

IN THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL PROVINCIAL DIVISION]

**APPEAL CASE NUMBER: 831/2005
COURT A QUO CASE NUMBER: 23005/2002**

In the matter between:-

**THE TRUSTEES FOR THE TIME BEING OF THE
BIOWATCH TRUST**

Appellant

and

THE REGISTRAR, GENETIC RESOURCES

First Respondent

**THE EXECUTIVE COUNCIL FOR GENETICALLY
MODIFIED ORGANISMS**

Second Respondent

MINISTER OF AGRICULTURE

Third Respondent

MONSANTO SOUTH AFRICA (PTY) LTD

Fourth Respondent

FIRST – THIRD RESPONDENTS’ HEADS OF ARGUMENT

INTRODUCTION:

1.

1.1. The Appellant (“Biowatch”) applied to the court *a quo* for an order against the First – Third Respondents (“the statutory respondents”) entitling Biowatch to access to information in terms of Section 32 of

the Constitution of the Republic of South Africa, 1996 and Section 31 of the National Environmental Management Act, 107 of 1998.

1.2. The Fourth Respondent (“Monsanto”), as also Stoneville Pedigreed Seed Company and D&PL SA South Africa Inc (the fifth and sixth respondents in the court *a quo*) sought leave to join the proceedings, which was granted by consent. The latter respondents in the court *a quo* are not parties to the present appeal.

1.3. The court *a quo* ordered that the statutory respondents provide Biowatch with certain of the information sought by it. Such order was subject to the qualification that the statutory respondents were entitled to withhold information on any of the grounds of refusal of information specified in Chapter 4 of Part 2 of the Promotion of Access to Information Act, 2000 (Act no. 2 of 2000).

See: Judgment, par. [69](a) – (b), pp 669 – 672 of record

1.4. No order as to costs was made in favour of Biowatch against the statutory respondents. Biowatch was ordered to pay the costs of Monsanto.

See: Judgment, par. [69](d), p 673 of record

- 1.5. Biowatch appeals against the costs order granted by the court *a quo*. In particular:
- 1.5.1. against the decision not to grant an order of costs in its favour against the statutory respondents;
- 1.5.2. against the decision to grant costs against it in favour of Monsanto.
- 1.6. The statutory respondents seek that the appeal against them be dismissed with costs.

SECTION 21A OF THE SUPREME COURT ACT, NO. 59 OF 1959:

2.

- 2.1. Section 21A(1) of the Supreme Court Act, No. 59 of 1959 (“the Act”) provides that *“(when) at the hearing of any civil appeal to ... any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone”*.

2.2. In terms of Section 21A(3) of the Act, *“(save) under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs”*.

2.3. Section 21A of the Act is aimed at alleviating the heavy workload of courts of appeal. Accordingly, appeals should be submitted for adjudication only if there will be a real, practical effect or result of a judgment of the court of appeal.

**See: Premier, Provinsie Mpumalanga en ‘n ander v Groblersdalse Stadsraad 1988 (2) SA 1136 (SCA) at 1141 D – E; 1142 E – F; 1143 A – B;
Natal Rugby Union v Gould 1999 (1) SA 432 (SCA) at 444 J – 445 B**

2.4. It has been stressed that practitioners should be mindful of the provisions of Section 21A of the Act in the prosecution of an appeal.

See: Premier, Provinsie Mpumalanga en ‘n ander v Groblersdalse Stadsraad *supra* at 1143 B;

**Western Cape Education Department and another v
George 1998 (3) SA 77 (SCA) at 84 G**

3.

- 3.1. It is submitted that the judgment sought by the Appellant will, save for costs, have no practical effect or result. The order sought by the Appellant goes to the question of costs alone.

**See: Premier, Provinsie Mpumalanga en 'n ander v
Groblersdalse Stadsraad supra at 1139 E – F; 1140
C; 1141 D – E;
Natal Rugby Union v Gould supra at 444 J – 445 B**

- 3.2. It is submitted further that there are no exceptional circumstances, for purposes of Section 21A(3) of the Act, whereby the question whether the judgment sought by the Appellant will have a practical effect or result is to be determined by reference to consideration of costs. In particular:

- 3.2.1. there is a lack of evidence as to the extent of Biowatch's costs, much less evidence that the costs incurred by Biowatch in the litigation were substantial;

See: Oudebaaskraal (Edms) Bpk en andere v Jansen van Vuuren en andere 2001 (2) SA 806 (SCA) at 812 D – F

3.2.2. The costs order granted by the court *a quo* did not involve “*not only a departure from a practice that is well established, but also an inroad in what has hitherto always been regarded as a substantive right enjoyed by (the Appellant)*”.

See: Naylor and Another v Jansen: Jansen v Naylor and Others 2006 (3) SA 546 (SCA) at 558 D – E; 561 E – F

3.3. In the premises, it is respectfully submitted that the appeal falls to be dismissed in terms of Section 21A of the Act alone.

DISCRETION OF THE COURT A QUO:

Legal principles:

4.

4.1. It is trite law that an award of costs is a matter wholly within the

discretion of the trial court and it must be exercised judicially on a consideration of the facts of each case.

See: Graham v Odendaal 1972 (2) SA 611 (A) at 616 A

- 4.2. In essence, the award the costs is a matter of fairness to both sides. The power of interference on appeal is therefore limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question.

See: Rondalia Assurance Corporation of SA Ltd v Page and Others 1975 (1) SA 708 (A) at 720 C;

Blou v Lampert & Chipkin NN.O. and Others 1973 (1) SA 1 (A) at 15 E – H;

Gelb v Hawkins 1960 (3) SA 687 (A) at 694 A

- 4.3. Substantial success is not the only or decisive consideration in the exercise of the court's discretion with regard to costs. The court is entitled to have regard to a wide range of factors, by way of taking into account the totality of the circumstances, in the exercise of its discretion with regard to costs.

**See: Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A)
at 149 A – B**

- 4.4. It is a well-crystallised rule that the court on appeal will not readily interfere with the exercise of the discretion of a trial court in awarding costs. If there are some grounds for refusing a successful litigant his costs, the appeal court will not interfere with the discretion of the trial court merely because it might have taken a different view.

**See: Penny v Walker 1936 AD 241 at 260;
Killian v Geregboode, Uitenhage 1980 (1) SA 808 (A)
at 815 H – 816**

- 4.5. Provided there are some grounds on which a court, acting reasonably, could have come to the particular conclusion, the sufficiency of such grounds to warrant that conclusion is a matter entirely for the trial court's discretion, and the court of appeal cannot interfere, even if it would itself have made a different order.

**See: Attorney-General, Eastern Cape v Blom 1988 (4) SA
645 (A) at 670 D – F;**

Unimark Distributors (Pty) Ltd v Erf 94

Silvertondale (Pty) Ltd 2003 (1) SA 204 (T) at 215 B;

Pretorius v Herbert 1966 (3) SA 298 (T) at 302

- 4.6. The test for interference with a costs order on appeal has been stated thus:

“The discretion is a discretion in the strict or narrow sense (also called a ‘strong’ or a ‘true’ discretion). In such a case, the power to interfere on appeal is limited to cases in which it is found that the Court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the Court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.”

**See: Naylor and Another v Jansen 2007 (1) SA 16
(SCA) at par. [14]**

Application of legal principles to the facts:

5.

- 5.1. The statutory respondents (so too the other respondents) opposed

the application, inter alia, on the basis of the commercial confidentiality of the information sought by Biowatch. It was in this regard contended that some of the information sought was confidential and should not be disclosed, thereby justifying the refusal to grant access to the information sought by Biowatch.

See: Judgment, par. [39], p 651 of record;

Answering Affidavit S R Moephuli, par. 37, p 227 of record

5.2. The statutory respondents opposed the application further on the basis that Biowatch's formulation of the information sought by it was unsatisfactory. It was in this regard contended that the information sought was too widely articulated for the statutory respondents properly to respond thereto, and that the request for information suffered from inherent vagueness and overbreadth amounting to a "*fishing expedition*".

See: Judgment, par. [42], p 655 of record

6.

6.1. The court *a quo*, in respect of the statutory respondents'

submission with regard to the manner in which Biowatch had formulated the information sought, held as follows:

“There is certainly substance in these submissions. Unfortunately, Biowatch also did not engage in the task of specifying in its notice of motion the precise list of information it seeks access to. Its approach seems to have been to expect the respondents and the court to read through all the correspondence and to divine precisely what information is requested and what information is still outstanding.”

See: Judgment, par. [42], p 656 of record

- 6.2. The court *a quo* referred further to *“the lackadaisical approach Biowatch had adopted, which showed that it expected the respondents and the court, as it were, to trawl through its various requests for information to find out precisely what information Biowatch wanted and in what form it sought such requests”*.

See: Judgment on application for leave to appeal, par. [12], p 736 of record

- 6.3. In respect of costs, the court *a quo* in this regard held as follows:

“As far as costs are concerned, the general rule in litigation is that the costs should follow the result. However, although Biowatch has been partially successful in obtaining some of the relief sought, the manner in which some of its requests for information were formulated, as well as the manner in which the relief claimed in the notice of motion was formulated, has convinced me that it should not be granted a costs order in its favour in the circumstances.”

See: Judgment, par. [68], p 669 of record

7.

- 7.1. It is further so (as it was put by the court *a quo*) that *“(the) difference between the relief initially sought and the relief granted is obvious. First, the information to which access was granted is fully specified in the order and, secondly, the right of access to such information is also specifically limited so as to entitle the Registrar, the Council and the Minister to invoke in appropriate circumstances the provisions of Chapter 4 of Part 2 of the Promotion of Access to Information Act 2000 (Act 2 of 2000)”*.

See: Judgment on application for leave to appeal, par. [6], p 732 of record

- 7.2. In amplification of paragraph 7.1 above, the order granted in favour of Biowatch was (as it was put by the court *a quo*) “*one which delineates the rights of parties. ... Whether or not the documentation and information sought will be given, depends on how the exercise of discretion, on the basis of (the Promotion of Access to Information Act, 2000) will come into play at some later stage*”. It can accordingly rightly be said that “*(the) relief was entirely refashioned*”.

See: Argument on application for leave to appeal, p 718 of record, lines 12 – 17; p 711 of record, line 20

8.

- 8.1. In the light of the foregoing, it is respectfully submitted that it cannot be held that the court *a quo* did not exercise its discretion judicially. The court *a quo* in this regard held that:

“It is, of course, so that Biowatch was obliged to come to court to obtain access to the information sought and that it was

obliged to persist with such application right to the end. Generally such a party is entitled to a costs order in its favour, but for the reasons referred to I considered it appropriate to deprive it of such a costs order in all the circumstances referred to.”

**See: Judgment on application for leave to appeal,
par. [14], p 738 of record**

- 8.2. Further to paragraphs 5 - 7 above, it was not the contention on the part of Biowatch at the hearing that there were *“no grounds upon which (the court a quo) could have exercised (its) discretion in the manner that (it) did”*. Rather, it was *“conceded during the course of (the) argument that there were grounds upon which (the court a quo) could exercise such a discretion.”* It was submitted, however, that *“those grounds were insufficient for (the court a quo) to have exercised (its) discretion in the manner that (it) did”*.

**See: Judgment on application for leave to appeal, par.
[10], p 734 of record**

- 8.3. It is respectfully submitted, more particularly in the light of the concession on the part of Biowatch that there were some grounds

upon which the court *a quo* could exercise its discretion in the manner that it did, that the question as to whether those grounds were sufficient or not is something with which a court of appeal will readily interfere.

See: Logistics Technologies (Pty) Ltd v Coetzee and Others 1998 (3) SA 1071 (W) at 1073 J – 1074 E; 1075 A – 1076 B

9.

9.1. It is correct that Biowatch achieved substantial success in the relief sought by it against the statutory respondents. It is equally so, however, that access was refused to certain information sought by Biowatch, more particularly:

9.1.1. the data concerning “*RR Wheat*” (item (ii) of the fourth request);

See: Judgment, par. [53], p 662 of record

9.1.2. the “*exact locations of field trials and commercial releases*” (item (vi) of the fourth request);

See: Judgment, par. [58], p 665 of record

- 9.1.3. the *“copies of all internal, interdepartmental, interstate, departmental and/or external letters, telefaxes, e-mails, circulars, memoranda and similar documents which relate to the development, production, use and application of GMO’s”* (item (ix) of the fourth request);

See: Judgment, par. [63], p 667 of record

- 9.1.4. the request for *“any other recorded information held by the state relating to the development, production, use and application of GMO’s”* (item (xi) of the fourth request).

See: Judgment, par. [65], p 667 of record

- 9.2. In the light of paragraph 9.1 above (taken together with the fact that access to such information as was granted, was limited so as to entitle the statutory respondents to withhold information by way of invoking the provisions of Chapter 4 of Part 2 of the Promotion of Access to Information Act, 2000) it is submitted that the statutory respondents were likewise substantially successful.

9.3. It is respectfully submitted that the allegation on the part of Biowatch that the court *a quo* misdirected itself with regard to the costs order, is without merit. In this regard:

9.3.1. the court *a quo* in fact had regard to, and made certain pertinent findings about the conduct of the statutory respondents in not granting access to the information sought by Biowatch;

**See: Judgment on application for leave to appeal,
par. [11](c), pp 735 – 736 of record**

9.3.2. the court *a quo* accepted that Biowatch was acting in the public interest in bringing the application;

See: Judgment, par. [14], p 618 of record, lines 23

- 26

9.3.3. that the court *a quo* did not expressly articulate all the factors considered by it in not granting a costs order in favour of Biowatch against the statutory respondents, does not mean that such factors were not considered;

See: Judgment, par. [11](b), p 735 of record

CONCLUSION:

10.

It is respectfully submitted that the appeal against the order of the court *a quo* not to grant a costs order in favour of Biowatch against the statutory respondents falls to be dismissed with costs.

SIGNED AT PRETORIA ON THIS

DAY OF APRIL 2007

T W G BESTER
COUNSEL FOR FIRST – THIRD
RESPONDENTS