt/ accessed 5 February 2019

Mpahlwa M and Lubuma J 2017 *Costs in pursuing constitutional rights: Who is liable?* https://www.cliffdekkerhofmeyr.com accessed 22 March 2019

Nel G *Attorney and Client scale explained* https://www.gertnelincattorneys.co.za/fee/attorney-client-fees-explained/ accessed 20 August 2018

Ntikinca L 2018 *Litigation costs in Constitutional matters* www.derebus.org.za accessed 28 January 2019

Prentice B 2013 *When Can An Employer Sue an Employee for Damages?* https://www.blaney.com/articles/when-can-employer-sue-employee-damages accessed 02 January 2019

Rosenbaum A *Good Governance, Accountability and the Public Servant* www.nipsa.org/news/rosen.rtf accessed 15 May 2019

Sibanda R 2015 *Re-examining costs awards in constitutional litigation: tebeila institute of leadership, education, governance and training v Limpopo College of Nursing and MEC of the Department of Health, Limpopo* www.cfcr.org.za accessed 4 June 2018

Staff Reporter 2018 *Zuma appoints lawyers to fight latest cost order - reports* https://mg.co.za/article/2018-04-19-zuma-appoints-lawyers-to-fight-latest-costs-order-reports accessed 9 September 2018

Steenkamp A 2016 *Vexatious litigation: Security for costs ordered* https://www.gilesfiles.co.za/vexatious-litigation-security-for-costs-ordered/ accessed 10 December 2018