THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 131/17

In the matter between:

NOMZAMO WINIFRED ZANYIWE MADIKIZELA MANDELA	**APPELLANT**

and

THE EXECUTORS ESTATE LATE NELSON ROLIHLAHLA MANDELA	**FIRST RESPONDENT**
THE REGISTRAR OF DEEDS, MTHATHA	**SECOND RESPONDENT**
MINISTER OF LAND AFFIARS FOR THE REPUBLIC OF SOUTH AFRICA	**THIRD RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FOURTH RESPONDENT**
THE NELSON MANDELA FAMILY TRUST	**FIFTH RESPONDENT**
THE MASTER OF THE HIGH COURT, SOUTH GAUTENG	**SIXTH RESPONDENT**
GRACA MACHEL	**SEVENTH REPONDENT**
EBOTWE TRIBAL AUTHORITY	**EIGHT RESPONDENT**
ZWELIDUMILE MBANDE	**NINTH RESPONDENT**

Neutral citation: *Mandela v The Executors, Estate Late Nelson Rolihlahla Mandela & others* (131/17) [2017] ZASCA02 (19 January 2018)

Coram: Shongwe AP and Swain and Mathopo JJA and Mokgohloa and Rogers AJJA

Heard: 16 November 2017

Delivered: 19 January 2018

Summary: Administrative law – common law review – unreasonable delay – assumption of prospects of success on merits – outweighed by potential for severe resultant prejudice – refusal of condonation – whether court justified in mulcting appellant with costs.

ORDER

On appeal from: The Eastern Cape Local Division, Mthatha (Makgoba JP and Van der Merwe and Teffo JJ sitting as court of first instance):

1 The appeal against the costs order granted by the court a quo against the appellant in favour of the third respondent is upheld.

2 The costs order granted by the court a quo against the appellant in favour of the third respondent is set aside and substituted with the following:

'As regards costs between the appellant and the third respondent, each party should bear its own costs'.

3 The appeal against the dismissal of the review application is dismissed.

4 The appellant is ordered to pay the first respondent's costs including costs of two counsel.

JUDGMENT

Shongwe AP (Swain and Mathopo JJA and Mokgohloa and Rogers AJJA concurring)

[1] This appeal, with special leave of this court, raises the question whether the court a quo was correct to dismiss the appellant's review application with costs on the basis that she delayed unreasonably in launching the application and that the delay should not be condoned. It also raises the question of the relevance of the *Biowatch* case on costs, where a litigant is unsuccessful against

the State. (*Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC)).

[2] On 16 November 1997, the third respondent, the Minister of Land Affairs for the Republic of South Africa (the Minister), took a decision to donate 'Lot, Kwa-Madiba (portion of A.A. No. 20 called QUNU) situated in the Administrative District of Umtata Province of the Eastern Cape', in extent 96, 8959 hectares (the property), to Mr Nelson Rolihlahla Mandela (Mr Mandela), the late former President of the Republic of South Africa. This donation took place after a final decree of divorce had been granted on 19 March 1996 in respect of a civil marriage that existed between the late Mr Mandela and Mrs Nomzamo Winifred Madikizela Mandela, the appellant. On 5 December 2013 Mr Mandela passed on and left a will in which he bequeathed the property to the Nelson Rolihlahla Mandela Family Trust (the Trust) in the following terms:

'I bequeath the Qunu Property and the movable assets of my estate in or on it at the time of my death, to THE NRM FAMILY TRUST. It is my wish that the trustees of THE NRM FAMILY TRUST administer the Qunu Property for the benefit of the MANDELA family and my third wife and her two children, MALENGANE MACHEL and JOSINA MACHEL. The Qunu Property should be used by my family in perpetuity in order to preserve the unity of the MANDELA family.'

The 'third wife' in the above clause is a reference to Ms Graca Machel whom Mr Mandela married on 18 July 1998. She was cited as the seventh respondent.

[3] On 14 October 2014 the appellant instituted review proceedings in which she sought an order declaring the Minister's decision of 16 November 1997 to donate the property as null and void; alternatively, reviewing and setting aside that decision and ancillary relief. She also sought an order declaring as invalid the legacy set out in clause 4.5.3 of the will of the late Mr Mandela in respect of the property in question.

[4] The review application was heard by the Eastern Cape Local Division of the High Court, Mthatha (Makgoba JP and Van der Merwe and Teffo JJ) and dismissed with costs including the costs of two counsel. The subsequent application for leave to appeal was also dismissed with costs. Aggrieved by this decision, the appellant applied to this court for special leave to appeal, which was granted on 20 January 2017.

[5] The first respondent, the executors of the estate late NR Mandela (the executors) and the Minister oppose the appeal (I shall hereafter refer to the executors and the Minister as 'the respondents'). The other respondents abide the decision of this court. The court a quo dismissed the review application mainly on the basis that there was an unreasonable delay which resulted in severe prejudice to the respondents. It did not extensively deal with the merits of the review but made reference thereto when considering whether to condone the appellant's unreasonable delay in launching the review proceedings and whether the appellant had reasonable prospects of success on the merits. It concluded that almost 17 years had gone by without the appellant doing anything to claim or assert her rights. The delay was therefore inordinate with no acceptable explanation as to why she took so long to assert her rights.

[6] The appellant contended that she was not aware of the donation made by the Minister to Mr Mandela and only became aware of it during August 2014 after obtaining a copy of Mr Mandela's will. Until then, so she says, she did not know that Mr Mandela was the registered owner of the property or that he thought himself entitled to dispose of it. She also contended that the respondents did not dispute that she lacked knowledge of the donation. She further

contended that she is the rightful holder of the right to occupy the property, or at least, the small portion initially allocated to her by the acting paramount chief Daliguba Joyi, in consultation with the local community. This, she contended, took place around 1989 and 1990, while Mr Mandela was incarcerated on Robben Island. She claims the property on the basis that she is entitled to the property by virtue of the fact that her customary marriage to Mr Mandela was not dissolved, notwithstanding the fact that their civil marriage had been dissolved by the issue of a final decree of divorce. Thus she personally acquired the property in accordance with the custom of the Abathembu clan, to which both she and Mr Mandela belonged. She contended that until and unless her late husband claimed his lobola back, the customary marriage remained extant.

[7] A brief factual background, which is not disputed, is that Mr and Mrs Mandela were married in terms of customary law in 1958. Subsequently on 14 June 1958 they concluded a civil marriage out of community of property. In 1964 Mr Mandela was convicted and sentenced to life imprisonment and eventually released in February 1990. He built a home in Qunu (on the property), between 1993 and 1995. At this stage the Qunu property was only about nine hectares in extent. On 13 April 1992 Mr Mandela publicly declared that his marriage had broken down irretrievably and subsequently instituted divorce proceedings. As stated earlier a final decree of divorce was granted on 19 March 1996. The appellant contested the divorce and filed a counterclaim. It is not clear from the evidence what happened to the counterclaim. The final order of divorce is silent regarding the proprietary rights of the parties.

[8] It must be made clear from the outset that the administrative action and the impugned decision must be adjudicated in terms of the common law and not

in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The impugned decision was taken in 1997, long before the coming into effect of PAJA. In *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46, it was held that since PAJA only came into operation on 30 November 2000, after the impugned decision in that case was taken, the validity of the defence of unreasonable delay had to be considered with reference to common law principles. Indeed, counsel for the appellant correctly conceded that the provisions of PAJA were not applicable to the present dispute. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC); 2004 (7) BCLR (CC) in para 22 the Constitutional Court remarked that 'the extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.' (See also *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC); (2000) (3) BCLR 241)).

[9] In *Van Zyl* para 46-47, it was pointed out that it is desirable and in the public interest that finality be reached within a reasonable time, in respect of judicial and administrative decisions and litigation in general. It was a long-standing rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party has been guilty of unreasonable delay in initiating the proceedings. The rationale for the long-standing rule is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. The application of the rule requires

consideration of two questions. Namely, was there an unreasonable delay? If so, should the delay in all the circumstances be condoned?

[10] In *Van Zyl* para 48, it was stated that the reasonableness or unreasonableness of a delay is dependent on the facts and circumstances of each case. It is a matter of a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable. In *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) para 24, it was pointed out that a material fact to be taken into account in making that value judgment was the nature of the challenged decision, as not all decisions have the same potential for prejudice, which may result from their being set aside. It was emphasised in *Van Zyl* that although this involved the exercise of a value judgment, it was not to be equated with the judicial discretion involved in the next question if it arose, namely, whether a delay which has been found to be unreasonable should be condoned.

[11] I turn to consider whether the court a quo correctly concluded that the appellant had unduly and unreasonably delayed in launching the application for review. The court a quo having referred to the evidence of the appellant, which was not disputed by the respondents, that she only became aware of the challenged decision when she became aware of the contents of the will in August 2014, phrased the question to be answered as follows, 'when a reasonable person in the shoes of Mrs Mandela would have acquired knowledge of the Minister's decision?'

[12] In Van *Zyl* para 51 the learned Judge observed that:

'In my view there is indeed a duty on the applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them *as soon as they are aware of the decision.* Whether the applicants in a particular case have taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case'. (Emphasis added.)

(See also *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA)).

[13] The present case may be regarded as distinguishable from this passage because here there was no unreasonable delay from the date on which the appellant claims to have learnt of the impugned decision. In my view, however, the same principle applies where there are circumstances which should have alerted an applicant to the existence of a decision adverse to her rights. Reasonable vigilance of one's rights is required. The failure to investigate such circumstances has the same potential to prejudice other parties as a failure to act promptly after learning of the adverse decision

[14] The court a quo decided that a reasonable person in the position of the appellant would have regarded recognition of her rights to the property as a critical issue in the divorce proceedings. Such a reasonable person would have asserted the rights to the property during the divorce proceedings and would accordingly have uncovered the steps taken to donate the land to Mr Mandela. However, as correctly pointed out by the appellant the decision to dispose of the property to Mr Mandela was only taken in November 1997, and the civil divorce took place in 1996. Nevertheless, the appellant's conduct is not consistent with that of a reasonable person who would have taken steps to

establish the outcome of her counterclaim and the fate of her claim to the property.

[15] In addition, the court a quo pointed out that the house on the property was built during the period from 1993 to 1995 and the statement by the appellant that she contributed to this was disingenuous as no proof of the contribution she made was produced. The respondents point out that the property on which the house was located was greatly increased in size. On 5 January 1996 Chief Mtirara wrote a letter to the magistrate in Mthatha stating that the extension of the original site of Mr Mandela from nine hectares to approximately 101.5 hectares carried the approval of the relevant tribal authority. In addition, the executors point out that the allotment of the property to Mr Mandela was done publicly where King Dalindyebo and other local chiefs were present representing the Ebotwe Tribal Authority. In response Mr Mandela donated a sum of R150 000 to the residents of Qunu to be used for a community project. This is borne out in a letter dated 10 November 1997 from Sangoni Incorporated, the attorneys who represented Mr Mandela.

[16] It appears that after his divorce Mr Mandela conducted himself as the owner of the house, without any recognition of any rights of the appellant. In addition, the property was vastly extended and improved from the resources of Mr Mandela. At some stage after the Qunu property was registered in Mr Mandela's name on 24 February 1998, extensive building was done to construct a much larger home than the one built during 1993-1995. Precisely when this occurred is unclear but the executors included in their answering papers a resolution by the NRM Family Trust dated 7 October 2002 in terms of which the trust resolved to enter into a building contract to the value of R4 548 600 for

the construction of a residence on Qunu. This, in my view, should have raised the appellant's eyebrows as regards the land itself. She could hardly have thought, after the divorce, that Mr Mandela would erect a mansion for her benefit. Indeed, the uncontested evidence is that even at the time of the divorce Mr Mandela and the appellant had not spoken for several years. The executors raised the same issues in order to show that there was an unreasonable delay and that a reasonable person in the shoes of the appellant would have reacted swiftly to assert her alleged right to the property. I therefor agree with the court a quo that there was an unreasonable delay by the appellant in instituting the review proceedings. (See *Gqwetha* para 49 and *Khumalo & another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 48).

[17] I turn to consider whether the court a quo in the exercise of its discretion correctly concluded that the unreasonable delay should not be condoned, with the result that the application for review could not be entertained. Of primary concern in this inquiry is the inherent potential for resultant prejudice to the heirs of Mr Mandela if the challenged decision is set aside. In *Gqwetha* para 23 the majority judgment remarked that:

'[P]roof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight'.

(See also *Wolgroeiers Afslaers v Munisipaliteit van Kaapstad* 1998 (1) SA 13 (A) at 38H-42D at 42C).

[18] In *Gqwetha* paras 33-35, it was pointed out that whether the delay should be condoned cannot be evaluated in a vacuum, but only relative to the challenged decision and particularly with the potential for prejudice in mind.

The prospect of setting aside the decision, ie the merits of the case, was not a material consideration in the absence of an evaluation of what the consequences of setting aside the decision were likely to be. The prospect (or lack of it) of a meaningful consequence to the setting aside of an administrative decision, rather than merely the prospect of the administrative decision being set aside, might be a relevant consideration to take into account.

[19] The appellant's challenge to the lawfulness of the decision of the Minister to donate the property to Mr Mandela and the subsequent transfer and registration of the property into Mr Mandela's name, was based upon the allegation that a formal resolution by the community of Qunu, was not obtained in respect of the donation of the land to Mr Mandela, as required in terms of s 3 of the Upgrading of Land Tenure Rights Act 112 of 1991. It was also alleged that the disposal of the property by the Minister was made without complying with the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996, which required that the informal rights holders consent to the disposal, before being stripped of their informal rights.

[20] The Minister however denied these assertions, contending that he had at his disposal information and documents which formed part of the Record of Decision, including an internal memorandum from the officials in the Minister's office, a resolution from the Ebotwe Tribal Authority authorising the registration of the deed of grant in respect of the property, and copies of the Permission to Occupy (PTO) allotment in favour of Mr Mandela dated 5 January 1995 or 1996. Although some of the copies of documents referred to are illegible, we were told that these are the best copies available. This is the sort of thing which can happen where a claimant lets the grass grow under her feet. Counsel for the Minister was at pains to explain the status of the PTO and

suggested that these were issued by the Department of Local Government and Land Tenure in terms of a Proclamation. The submissions were difficult to follow. Neither side properly addressed the legislative regime under which the PTO was purportedly issued. The PTO itself refers to s 3(*k*) of a Transkeian Proclamation 10 of 1966 which is not readily available to us and which neither side furnished to the court. After the hearing the Minister's counsel provided to the court a copy of Location Regulations: Unsurveyed Districts: Transkeian Territories, No 26 of 1936. How these bear on the matter is not self-evident.

[21] In support of her customary law claim to the property, the appellant says she believed that she was still married to Mr Mandela in terms of customary law even after the dissolution of their civil marriage. She contended that Mr Mandela also believed and lived in accordance with the Abathembu custom. However, notwithstanding the advice from her mother-in-law that she was entitled to have her own house, she never asserted her right to have her own house, to the exclusion of Ms Machel. She alleged that she visited the property even after the final decree had been granted but at no stage did she protest that Ms Machel was not entitled to occupy what she claims to be her house. She gave no particulars as to how often and under what circumstances she visited the Qunu property. The executors' evidence indicates that in the main it was used by Mr Mandela and his third wife, Ms Machel.

[22] If Mr Mandela lived strictly in accordance with the Abathembu customs, he would have claimed his lobola back in order to bring the customary marriage to a final end. But, apparently he did not, because he believed that the marriage bond between himself and the appellant had been finally put asunder by the decree of divorce. Of significance in this regard is what Mr Mandela himself

said in para 22 of his unsigned affidavit in opposing an application for the postponement of the divorce proceedings:

'[I]t is correct that it is customary among the Tembus for a person in my position to have regard to our customs and traditions. I have respected them in the past and will continue to do so now and in future. *However I know of no custom or tradition that deals with the dissolution of a civil marriage by the courts*'. (Emphasis added.)

It is therefore clear that Mr Mandela regarded the decree of divorce as being determinative of any rights flowing from the marriage concluded between the appellant and himself. That he did not claim the return of his lobola, is a clear indication that he regarded the marriage as at an end, in terms of customary law. In any event, there is very little evidence to prove that the custom of claiming the lobola back was followed by the wider Abathembu clan.

[23] There are conflicting opinions between the experts called by both parties as to the effect upon a customary marriage of a decree of divorce. One opinion confirms the existence of the custom that the customary marriage remains extant even after the dissolution of the civil marriage (Prof R B Mqeke for the appellant). The other, Prof D S Koyana for the executors, opines that courts have expressed themselves clearly (and perhaps somewhat harshly) against the inclination to import customary marriage rules into civil rites marriages, which is offensive precisely because the (unpurified) customary marriage pre-1998 was not recognised as a valid marriage.

[24] In the result the court a quo concluded that the appellant's prospects of showing that the customary marriage remained in existence appeared to be tenuous. As regards the appellant's claim to the property in reliance upon her status as the second customary wife of the late Mr Mandela, the court a quo concluded that the appellant's prospects of showing that the original site and the extended site were allocated to her in her personal capacity, were not strong.

The court a quo also found that in the absence of a right to the property, the appellant may not achieve anything meaningful in reviewing and setting aside the decision of the Minister. The court a quo therefor refused to grant an order declaring as null and void, the decision by the Minister to donate the property to Mr Mandela. The court a quo then dismissed the review application on the basis that the unreasonable delay of the appellant should not be condoned, regard being had to the nature and strength of the merits of the application, as well as the prospects of the appellant achieving anything meaningful, by setting aside the decision of the Minister.

[25] It should be noted that with regard to the issue of whether the appellant would achieve anything meaningful by setting aside the decision of the Minister, although Counsel for the appellant accepted that the appellant and her children would be entitled to use the property in terms of the provisions of Mr Mandela's will, as set out above, Counsel stated that the meaningful result for the appellant if her claim to the property was upheld, would be that she would then be entitled to exclude Ms Machel from using the property. For reasons which will become apparent, I find it unnecessary to determine whether the court a quo was correct or not, in the conclusions it reached on the merits of the appellant's claim.

[26] I turn to the issue of the potential for resultant prejudice if the decision of the Minister is set aside, which is inextricably connected to the finding of unreasonable delay. As stated in *Liberty Life Association of Africa v Kachelhoffer NO & others* 2001 SA 1094 (C) at 1114;

'The enquiry into whether prejudice is present or not entails comparing the present position of the other parties involved with what it would have been had proceedings been instituted within a reasonable time. Prejudice will be considered to be present if because of the delay

the recollections of parties or the person whose decision is being reviewed have paled; persons who have to depose to affidavits or testify are no longer available; and where documentary or other forms of evidence are no longer available.'

[27] In this case Mr Mandela is not available to put his side of the story which compromises the principle of *audi alteram partem*. Although the appellant had a number of witnesses in support of her version as to how the Qunu property was allocated to her by the tribal leaders, the weight of this evidence might have been diminished if Mr Mandela himself had been alive to give his version. All the evidence and the conduct of Mr Mandela indicate that he genuinely believed that the Qunu property was his to the exclusion of the appellant. The original modest dwelling constructed on the property over the period 1993-1995 was built at a time when he and the appellant were separated from each other and hardly talking. The mansion was erected after they were divorced and was used by himself and his new wife. The appellant must have been aware of such improvements and adopted a supine attitude towards her alleged claim. She provided no acceptable evidence that she contributed financially to the improvements on the property. Mr Mandela allowed the property to be donated to himself and to be registered in his name. He disposed of it by will. Absent any dishonest and unworthy intentions to the late Mr Mandela, one is bound to conclude that there is some important part of the story which the court did not hear because the review was only instituted after Mr Mandela's death.

[28] I agree with the submission by the respondents that a reasonable person in the position of the appellant would have asserted a right to ownership of the property before the death of Mr Mandela. To wait until after his death is extremely prejudicial to his estate and heirs because his version of events is not available. Part of the prejudice lies in the very fact that, because the appellant's

claim was only asserted after Mr Mandela died, the evidence in her favour may now seem to be stronger than it would have been had Mr Mandela's counter-version been before the court.

[29] Another relevant consideration is that if Mr Mandela had been aware of this claim in good time, he most probably would have devolved his estate differently. He bequeathed substantial sums to the children, grandchildren and great-grandchildren from his marriage with the appellant. If he had known that the appellant laid claim to the Qunu property for herself and for the benefit of the children from her marriage to Mr Mandela, he may well not have made these bequests or may have bequeathed more modest amounts. He may have taken steps to exclude her as a beneficiary of family trusts on the basis that the value of the Qunu property would be sufficient for her and the descendants from that marriage.

[30] Be that as it may, I am prepared to assume, without deciding, that on the evidence before the court the appellant's case on the merits has good prospects of success and that a meaningful result for the appellant would be achieved by setting aside the decision of the Minister. These assumed prospects of success are however not sufficient to swing the balance in her favour when it comes to the discretion as to whether to overlook the delay, when due regard is had to the potential for severe resultant prejudice if the decision of the Minister is set aside.

[31] It must be made clear that the decision to dismiss the appeal is exclusively based on the excessive undue delay coupled with the potential for severe resultant prejudice to be suffered by the respondents, and the lack of an acceptable explanation for the unreasonable delay. The following warrants

mentioning: It should be noted that although customary law marriages were not recognised in South African law until 1998, s 2 of the Recognition of Customary Marriages Act 120 of 1998 provides that a marriage which is a valid marriage at customary law and existed at the commencement of this Act is for all purposes recognised as a marriage. This narration is to clarify the fact that the appellant's customary law right and constitutional right to property were not simply ignored by this court. Even if the appellant were to succeed in asserting her customary law claim to the property, she would not be entitled to the whole property measuring (96, 9856) hectares simply because her right of possession, customarily, would have been limited to the small portion allegedly allotted to her by the King and the local community in her capacity as the second wife to the late Mr Mandela. If the appellant's case was confined to the small portion of the entire property without conflating it with the larger portion which was donated by the Minister in 1997, perhaps her case would have been adjudicated differently.

[32] I now turn to deal with the question of costs. On the face of it the case sought to be made by the appellant does not appear to be of a constitutional nature. However, on analysis I think in essence she was challenging the legality of a decision of the Minister to donate what she alleged to be her property to Mr Mandela. The litigation thus implicated the constitutional principle of legality as well as her rights to property (s 25 of the Constitution). See *Harrielall v University of KwaZulu-Natal* (CCT100/17) [2017] ZACC 38 (31 October 2017) paras 17-18. It is settled law that unsuccessful litigants who approach the court, in good faith, to assert constitutional rights, should not be discouraged to do so for fear of having costs awarded against them. (See *Biowatch* para 21 and *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 138).

[33] If the appellant's delay justified a conclusion that the institution of the review proceedings was frivolous or vexatious or manifestly inappropriate, this may have justified a departure from *Biowatch*. However, the fact that a delay is found by the court to be objectively unreasonable does not mean that the litigation is frivolous or vexatious in the sense contemplated in the Constitutional Court jurisprudence. The court a quo did not find that the appellant's institution of the proceedings was frivolous or vexatious; she was ordered to pay costs on the sole basis that no constitutional issues were decided in the light of the finding on delay. I do not think that this in itself warrants a departure from *Biowatch* nor am I persuaded that the appellant's institution of the proceedings was vexatious or frivolous or manifestly inappropriate.

[34] In this regard the court a quo thus misdirected itself by ordering the appellant to pay the costs as against the Minister. The appeal must succeed on the costs issue against the Minister, I am of the view that each party should bear its own costs. However, as regards the first respondent and the appellant these are private persons in their private capacities, therefore the *Biowatch* principles should not be applicable (cf *Turnbull-Jackson v Hibiscus Court Municipality & others* [2014] ZACC 24; 2014 (6) SA 592 (CC) para 99).

[35] On the basis that the appellant instituted the review proceedings after 17 years without an acceptable explanation, the common law rule that review proceedings should be initiated without undue delay has been violated. I am accordingly satisfied that the court a quo in the exercise of its discretion correctly concluded that this unreasonable delay should not be condoned. The appeal on the merits must accordingly fail.

[36] For the above reasons, I make the following order.

1 The appeal against the costs order granted by the court a quo against the appellant in favour of the third respondent is upheld.

2 The costs order granted by the court a quo against the appellant in favour of the third respondent is set aside and substituted with the following:

'As regards costs between the appellant and the third respondent, each party should bear its own costs'.

3 The appeal against the dismissal of the review application is dismissed.

4 The appellant is ordered to pay the first respondent's costs including costs of two counsel.

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J B Z Shongwe

Acting President of the Supreme Court of Appeal

Appearances

For the Appellant:	K Pillay SC (with her M Sello and M Lekoane) Instructed by: Mvuzo Notyesi Incorporated, Mthatha Christo Dippenaar Attorneys, Bloemfontein
For the first Respondent:	V Maleka SC (with him T Ngcukaitobi) Instructed by: Messrs Ledwaba Mazwai, Pretoria Kramer Wiehman Joubert, Bloemfontein

For the 3rd and 4th Respondent:	V Notshe SC (with him M Pangio) Instructed by: The State Attorney, Bloemfontein
For the 8th and 9th Respondent:	S C Makangoa Instructed by: Messrs Makangela Mtungani Incorporated, Mthatha Moroka Attorneys, Bloemfontein