

**IN THE HIGH COURT OF SOUTH AFRICA**  
(TRANSVAAL PROVINCIAL DIVISION)

Appeal Case No.: A831/05  
(Case No.: 23005/2002)

In the matter between:

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

Appellants  
(Applicants *a quo*)

and

**THE REGISTRAR, GENETIC RESOURCES**

First Respondent  
(1<sup>st</sup> Respondent *a quo*)

**THE EXECUTIVE COUNCIL FOR  
GENETICALLY MODIFIED ORGANISMS**

Second Respondent  
(2<sup>nd</sup> Respondent *a quo*)

**THE MINISTER FOR AGRICULTURE**

Third Respondent  
(3<sup>rd</sup> Respondent *a quo*)

**MONSANTO SOUTH AFRICA (PTY) LTD**

Fourth Respondent  
(4<sup>th</sup> Respondent *a quo*)

**STONEVILLE PEDIGREED SEED COMPANY**

Fifth Respondent  
(5<sup>th</sup> Respondent *a quo*)

**D&PL SA SOUTH AFRICA INC**

Sixth Respondent  
(6<sup>th</sup> Respondent *a quo*)

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**APPELLANTS' LONG HEADS OF ARGUMENT  
(ON ROLL: 23 APRIL 2007 – FULL BENCH)**

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## **PART I: INTRODUCTION AND BACKGROUND**

### **1. The history of the litigation and its “public interest” nature**

- 1.1 This matter arises out of a request for access to information brought by the appellants (“Biowatch”) against the first to third respondents (“the statutory respondents”). When the request for access to the information was refused by the statutory respondents, Biowatch applied to the court *a quo* for an order entitling Biowatch to gain access to the information in terms of section 32 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) and section 31 of the National Environmental Management Act, 107 of 1998 (“NEMA”).<sup>1</sup>

#### **Founding Affidavit (“FA”) para 5 (vol. 1, pp. 6 – 7)**

- 1.2 Some time after the replying affidavit was delivered by Biowatch in the court *a quo*, the fourth respondent (“Monsanto”) sought leave to join the proceedings and this was granted by consent.

#### **Monsanto’s Answering Affidavit (“AA), para 5 (vol. 3, p. 270)**

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<sup>1</sup> It should be noted that, at the time that the application was launched, the Promotion of Access to Information Act, 2 of 2000 (“PAIA”) had not yet come into force.

1.3 Monsanto delivered an answering affidavit in May 2003 and a further replying affidavit was delivered by Biowatch in July 2003. A number of additional parties (the fifth and sixth respondents and the *amicus curiae*) were subsequently joined in the proceedings, all by consent. The details of the joinder and the efforts undertaken by Biowatch to include potentially interested parties are set out in an affidavit deposed to by Biowatch's attorney, Mr CP Cullinan.

**Biowatch's supplementary affidavit, paras 4 - 21 (vol. 6, pp. 524 – 529)**

1.4 In its founding affidavit, Biowatch indicated that it "is a national non-governmental organisation ("NGO") that acts in the public interest" and that it "was established inter alia in response to concerns arising from the widespread commercialisation of genetically modified organisms ("GMOs") in South Africa and the absence of civil society involvement in the determination of policy and law regulating their use, control and release".

**FA paras 6.2 & 15 (vol. 1, pp. 7 & 28)**

1.5 The state respondents tendered a bare denial of Biowatch's allegation that it acted in the public interest. Monsanto stated only that "Biowatch is a private organisation that simply represents and advances the personal interests and opinions of its trustees" and

that “further argument will be made in this regard at the hearing of this application”. In reply to Monsanto, Biowatch avers that “none of the applicants are remunerated for their services as trustees, nor does the trust itself exist for any purpose other than the protection of the environment and the pursuit of environmental issues”.

**State Respondents’ AA para 24 & 33 (vol. 3, pp. 221 & 226); Monsanto AA, paras 16 & 75 (vol. 3, p. 274 & 298); Reply to Monsanto para 60 (vol. 4, p. 333)**

1.6 It is trite law that “(A) bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court ... to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must, at least, disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after *viva voce* evidence has been heard”.

***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; See also *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G – H; *Mall (Cape) (Pty) Ltd v Merino Kooperasie Bpk* 1957 (2) SA 347 (C) at 351H - 352C; *Dowson & Dobson Ltd v Evans & Kerns (Pty) Ltd* 1973 (4) SA 136 (E).**

1.7 The public interest nature of Biowatch's activities in general is underlined by the provisions of Biowatch's trust deed, which was annexed to the founding affidavit. The following aspects are relevant in this appeal:

1.7.1 According to clause 5 of the deed, the primary object of Biowatch is to "engage in and promote nature conservation activities";

1.7.2 In terms of clause 2.3.7 of the deed, "nature conservation activities" means "activities promoting nature conservation and, without derogating from the generation of the foregoing, shall include ... monitoring the use, control and release of genetically modified organisms in South Africa including (1) the social, economic and environmental impacts of releases; (2) the activities of domestic and foreign biotechnology companies and the implementation of the national legislation and policy including Genetically Modified Organisms Act No. 15 of 1997 and deliberations of its Executive Council and Advisory Committee ... [and] taking measures, including legal action, to ensure compliance with the principal object"; [Emphasis supplied]

- 1.7.3 “Nature conservation” is, in turn, defined as “the sustainable use, protection, maintenance, rehabilitation, restoration and enhancement of the natural environment and the management of human use of the biosphere to yield the greatest benefit to present generations while maintaining the potential to meet the needs and aspirations of future generations”. [emphasis supplied]

**Biowatch Trust Deed, FA Annexure EPS3 (p. 46ff)**

- 1.8 The court *a quo* specifically referred to the state respondents’ failure to adequately address “any doubt about Biowatch’s claim that it acts in the public interest and deal with it in the answering affidavit deposed to by the Registrar”.

**Judgment, para 14 (vol. 7, p. 618)**

- 1.9 In paragraph 12 of its founding affidavit, Biowatch set out in detail the extent of the public interest concerns surrounding GMOs. None of these were significantly challenged by the respondents.

**FA, para 12 (vol. 1, pp. 11 – 21); Statutory respondents’ AA, para 31 (vol. 3, p. 225); Monsanto’s AA, paras 78 – 79 (vol. 3, pp. 299 – 301)**

1.10 It is submitted, therefore, that there is no doubt that the only conclusion that can be drawn from the record as a whole is that Biowatch was in fact litigating in the public interest.

2. **The information sought and the court *a quo*'s order**

2.1 It appears from the notice of motion that the information requested by Biowatch and sought in the court *a quo* is described in four annexures to the founding affidavit.

**Notice of Motion, prayer 1 (p. 1)**

2.2 Although the manner in which the relief was framed, and in particular the reference to the annexures in the prayers, was criticised by the learned judge *a quo*, it is submitted that he correctly made the following observations regarding the four requests for information:

2.2.1 Part of the information sought in the “first” request had in fact been provided to Biowatch by the state respondents prior to the hearing. The remaining enquiries were contained in the “fourth” request. There was therefore no need to consider the first request for the purposes of the litigation;

**Judgment, para 45 (vol. 7, p. 658)**

2.2.2 All of the information sought in the second and third requests were covered by the fourth request and these requests could therefore also be ignored for the purposes of the litigation (with the exception of the manner of access sought, which was not specified in the fourth request);

**Judgment, paras 46 - 50 (vol. 7, pp. 659 – 661)**

2.2.3 It was therefore only necessary for the court to consider the information sought in the fourth request. The fourth request (contained in annexure “EPS9” to the founding affidavit) contained eleven categories of requests for information.

**Judgment, para 51ff (vol. 7, p. 661ff)**

2.3 In his judgment, Dunn J ordered, *inter alia*, that the statutory respondents should provide Biowatch with eight of the eleven categories of the information sought by it in the fourth request, subject to the qualification that they were entitled to withhold information insofar as this is “permitted in terms of any of the specific 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) (“PAIA”). The statutory respondents were further ordered to provide reasons for any such refusal.

**Court order, paras (A) – (C) (vol. 7, p. 674 - 676)**

2.4 In relation to costs, Biowatch was required to pay Monsanto’s costs in the litigation. No further order as to costs was made.

**Court order, para (D) (vol. 7, p. 676)**

**3. The two costs orders and the grounds of appeal**

3.1 As appears from the notice of appeal, Biowatch challenges the costs order. In particular, two aspects are challenged:

3.1.1 Firstly, Biowatch challenges the decision not to grant an order of costs in its favour against the first to third respondents. In what follows, this is referred to as “the first costs order”.

**Notice of appeal, paras 1 – 3 (vol. 8, p. 743 – 745)**

3.1.2 Secondly, Biowatch challenges the decision to grant costs against it in favour of the fourth respondent. In what follows, this is referred to as “the second costs order”.

**Notice of appeal, paras 4 – 5 (vol. 8, p. 745 – 749)**

3.2 The fifth and further respondents have no interest in this appeal and do not participate therein in any capacity.

**4. The court *a quo*'s reasons for the cost orders**

4.1 The only portion of the judgment of the court *a quo* dealing with the question of costs is paragraph 68. In that paragraph, having adverted to the general rule that costs should follow the result, the learned judge expressly mentioned four considerations that he took into account in deciding not to grant a costs order in Biowatch's favour. These considerations were:

4.1.1 The "manner in which some of [Biowatch's] requests for information were formulated";

4.1.2 The "manner in which the relief claimed in the notice of motion was formulated";

4.1.3 The approach adopted by Biowatch "compelled Monsanto, Stoneville and D&PL SA to come to court to protect their interests; and

- 4.1.4 The “issues were complex and the arguments presented by [Monsanto, Stoneville and D&PL SA] were of great assistance”.

**Judgment, para 68 (vol. 7, p. 669)**

- 4.2 Although the learned judge *a quo* did not distinguish in his judgment which of these considerations related to the first costs order and which of them related to the second costs order, it would appear that only the first two considerations related to the first costs order whereas all four considerations applied to the “second” costs order.

- 4.3 It is not suggested by Biowatch in this appeal that the full bench is entitled only to have regard to the reasons expressly set out in the judgment on the merits in determining the question of whether the appeal should succeed. In his judgment on leave to appeal, the learned judge *a quo* advanced further reasons for his decision on costs. In this judgment, the two costs orders were dealt with separately.

- 4.3.1 In relation to the first costs order (the decision not to award costs in favour of Biowatch against the statutory

defendants), the court *a quo* did nothing more than provide additional detail regarding its concern with the manner in which the requests for information and relief sought were formulated;

**Leave to appeal judgment, paras 12 & 13 (pp. 736 – 737)**

4.3.2 In relation to the second costs order (the decision to award costs against Biowatch in Monsanto's favour), the court *a quo* referred once again to its concerns regarding the manner in which the requests and the relief were formulated but stated the additional reason that he was of the view that "Monsanto achieved substantial success, because it all along contended that Biowatch did not have open sesame to [the] information and that its right of access was subject to the provisions of PAIA and, at the very least, also subject to the limitations contained in the Genetically Modified Organisms Act, 1997 (Act 15 of 1997)".

**Leave to appeal judgment, para 7 (p. 732)**

4.4 It is submitted that the reasons advanced by the court *a quo* for the two costs orders are entirely insufficient to justify its failure to follow the ordinary rule in relation to costs, namely that the successful

party should be awarded its costs. It is further submitted that the court failed to take a number of relevant considerations into account in making his award as to costs, including its own finding that Biowatch was litigating in the public interest.

## **PART II: THE LAW**

### **5. Costs: The general principles at common law**

5.1 The Constitutional Court has referred with apparent approval to the “two basic principles” developed by the courts in relation to costs.

***Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) at para 3.**

5.2 These principles are as follows:

5.2.1 The award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and is “in essence a matter of fairness to both sides”.

***Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Rondalia Assurance corporation of SA Ltd v Page and others* 1975 (1) SA 708 (A) at 720A; *Ward v Sulzer* 1973 (3) SA 701 (A) at 706**

5.2.2 The successful party should, as a general rule, have his or her costs.

***Fripp v Gibbon & Co* 1913 AD 354 at 357; *Merber v Merber* 1948 (1) SA 446 (A) at 452.**

5.3 The Constitutional Court, however, stated that “the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.” Although the general principles “offer a useful point of departure ... [i]f the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis.”

***Ferreira (supra)* at para 3**

## **6. Interference with costs orders on appeal: The “traditional” test**

6.1 It has commonly been stated that the decision of a trial court in awarding costs is a judicial discretion that will not be readily interfered with on appeal and the mere fact that the appeal court would come to a different conclusion on costs would not justify interference. This statement, however, requires considerable

qualification and it is therefore necessary to deal in some detail with the principles applicable to the consideration of costs orders on appeal.

**See, for example, *Blou v Lampert & Chipkin NNO and others* 1973 (1) SA 1 (A) at 15**

6.2 At the outset, it must be emphasised that there is no general presumption against interference with costs orders on appeal. In what is probably the earliest reported case on the issue in South Africa, *Fripp v Gibbon and Company*, Lord De Villiers CJ said:

*“In appeals upon questions of costs two general principles should be observed. The first is that the Court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs.”*

***Fripp v Gibbon and Company (supra) at 357***

6.3 A court’s discretion in relation to costs has been described as a “narrow” discretion with which an appeal court will interfere only in limited circumstances.

***Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 806**

6.4 The “traditional” test for interference with a cost order on appeal has been most recently (and succinctly) formulated by the Supreme Court of Appeal in the *Naylor* case as follows:

*“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”.* [footnotes omitted]

***Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at para 14. See also: *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781-782; *Letsitele Stores (Pty) Ltd v Roets* 1959 (4) SA 579 (T) at 580C; *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* (*supra*) at 804; *Jonker v Schultz* 2002 (2) SA 360 (O) at 364I - 365A; *R v Zackey* 1945 AD 505 at 513; *Ritter v Godfrey* [1920] 2 KB 47; *South African Permanent Building Society v Powell and Others* 1986 (1) SA 722 (A) at 728B; *Kathrada v Arbitration Tribunal and Another* 1975 (2) SA 673 (A) at 675 - 676**

6.5 Although the Constitutional Court has developed a growing body of jurisprudence relating to costs in constitutional matters and matters of public interest, the traditional test for interference with a costs order on appeal has never been directly considered by the Constitutional Court (or any other appeal court) in relation to whether a court's failure to take the new principles on costs in constitutional matters and matters of public interest into account when exercising its discretion in relation to costs would render that decision open to interference. It is submitted that such a failure took place in the current matter and that this alone justifies interference in the costs award of the court *a quo*.

6.6 Before proceeding to consider how the above principles apply in the current case, however, it is necessary to clarify one important aspect of the "traditional" test for interference on costs in an appeal, namely that it appears, on a proper understanding of the authorities, that the traditional test for interference with a costs order on appeal only applies where the court *a quo* has exercised its discretion not to apply the ordinary rule that a successful litigant should be awarded his costs.

## 7. Circumstances in which the “traditional” test applies

7.1 Although the Constitutional Court refers to the *Kruger* case, the principle that the award of costs is a matter of discretion was first mentioned in South Africa in the *Fripp* case. In neither case, however, did the court expand in any detail on the reasons for the principle or its origins. The first attribution of the origin of the principle in South African law is to be found in *Penny v Walker*, where the Appellate Division referred to the judgment of Atkin LJ in the English case of *Ritter v Godfrey*. In an effort to explain the principle in detail, the history is summarised in *Merber v Merber* as follows:

*“It has repeatedly been said in our courts that an appeal tribunal will not readily interfere with an exercise of discretion by the Court a quo in awarding costs (e.g. Penny v Walker (1936 AD 241 at p. 260); Rex v Zackey (1945 AD 505, at pp. 510 and 513, 514)). In Ritter v Godfrey (1920, 2.K.B. 47) the Master of the Rolls said:*

*'The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If however there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial and this Court cannot interfere with his discretion.'*

*I presume that 'any grounds' mean any grounds on which a reasonable person could come to the conclusion arrived at. ... In Penny v Walker (supra) this Court, in laying down what was meant by a judicial discretion referred to p. 60 of the report of Ritter v Godfrey [(1920) 2 KB 47]. What ATKIN, L.J., there said was:*

*'In the case of a wholly successful defendant, in my opinion, the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.'*

***Kruger (supra) at 69; Fripp (supra) at 357 & 361; Penny v Walker (supra) at 260; Merber v Merber (supra) at 452 - 453. See also Molteno Bros v South African Railways 1936 AD 408 at 417***

7.2 Ever since this exposition of the principle, the *Merber* case has been the leading case in relation to the test for interference. It has been cited in almost all instances in which the courts have described the test, including the cases in which the *Naylor* formulation has been adopted.

7.3 Close examination of the *Merber* case, however, reveals that it is authority for the proposition that the "traditional" approach to

appeals on costs applies only where the court *a quo* has followed the ordinary rule (i.e. that a successful litigant should get his costs). Where, however, the court *a quo* does not apply the ordinary rule, then “ordinarily it will interfere”. The two situations are clearly distinguished in the judgment:

*“The learned LORD JUSTICE [in Ritter] was dealing with a case where the successful defendant had been deprived of his costs in the Trial Court and not with a case where he had been granted his costs. ... It seems therefore that, when a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule and if there are no such grounds, then ordinarily it will interfere. But when, as in the present case, the general rule has been followed, then the appellant must first show that there were grounds for departing from the rule and, if there are such grounds, that the trial Judge, in refusing to depart from the rule, has either failed to take such grounds into consideration or has acted arbitrarily in not giving effect to them by depriving the successful party of his costs. In either of these events the appeal court would be free to exercise its own discretion.” [emphasis supplied]*

7.4 It is submitted that the true implications of the *Merber* judgment are as follows:

7.4.1 It is necessary for the appeal court to enquire which party

was successful.

7.4.2 If the successful party has not been awarded his costs, the appeal court will “ordinarily” interfere (i.e. apply its own judgment as to whether there are any grounds to depart from the general rule).

7.4.3 It is only if the successful party has been awarded his costs, that the appeal court is constrained by the strict (“traditional”) test on appeal. In such circumstances, the appeal court may only interfere if the unsuccessful party first shows that there were grounds for departing from the ordinary rule and, if there are such grounds, that the trial Judge, in refusing to depart from the rule, has either failed to take such grounds into consideration or has acted arbitrarily in not giving effect to them by depriving the successful party of his costs.

7.5 The above reading of the principle in the *Merber* case is supported by the following statement made in the concurring judgment of Solomon J in *Fripp v Gibbon & Co* (upon which the *Merber* judgment relies):

*“[it] is only, in my opinion, where there are ... special circumstances, that there is room for the exercise of any*

*discretion by the judge or magistrate. Just as in an ordinary case where a plaintiff succeeds in an action, he is entitled as of course to his costs, unless there is good cause for depriving him of them, so, in my opinion, where there is a counterclaim or cross-action, there must be special circumstances to justify a court in depriving the successful plaintiff in reconvention of the costs of establishing his claim. If there are such special circumstances, then the magistrate has a discretion, and I agree that a higher court should then be slow to interfere with the exercise of his discretion.”*  
[emphasis supplied]

***Fripp v Gibbon & Co (supra) at 361. See also Pyott Ltd v Commissioner for Inland Revenue 1925 AD 298 at 314.***

7.6 It is submitted that, since Biowatch was successful in this matter in the court *a quo*, this court has a discretion to substitute the costs award in the court *a quo* for the award that it would have given in the circumstances.

7.7 However, it is further submitted that, even if this court should conclude that the traditional test applies, it is demonstrable that the learned judge *a quo* misdirected himself in that he failed, *inter alia*, to take relevant considerations into account. Thus, even on the traditional test, the costs order should be interfered with on the basis set out in the notice of appeal.

## 8. What is success?

8.1 As has been stated above, the award of costs is usually decided in relation to which party was successful. In considering whether to interfere with a costs order, it is therefore necessary for the appeal court to consider the merits of the matter and determine which of the parties was successful. This approach applies even where the case has been withdrawn for all purposes except for costs, in which event the court must consider which party would have been successful, taking into account all the information available to the court.

*“[I]n an appeal against a costs order, the Court’s decision, in the absence of other relevant factors, would in the normal course be largely based on whether or not the appellant would have been successful on the merits ... In an appeal from an order as to costs, the decision of the Court, in the absence of other and complicating factors, is reached with reference to the question whether the appellant, with regard to the merits, would have been successful ...”*

***Gamlan Investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd and Another 1996 (3) SA 692 (C) at 701 (referring to Erasmus v Grunow en 'n Ander 1980 (2) SA 793 (O) at 798D-H)***

8.2 In determining who was the successful party, the appeal court will attempt to ascertain which of the parties has been “substantially” successful.

***Guiliani v Diesel Pump Injector Services (Pvt) Ltd* 1966 (3) SA 451 (R) at 452G-H; *Swanepoel NO v Van Heerden NO* 1928 AD 15 at 24**

8.3 Substantial success may be achieved where the plaintiff or applicant has only had partial success. The courts have recognised that even though a plaintiff may recover only a very small amount, he may achieve substantial success, for example where, although awarded nominal damages, he succeeds in establishing a substantial right. In the *Bhika* case, the plaintiff sought damages for wrongful arrest and wrongful detention. The court recognised that the matter had been brought “as a test case” and agreed that although only a nominal amount of R25 was awarded in damages, the plaintiff was entitled to the full amount of his costs on the Supreme Court scale.

***Bhika v Minister of Justice and Another* 1965 (4) SA 399 (W) at 401 – 402**

8.4 Even where the defendant succeeds in significantly limiting the plaintiff's claim, this does not mean that the plaintiff is not successful:

*"... the plaintiff succeeded in obtaining judgment ... in a sum substantially greater than the amount admitted by defendant. The fact that defendant succeeded in reducing the amount claimed by plaintiff does not, in my view, alter the fact that in these circumstances the plaintiff is the successful party in considering the question of costs, because he had to come to Court in order to succeed to the extent that he did."*

***Guiliani (supra) at 452H-I (referring to Fripp v Gibbon & Co. (supra) 361); Letsitele Stores (supra) at 582***

8.5 A further issue relevant to the question of success is whether there was any indication that the respondent would not have opposed the matter had the appellant limited his claim to the amount eventually awarded.

***Letsitele Stores (supra) at 582; Jonker (supra) at 366E-G;***

8.6 In the light of these authorities, it is submitted that the key measure of success is whether the applicant was granted from the court more than the respondent was willing to offer.

## 9. Possibilities as to costs orders

9.1 It is only in very unusual cases that the court may order a successful party to pay the costs of the proceedings and very special circumstances would have to exist in order to justify such an order. More latitude is give to a court simply to deprive a successful party of his or her costs, thus making no order of costs against the unsuccessful party. According to the court in the *TAC* case:

*“In the exercise of its discretion the courts have on occasion departed from the rule that the successful party should at all times be favoured with a costs order. Such a departure only occurs in exceptional circumstances. The major exception to the rule is one that deprives the successful party its costs. There is also a possibility that a successful party should pay the costs of the unsuccessful party. The latter is, however, extremely rare in practice whereas the former is not. ... In very special circumstances the successful party may be ordered to pay the costs of the unsuccessful party. An order to this effect is ‘very unusual (and) is very seldom given.’”*

***Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (T) at 371E-F (referring to Cilliers Law of Costs 3ed at 3.20.)***

9.2 In *Nxumalo*, the court ordered the respondent to pay the respondents costs where she had induced the litigation by withholding access to a will that indicated the deceased’s wishes as

to her burial, which was the subject of the dispute. Even though it was found that the respondent would have been successful in the application (which was settled), the withholding of the will had induced the litigation and the respondent should therefore be responsible for the applicant's costs. In *Kent v Bevern & Co*, it was recognised that such an order is made "very seldom".

***Nxumalo v Mavundla 2000 (4) SA 349 (D) at 358Bff. See also Kent v Bevern & Co 1907 TS 395 at 400 - 401***

## 10. Public interest litigation and costs in the Constitutional Court

10.1 As noted above, the Constitutional Court in *Ferreira* stated that although the traditional rules relating to costs are flexible and "offer a useful point of departure. If the need arises the rules may have to be substantially adapted ...".

***Ferreira (supra) at para 3***

10.2 In the light of this *dictum*, the Constitutional Court has proceeded to develop a growing jurisprudence relating to costs orders in constitutional and public interest matters.

10.3 In the *Gauteng Education Bill* matter, the Constitutional Court referred to "the well-known rule in the Supreme Court that

ordinarily, and subject to the discretion of the Supreme Court, costs should follow the result and the losing party should be directed to pay the costs of the successful party” and recognised that there are “attractive grounds of policy which support such an approach in ordinary litigation between litigants in the Supreme Court”. The Court, however, indicated that such rules did not necessarily apply in the Constitutional Court. The court (per Mohamed DP) opined that persons 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 adversaries 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.”*

***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) at para 36***

10.4 The court went on to make no order as to costs “notwithstanding the fact that the record was unjustifiably burdened by a large number of unnecessary documents lodged on behalf of the petitioners”.

10.5 In *Motsepe*, the Constitutional Court followed the “traditional approach” to costs by awarding costs to the successful litigant. Specific reasons were given why the emerging rule of “caution” in relation to costs orders in the Constitutional Court would not be followed, referring to the applicant’s “lack of candour” and the fact that “her endeavour to engage this Court was little more than an attempt to gain time”.

***Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC) at paras 31 – 32***

10.6 In *Sanderson*, the appellant applied to the High Court seeking a permanent stay of the prosecution against him based on the contention that his fair trial rights had been infringed due to the allegedly unreasonable delay that had elapsed between being charged and the commencement of his trial. The court *a quo* had dismissed the appellant’s application and made an adverse costs order against him. He appealed *inter alia* on costs. Although the Constitutional Court confirmed that the decision of the court *a quo*

had been correct on the merits, the court not only made no costs order in the appeal it also overturned the costs order in the court *a quo*. In doing so, the Constitutional Court stated “[t]he observations in *Motsepe* and *Ferreira* were based on policy considerations that apply with equal force to other courts”. The only reference to the principles usually applicable to considering costs orders on appeal was the statement that “[h]owever slow a Court of appeal should be to interfere with a costs order in a court of first instance, this is clearly a case where intervention is necessary. Although the appeal must fail on the merits, the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay the costs and should not have to bear the costs in this Court”.

***Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 39 (CC) at para 44***

- 10.7 In the *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole* case, the Constitutional Court, per Goldstone J declined to award costs to the respondent where the applicant had withdrawn the referral when the relief sought had become moot. The basis of the refusal to award costs was that the “applicants' complaints were clearly not frivolous or vexatious and there can be no suggestion that they acted from improper motives”.

***Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and Another v Premier, Province of the Free State, and Others***  
**1998 (3) SA 692 (CC)**

10.8 In *DA v Masondo* the majority of the Constitutional Court per Langa DCJ stated that:

*“In the High Court, the appellants were ordered to pay costs. The respondents have asked for costs in this Court in the event of their being successful. The issues at stake are important matters of public interest affecting local government structures throughout the Republic. I consider that an appropriate order in this Court is for each party to pay its own costs”*

***Democratic Alliance and Another v Masondo NO and Another***  
**2003 (2) SA 413 (CC) at para 35**

10.9 In *City of Cape Town v Robertson*, the Constitutional Court declined to make an order of costs even though the respondent was unsuccessful in arguing that the rates policies of the City of Cape Town were unconstitutional and even though he made several public utterances (expressed in “strong language”) on the City’s property rating policy and powers. The court took the view that since the unsuccessful respondents had sought to vindicate a constitutional protection and had not pursued the litigation with an ulterior motive, no order of costs should be made.

***City of Cape Town and Another v Robertson and Another* 2005  
(2) SA 323 (CC) at para 79**

- 10.10 It is submitted that the Constitutional Court's approach to costs in public interest litigation must now be regarded as a key factor to be considered by a court in the exercise of its discretion as to costs. This is particularly so in light of the recognition in *Ferreira* that the common law rules may have to be "substantially adapted" and the statement in *Sanderson* the same policy considerations "apply with equal force to other courts".

***Ferreira (supra)* at para 3; *Sanderson (supra)* at para 44**

**11. Public interest litigation and costs in other South African courts**

- 11.1 In the notice of appeal, Biowatch takes issue with the decision on costs on the ground that "the learned judge misdirected himself ... in not giving due weight to the facts that the appellants were acting in the public interest (as found at paragraph 14 of the judgment) in the interests of protecting the environment, and to uphold Constitutional rights".

**Notice of appeal, para 3.1 (vol. 8, p. 745). See also notice of appeal, paras 5.2 – 5.4 (vol. 8, p. 746)**

11.2 It is submitted that the court *a quo*'s failure to take into account the public interest aspects of this litigation when considering the question of costs meant that it exercised its power "*upon a wrong principle ... or did not act for substantial reasons*" and that the decision on costs is therefore liable to be overturned on appeal.

11.3 To the extent that such aspects are not regarded as being relevant to the question of costs at common law, it is submitted that the common law must be developed in line with the Constitution to ensure adequate access to court in public interest matters.

**Constitution, sections 34 & 39; *Hlatshwayo v Hein* 1999 (2) SA 834 (LCC) at para 22; *Ferreira (supra)* para 3**

11.4 It is clear, however, that the courts have consistently recognised that the ordinary principles in relation to costs should not be applied in public interest litigation.

11.5 In *Hlatshwayo*, the Land claims Court found that it was dealing with a case that could "be described as falling under a new area of public interest litigation" and that "[t]his tends to set it apart from conventional litigation". Although it must be recognised that that the court in this case found that it was not bound by the ordinary

principles applicable in the High Court, due to the fact that its power to award costs was specifically granted by section 33(1)(f) of the Land Reform (Labour Tenants) Act 3 of 1996, the following statement is noteworthy:

*“Our law recognises that in the exercise of its discretion relating to costs a court may deprive a successful party of his or her costs and the trend in the Constitutional Court at least appears to be in the direction of recognising public interest cases as one of those circumstances where it may be appropriate to do so.”*

***Hlatshwayo (supra)* at paras 18 & 24**

11.6 In the environmental law context, the comments of the Cape High Court in the *Silvermine* matter are of relevance. In that case, the applicant was unsuccessful in preventing the development of a vineyard in a nature conservation area. In considering costs, the court held that “NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment”. It is noteworthy that the court in that case took the view that the fourth respondent (a statutory respondent) failed to act according to its mandate (albeit that it had not done so on the basis of advice from a distinguished senior

counsel) and, had it done so, this would probably have meant that the application would not have had to be launched by the applicant.

***Silvermine Valley Coalition v Sybrand Van der Spuy Boerderye and others* 2002 (1) SA 478 (C) at 491 - 493**

11.7 In *Rates Action Group v City of Cape Town*, the Cape High Court declined to make an order of costs in circumstances where an applicant unsuccessfully challenged the power of a Municipality to levy service charges comprising partly property rates and partly service fees. The court held that “[e]ven though the interests the applicant seeks to promote are the private interests of the individuals whom it represents, the applicant raises a constitutional issue of substance and of public interest” because the applicant was seeking “to ventilate an important issue of constitutional principle”.

***Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at para 113**

11.8 In the WLD, it has been recognised that where the litigants sought to test the “implementation and application of a statute which has important socio-economic consequences” (i.e. the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988) then “[s]uch persons 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 appellant” as long as “the grounds of attack on the impugned statute are [not] frivolous or vexatious” or the unsuccessful litigants “have [not] acted from improper motives or there are other circumstances which make it in the interests of justice to direct such costs should be paid by the losing party”.

***Nzimande v Nzimande and Another 2005 (1) SA 83 (W) at para 75***

11.9 As in the current matter, the *Idasa* case involved an application for access to information (in that case to information regarding funding of various political parties). Although the applicants were unsuccessful, the Court, per Griesel J made no order as to costs. The case is particularly relevant in the current matter because it sets out principles in relation to public interest litigation against private bodies. The court held that:

*“The guiding principle in this regard appears to be that the question of costs in constitutional and public interest litigation remains a discretionary matter. However, parties who litigate to test the constitutionality of law or conduct usually seek to ventilate important issues relating to constitutional principle. Such persons should not be discouraged from doing so by running 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. These principles have been applied uniformly where litigation is against an organ of State. The same principles apply in cases involving private litigants where a party litigates for public purposes and in the public interest. The Court's discretion could be exercised against a private litigant, however, inter alia, where the litigation was spurious or frivolous or where such litigant has not acted in good faith or where it was apparently pursuing private commercial interests. In my view, the applicants in the present case raised matters of great public interest and concern - not for any benefit or advantage to themselves, but bona fide and for the common good, as perceived by them. Moreover, the points they raised, though ultimately unsuccessful, were not without merit. In line with the general approach outlined above, I am of the view that it would be fair if no order as to costs were made, thus leaving each party to pay its own costs."*

***Institute for Democracy in South Africa v African national Congress and others 2005 (5) SA 39 (C) at paras 60 - 62***

**12. Environmental litigation and costs (and section 32 of NEMA)**

- 12.1 Apart from the fact that the cause of action is based on the Constitutional right of access to information, this litigation is also fundamentally environmental litigation. It has been recognised that environmental litigation is usually litigation in the public interest.

***Petro Props (Pty) Ltd v Barlow and Another 2006 (5) SA 160 (W) at para 61 (referring to *Steel and Morris v The United Kingdom* (ECHR application No 68416/01, Strasbourg, 15 February 2005) at para 89 (relating, *inter alia*, to allegations of serious health consequences flowing from the eating of McDonald's products)***

12.2 The legislature has recognised the key importance of environmental litigation as public interest litigation and has, to some extent, codified the Constitutional Court's public interest cost principles in section 32(2) of the National Environmental Management Act, 107 of 1998 ("NEMA"), which stipulates that:

*"A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."*  
[Emphasis supplied]

12.3 It is submitted that section 32(2) applies to this case in that the claim was brought under section 32 of the Constitution, which must be regarded as “a statutory provision concerned with the protection of the environment or the use of natural resources”. The central role that access to information plays in relation to environmental law is indicated, *inter alia*, by the references to environmental issues in section 46 of PAIA and the specific provisions relating to access to information contained in section 31 of the NEMA.

**Jan Glazewski *Environmental Law in South Africa 2ed 2005* (Kenwyn: Juta & Co Ltd) at 94ff referring to the 1990 EC Council Directive on Freedom of Access to Information on the Environment (90/313/EEC).**

12.4 Furthermore, it is submitted that Biowatch acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought. At the very least, the court should have considered whether this was the case.

12.5 In *Silvermine Valley Coalition* Davis J concluded that “it would be an improper employment of the discretion of this Court in terms of s 32(2) of NEMA to award costs in favour of first respondent insofar as the application is concerned” and made the following statement:

*“This section confers a discretion on the Court with regard to costs. Even without this section, costs would be in the Court's discretion but the judicial exercise of the Court's ordinary discretion of costs is now made subject to certain further guiding principles contained in the legislation. Section 32(2) frees the Court from the fetter of ordinary principles on the basis of compliance with certain conditions.”*

***Silvermine Valley Coalition (supra) at 4911***

- 12.6 Section 32 was applied in the recent *WESSA* case where the court accepted that the applicant was acting in the public interest. In considering the facts of the case, the court decided not to exercise its discretion in the applicant's favour in relation to the withdrawn application because it was found that *WESSA's* conduct in relation to the litigation was unreasonable: “... the long road leading to litigation was lined with alarm bells, to which, unfortunately, no proper heed was paid by applicant”. It should be noted that no such suggestion is made in the current matter.

***Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others 2005 (6) SA 123 (E) at 133D and 142G-H.***

- 12.7 Section 32(2) was also relevant in an earlier case arising from the same facts that were in issue in the *WESSA* case. In the *Hichange* case, the applicant company (a commercial enterprise) successfully

obtained an order directing the fourth respondent (head of the provincial Department of Economic Affairs and Tourism) to direct the first respondent to “investigate, evaluate and assess the impact of gases emitted from [it’s] tannery”.

***Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products, and Others 2004 (2) SA 393 (E)***

12.8 Dealing with the applicant’s costs, the court stated that “there seems to me to be no reason why, on general principles, the [fourth respondent] should not be ordered to pay the applicant’s costs”. Of particular relevance to the current matter, however, is the court’s reasoning in relation to the costs of the private polluter. The court’s analysis is most relevant to the current matter:

*“Turning to the costs of the first respondent, it is, of course, a material consideration that no direct relief will be granted against it. [The court proceeded to refer to s 32(2) and various other provisions of NEMA]. It is clear from these provisions that in order to avoid persons aggrieved by pollution being discouraged from bringing proceedings ..., the Legislature sought to ameliorate the general principle that an unsuccessful party should pay the costs of his successful opponent. ... In my opinion, a material consideration to be taken into account is the fact that the first respondent not only opposed the relief sought directly against it in prayer 3 or the draft notice but strenuously*

*opposed the relief which I have decided should be granted in favour of the applicant, a fact which in itself justifies a costs order being granted against it. Indeed, so vigorous was its opposition to the relief sought that the other respondents effectively rode on the back of its argument. Moreover, and most importantly, although the order I intend to make is granted directly against the fourth respondent, the effect thereof is an indirect order against the first respondent as, in terms thereof, the fourth respondent will be obliged to direct the first respondent to take certain steps (which explains the first respondent's strenuous opposition to such an order). I have therefore concluded that the first respondent should also be ordered to pay the applicant's costs. Its liability will, of course, be joint and several with that of the fourth respondent.” [emphasis supplied]*

**Hichange (supra) at 419 - 420**

- 12.9 The most recent reported consideration of the law of costs in relation to public interest cases is the *Wildlife and Environmental Society of South Africa* (“WESSA”) case. In this case, Pickering J, relying on the *dicta* of the Constitutional Court referred to above and the *Nzimande* case, held that “[the] submission that the ordinary common-law principles relating to the award of costs apply in such as the present loses sight of the public interest and constitutional nature of the litigation. ... [W]ith the enactment of the Constitution, the common-law principles set out above are to be

regarded only as the starting point of the enquiry in matters of this nature”.

**WESSA (*supra*) at 131C.**

### 13. **Public interest litigation and costs: Comparative law**

13.1 It is submitted that foreign jurisprudence provides guidance as to the correct approach to be taken in relation to costs in public interest matters. In the *Hlatshwayo* case, the Land Claims Court made the following observations in relation to comparative law:

*“In the United States and, more importantly, in Canada the question of costs may, in certain circumstances, be approached differently in matters of public interest. I say more importantly in respect of Canada because it, unlike the United States, shares our general rule that costs follow the result.”*

***Hlatshwayo (supra)* at para 24 (referring to Percival and Miller 'The Role of Attorney Fee Shifting in Public Interest Litigation' 47 *Law and Contemporary Problems* (1984) at 233ff and Carolyn McCool “Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article, ‘When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards’” 30 *University of British Columbia Law Review* (1996) at 309ff; and Schlesinger Baade Damaska and**

**Herzog *Comparative Law* 5th ed (Foundation Press, New York 1988) at 352ff))**

United Kingdom

- 13.2 Firstly, since it appears from the *Merber* judgment that English law played a central part in developing the South African common law principles, it is worthwhile considering how the issue of costs in public interest cases has been dealt with in that jurisdiction.

***Merber (supra)*; *Ritter (supra)*. (For a discussion of the old Roman Dutch authorities in relation to costs and discretion see also the judgment of the Transvaal Supreme Court discussed in *Kent v Bevern & Co (supra)* at 401)**

- 13.3 The current UK position in relation to costs in public interest matters has been usefully set out in detail (together with a comprehensive international survey) in the *Corner House* judgment of the Court of Appeal. In paragraph 41 the court stated that “some ... authorities ... demonstrate a trend towards protecting litigants, who reasonably bring public law proceedings in the public interest, from the liability to costs that falls, as a general rule, on an unsuccessful party”.

***R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 per Brooke LJ at para 41. See also**

***R v Secretary of State for the Environment ex p Shelter* [1997]  
COD 49 per Carnwath J**

- 13.4 The Corner House judgment also refers to the development of the so-called “Protective Costs Order”, which effectively allows a party to approach the court in advance of a hearing for an order capping its liability for costs in the event that it was unsuccessful. One such order has recently been handed down in the *Campaign Against Arms Trade* case in the Queens Bench Division.

***Campaign Against Arms Trade v BAE Systems PLC* [2007] EWHC 330 (QB) (26 February 2007) per King J. See also *R v The Prime Minister ex p CND* [2002] EWHC 2712 (Admin) and *King v. Telegraph Group Ltd* [2005] 1 WLR 2282**

Canada

- 13.5 The court in *Hlatshwayo* referred to the judgment in the Canadian case of *Mahar v Rogers Cable Systems Ltd*, where the Ontario Court (General Division) held as follows:

*“(I)t is fair to characterise this proceeding as a public interest suit. While the ordinary cost rules apply in public interest litigation, those rules do include a discretion to relieve the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in favour of public interest litigants. ... . In my view, it is appropriate in this*

*case to exercise my discretion in favour of the applicant and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved.”*

***Mahar v Rogers Cable Systems Ltd (1995) 25 OR (3d) 690 (Gen. Div.) at 703b (referring to Orkin The Law of Costs 2ed (1994) at p. 2-33 – 2-34) and 704e.***

13.6 In *B. (R.) v Children’s Aid Society of Metropolitan Toronto*, the applicants, who were Jehovah’s Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter against their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney-General to pay the applicants’ costs. This decision was upheld by the Ontario Court of Appeal and the Supreme Court of Canada, albeit that it was recognized by La Forest J at paragraph 122 of the Supreme Court’s judgment as being “high unusual”. In an extensive minority judgment, L’Heureux-Dube J argued that there should have been no costs award at all.

***B. (R.) v. Children’s Aid Society of Metropolitan Toronto [1995] 1 S.C.R. 315 at para 122. See also *Canadian Newspapers Co. v. Attorney-General of Canada (1986)*, 32 D.L.R. (4th) 292 (Ont.***

H.C.J.); *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.) [overturned on the merits on appeal to the Supreme Court in [1991] 2 S.C.R. 211), but no comment re costs].

13.7 In the *Okanagan Indian Band* matter the Supreme Court of Canada made an “interim costs” order directing the respondents to pay the costs of the appellants as the proceedings went on, on a strictly controlled basis. The case concerned a challenge by the Okanagan Indian Band to a prohibition on logging on their lands without prior authorisation. They asserted aboriginal title to the land in question and complained of a breach of their constitutionally protected aboriginal rights. Writing for the majority, Le Bel J stated that:

*“[A] consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the Charter. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole”.*

***British Columbia (Minister of Forests) v Okanagan Indian Band***  
**[2003] 3 S.C.R. 371 (SCC) at para 27**

13.8 At paragraph 30, the Supreme court referred to the *B.(R.)* case with apparent approval as “generally relevant in guiding the exercise of a court’s discretion as to costs”.

***Okanagan Indian Band (supra)* at para 30. See also Lara Friedlander “Costs and the Public Interest Litigant” (1995) 40 *McGill Law Journal* 55; C Tollefson “Costs in Public Interest Litigation: *Okanagan* and Beyond” (2006) 19 *Canadian Journal of Administrative Law and Practice* 39.**

The Privy Council

13.9 In *New Zealand Maori Council v Attorney-General of New Zealand*, the Privy Council declined to make an order for costs against the unsuccessful appellants where they were not pursuing the proceedings out of any motive of private gain, but "in the interests of taonga which is an important part of the heritage of New Zealand".

***New Zealand Maori Council v Attorney-General of New Zealand* [1994] 1 AC 466 (referred to in *Corner House (supra)*)**

13.10 More recently, the Privy Council considered the question of costs in public interest environmental litigation in the case of *Belize Alliance*

*of Conservation Non-Governmental Organisations v Department of the Environment*, which related to the building of a hydro-electric power scheme on the Macal River. Although the Privy Council declined in its judgment to grant an application brought by an NGO for an interim injunction against the continued construction of the hydro-electric scheme, the Board held that the issue of costs would be dealt with by means of written argument. In the final order delivered on 19 January 2004, the board indicated there would be no order as to costs. In a covering note, the registrar indicated that the “the board has decided that because this was a public interest case there should be no order as to the costs of the appeal, including the proceedings for the conservatory order”.

***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2003] UKPC 63; Order of the Privy Council 29 January 2004.**

#### Australia

- 13.11 In 1995 the Australian Law Reform Commission produced a report entitled “*Costs shifting - who pays for litigation*” (ALRC 75 (1995)). In Chapter 13, the Commission discussed what it called “public interest costs orders”. It observed that public interest litigation was an important mechanism for clarifying legal issues to the benefit of

the general community, and commented that what it described as “the costs indemnity rule” generally had a deterrent effect on this type of litigation (para 13.8). It recommended that courts or tribunals should have power to make a public interest costs order at any stage of the proceedings, and suggested criteria which should be taken into account when determining what type of order to make. It might, for example, direct that each party should bear his or her own costs, or that:

*“... the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall not be liable for the other party's costs; ... only be liable to pay a specified proportion of the other party's costs; or ... be able to recover all or part of his or her costs from the other party.”*

**Australian Law Reform Commission “Costs shifting - who pays for litigation” ALRC 75 (1995) (as quoted in *Corner House (supra)* at para 43)**

13.12 In *Oshlack v Richmond River Council* [1998] HCA 11, a majority of judges of the High Court of Australia restored the refusal of a judge at first instance to order costs in favour of a council who were the successful respondents to a challenge to a planning consent. The appellant had been concerned about the habitat of the endangered Koala, and complained about the absence of any fauna impact statement before the consent was granted. The judge considered

that there were "sufficient special circumstances to justify a departure from the ordinary rule as to costs" including the following:

13.12.1 The appellant had nothing to gain from the litigation "other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna";

13.12.2 A significant number of members of the public shared the appellant's stance, so that in that sense there was a public interest in the outcome of the litigation;

13.12.3 The challenge had raised and resolved significant issues as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and the present and future administration of the development consent in question, which had implications for the council, the developer and the public.

***Oshlack v Richmond River Council (1997) 152 ALR 83 (HCA). See also K Edwards "Costs and Public Interest Litigation after Oshlack v Richmond River Council" (1999) 21 Sydney Law Review 680.***

13.13 In conclusion, it is evident that the international trend, in the highest courts of comparative commonwealth jurisdictions, is towards

special provision being made for litigants who bring cases in the public interest, particularly in relation to the environment. It is submitted that this trend should be viewed favourably by South African courts and be followed in appropriate cases such as the current matter.

#### 14. **Section 21A of the Supreme Court Act**

14.1 Before proceeding to consider the facts of the current matter and applying the above legal principles to them, it is necessary to briefly deal with the issue of section 21A of the Supreme Court Act, 59 of 1959 (as amended), which was raised in argument in relation to leave to appeal.

14.2 In this regard, it is submitted that the mere fact that the only issue of relevance in an appeal is the question of costs does not automatically mean that the appeal should be refused on the basis of section 21A. This is especially the case where “the order granted by the Court *a quo* involves ... a departure from a practice”.

***Naylor and Another v Jansen; Jansen v Naylor and Others***  
**2006 (3) SA 546 (SCA) at para 22**

14.3 To the extent that this *Naylor* judgment<sup>2</sup> does not put this issue to rest, and it is suggested that section 21A has the effect of making an appeal only on costs impossible, it is submitted that that limitation is unconstitutional and in breach of the right of access to court in terms of section 34 of the Constitution. The correct remedy for such unconstitutionality is that it must be “read down” to allow for such appeals. This would not involve a strained or unsupportable interpretation of the legislation, but would render it applicable primarily to appeals on both merits and costs or only as to merits.

**Constitution, section 34. *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 23; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at paras 22 - 24**

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<sup>2</sup> Note that this is not the same “Naylor” judgment referred to above.

### **PART III: THE FACTS**

#### **15. Introduction: The relevant facts**

15.1 It is submitted that the relevant facts in this matter for the purposes of the award of costs are the following:

15.1.1 Biowatch was in fact the successful party;

15.1.2 To the extent that Biowatch unsuccessful, this was only partial and not substantial;

15.1.3 Biowatch approached the court in the public interest in order to protect the environment;

15.1.4 The statutory respondents were unsuccessful parties in the litigation;

15.1.5 Monsanto initially came to court to oppose the relief in its entirety but did not succeed in doing so;

15.1.6 Monsanto was not even substantially successful in opposing the relief; and

15.1.7 Monsanto could have taken a different approach to the litigation. It was not “compelled” to come to court.

15.2 Each of these factual allegations is dealt with in turn below with reference to the record of the proceedings in the court *a quo*. It is, however, necessary first to deal with the issue of the manner in which the relief sought was formulated and its relevance to the issue of costs.

16. **The manner in which the relief sought was formulated**

16.1 Biowatch was criticized for the manner in which it framed the relief sought in the notice of motion. The information to which access was sought was identified by reference to the four requests for information that Biowatch had previously made to the first respondent and which were attached to the founding affidavit. The requests were made on 17 July 2000, 23 August 2000, 19 October 2000 and 26 February 2001 respectively.

**NoM, para 1 (vol. 1, pp. 1 - 2); Annexures EPS8(1) (vol. 2, p. 161); EPS 8(2) (vol. 2, p. 162), EPS8(5) (vol. 2, p. 167) and EPS9 (vol. 3, p. 190)**

16.2 Biowatch only sought access to the information in the four requests insofar as it had not already been provided by the first respondent in its responses (dated 26 October 2000 and 25 October 2000 respectively) to the first three requests.

**Annexures EPS8(4) (vol. 2, p. 165) and EPS8(6) (vol. 2, p. 169)**

16.3 As mentioned above, it is quickly obvious that the “fourth” request (annexure EPS9) includes the information requested in the “second” and “third” requests. As a result, Dunn J correctly found that it was unnecessary to refer to these in the notice of motion. This approach was not disputed by Biowatch at the hearing. Dunn J further correctly found that, to the extent that the first request sought information that was not covered by the fourth request, the first respondent had given Biowatch access to it prior to the launching of the application. This was also not disputed by the applicant at the hearing.

16.4 Having effectively dealt with the first three requests in this way, the remaining requests were the eleven categories referred to in the fourth request (annexure EPS9) and it was these requests that formed the subject of the dispute in the court *a quo*.

16.5 It should be emphasised that it would be misleading to suggest that the court refused any of the relief sought in the process of simply narrowing it down to the eleven categories contained in the fourth request. In fact, this was the only relief sought by Biowatch in the Notice of Motion – the exercise engaged in by the court was merely aimed at determining what that relief was.

16.6 Furthermore, it would be inaccurate to suggest that Biowatch was not granted access to the information sought in the first three requests – these requests were taken into account as part of the fourth request. While the terminology “first” to “fourth request” was used, this was only for ease of reference – the requests were all part of the same enquiry, which developed over time, and they cannot be regarded as separate and discrete causes of action. It would therefore be entirely inappropriate to judge Biowatch’s relative success on the basis of the exercise of identifying what relief was sought in the Notice of Motion.

16.7 It is submitted that the formulation of the relief (i.e. by reference to the four requests and two answers received from the first respondent) was neither vague nor misleading. Dunn J accepted that Biowatch should not be “non-suited” on the basis of the formulation of the relief. The reference to the original requests was

clearly intended to avoid any suggestion that Biowatch had not asked for access to the information sought prior to launching the proceedings. It is submitted that neither the learned judge *a quo* nor Monsanto had any real difficulty determining what information was sought.

**Judgment, para 66 (vol. 7, p. 668)**

16.8 It is submitted that, to the extent that the learned judge *a quo* made the costs orders on the basis of the manner in which the relief was framed, he acted capriciously in the exercise of his discretion. Not only was the formulation of the majority of the relief found in fact not to have been vague, there is no logical basis to suggest that the formulation of the relief caused the proceedings to be opposed or even extended unduly.

**17. Biowatch was the successful party**

17.1 In relation to the eleven categories of information actually sought in the notice of motion, Biowatch was (as the judge *a quo* recognised) substantially successful. In this regard:

17.1.1 Firstly, in relation to the request for the location of field trials and commercial releases (item (vi) of the fourth request),

Dunn J found that, although Biowatch could not have the exact co-ordinates, it should be given the information published in the regulation 6(3) notices. This would include information regarding “the area and environment in which the release is to take place” which could not be “mere reference to a town or magisterial district”. The statutory respondents and Monsanto had both declined to provide even this information and it is submitted that Biowatch was substantially successful in this regard.

**Judgment, paras 57 (vol. 7, pp. 664 – 664)**

17.1.2

Secondly, in relation to an additional seven of the eleven categories in the fourth request (i.e. items (i), (iii), (iv), (v), (vii); (viii) & (x)), Biowatch successfully showed that it had a clear right and was entitled to the information sought. The court found that the first respondent had failed to grant Biowatch access to the information and that this “constituted a continued infringement of Biowatch’s rights under section 32(1)(a) of the Constitution”, with the only caveat being that information sought would be subject to the protections for confidentiality and privacy as set out in Chapter 4, part 2 of PAIA. (This is dealt with in more detail below)

**Judgment, para 66 (vol. 7, p. 668)**

17.1.3 Thirdly, Biowatch was only wholly unsuccessful in relation to three of the eleven categories (on the basis that the requests were insufficiently particularised). This is dealt with in more detail below.

17.2 In relation to confidentiality, it is noteworthy that Biowatch at all times during the litigation accepted that some form of protection was required for confidential information. This is clearly demonstrated by the concession in Biowatch's affidavit in reply to Monsanto to this effect. In addition, although Biowatch did not initially accept that section 18 of the Genetically Modified Organisms Act 15 of 1997 ("the GMO Act") was applicable, it nevertheless expressly accepted in the fourth request (i.e. in correspondence even prior to the litigation) that the right of access to information was "not absolute" and could be limited by section 36 of the Constitution. This concession clearly related to the objection raised by the respondents that the information sought was confidential.

**Annexure "EPS9" (vol. 3, p. 192, line 30ff); Reply to Monsanto, para 26 (vol. 321 – 322)**

17.3 Furthermore, it is clear from the various draft orders that were handed up by the parties during the course of the hearing that Biowatch was prepared to make allowances for confidentiality. The “first” draft order (handed up by Biowatch’s counsel at the commencement of the hearing – undoubtedly in order to address the criticism in the respondents’ affidavits that the notice of motion was not sufficiently particularised) sets out and summarises the information contained in the “fourth request”. This draft clearly made allowance in paragraph 2 for the determination of confidentiality issues in terms of section 18(2) of the GMO Act.

**First draft order, para 2 (supplementary volume, p. 4);  
Argument on leave to appeal (vol. 8, p. 691, lines 17 – 22)**

17.4 The learned judge *a quo* at the conclusion of the hearing requested the parties to prepare and hand up a draft order “that reflected the various views expressed to you during the hearing”. In response to this, two drafts were submitted to Dunn J under cover of a letter from Winstanley Smith dated 27 May 2004. These included a draft containing the position as understood by Biowatch’s counsel (“the second draft order”). The letter also enclosed a draft which contained amendments proposed by Monsanto’s counsel (the third draft order”). From these drafts it is evident not only that Biowatch continued to recognise the need for confidentiality but also that

Monsanto did not seek to rely on the provisions of PAIA for the protection of such confidentiality.

**Winstanley Smith letter (supplementary volume p. 16); Second draft order, para 2 (supplementary volume, p. 9); third draft order, para 2, (supplementary volume, pp. 14 - 15)**

17.5 It is submitted that the order of the court *a quo* effectively grants Biowatch access to all the information that it had sought in the first and third draft orders, with the exception of item (ix) of the fourth request (which was one of the categories refused on the basis that it was insufficiently particularised) and with provision made for dealing with confidential material.

17.6 When the matter is analysed in this way, it is clear that Biowatch was the successful party, at least in relation to the statutory respondents. In the circumstances, it is submitted that the court *a quo* should have followed the ordinary rule in relation to costs and awarded Biowatch (as the successful party) its costs. Having failed to follow the ordinary rule, it is submitted that, in the light of the *Merber* judgment, the appeal court is at large to interfere with the costs award and substitute it with the award that it would have.

17.7 Even if this approach is not correct, it is submitted that the court *a quo*'s failure to adequately take into account this most basic of all considerations in relation to costs, namely the success of the applicant, constitutes a material irregularity in relation to the exercise of its discretion. It is submitted that had the court taken this factor into account, it could not reasonably have come to the conclusion either that the statutory respondents should not pay Biowatch's costs or that Biowatch should pay Monsanto's costs.

18. **Biowatch's lack of success was only partial and insubstantial**

18.1 As mentioned above, of the 11 categories of information to which access was sought in the fourth request, a minority of only three categories (i.e. items (ii), (ix) and (xi)) were refused by the court *a quo* on the basis that they were framed in an overly broad manner.

**Judgment, paras 53, 63 & 65 (vol. 7, pp. 662 & 667)**

18.2 It is submitted that Biowatch could not have further particularised its claim for access to the information sought in these three categories. Biowatch did not know (indeed, could not have known) what documents existed in the possession of the statutory respondents without further information either from them (the court found that they did not respond adequately to the requests) or from Monsanto

(which expressly refused to list the documents that it had submitted to the statutory respondents). It is unjust to punish Biowatch for its lack of knowledge of facts that were peculiarly within the knowledge of the respondents. This failure to particularise the request is consequently not an issue that is relevant to the exercise of the judicial discretion in relation to costs. If anything, the respondent's unwillingness to disclose this information should be taken into account in favour of awarding costs to Biowatch on the basis of the cases referred to above.

**Monsanto AA, para 3 (vol. 3, p. 269); Annexure EPS16 (vol. 4, p. 350, line 13); Annexure EPS17 para 5 (vol. 4, pp. 351 – 352); TAC (supra) and Kent v Bevern & Co (supra).**

- 18.3 The inability of a requester of information to identify in advance precisely what records it seeks to access is a problem that cannot be avoided in this area of the law. In the *Hlatshwayo* case, this court held that the applicant could not be faulted for not being in a position to know exactly which documents he was seeking and recognised that it might be difficult for him to ascertain or establish whether the documentation exists without clear guidance from the respondent.

***Hlatshwayo v Iscor* (unreported judgment of the Transvaal Provincial Division per Van der Westhuizen J, Case No.**

**17941/03 dated 21 January 2005) at para 19 (referred to in Makhamele & Sorenson “Costs in Public Interest Litigation: The Biowatch Case” (2005) 8 *De Rebus* 41)**

- 18.4 It is submitted that Biowatch’s failure to obtain the information sought in these three categories is not relevant to the question whether it should be awarded costs or not. Not only was this refusal made in respect of a minority of the information that was sought, the reason for the failure (i.e. lack of knowledge as to the exact information sought) is also endemic to this kind of claim.
- 18.5 In particular, it is submitted that the refusal of this information can in no way be regarded as a “victory” for Monsanto. The information sought under these categories was generic information in the possession of the first respondent and the reason for refusal of access was a reason raised by the statutory respondents themselves. It is submitted that in the light of the approach taken to these requests by the court, Monsanto’s presence in court was irrelevant to these issues.
- 18.6 Finally, it is submitted that, to the extent that the notice of motion or the requests it refers to do not specifically provide for the removal from the required information of any confidential information whereas the order specifies that information may be withheld where

this is permitted in terms of any of the specific grounds of refusal of information specified in Chapter 4 of Part 2 of the PAIA, this requirement does not constitute either a significant defeat for Biowatch or a significant success for Monsanto.

18.7 In this regard, as pointed out above, Biowatch had made efforts to engage Monsanto in order to determine which, if any, of the claimed information sought was confidential. Furthermore, Biowatch specifically accepted in the first draft order (i.e. at the outset of the hearing) that some provision for confidentiality needed to be made. To the extent that confidentiality was protected by reference to Part 2, chapter 4 of the PAIA, it is clear from the draft orders handed up that this does not constitute a defeat for Biowatch. To the extent that the order also required the statutory respondents to provide reasons for any refusal to provide information in terms of the PAIA grounds of refusal, it is submitted that this is clearly relief that favours Biowatch, as opposed to the Respondents.

**First draft order, (Supplementary vol., p. 4)**

19. **Biowatch litigated in the public interest to protect the environment**

19.1 As discussed in detail above, the court *a quo* accepted that in instituting the litigation, Biowatch was acting in the public interest to protect the environment. The statutory respondents' and Monsanto's bare denials in this regard should simply be ignored.

**Judgment, para 14 (vol. 7, p. 618)**

19.2 The fact that Biowatch acted in the public interest to protect the environment is an important factor to be taken into account in relation to the costs award and the court's failure to do so in exercising its discretion in relation to costs constitutes a material irregularity that justifies the appeal court substituting the costs award. In the words of the court in *WESSA (supra)* "[w]ith the enactment of the Constitution, the common-law principles set out above are to be regarded only as the starting point of the enquiry in matters of this nature."

20. **The statutory respondents were unsuccessful parties**

20.1 The relief originally sought in the application was against the statutory respondents. Even after Monsanto joined the litigation, no order was sought against it.

20.2 The statutory respondents' opposition to the application was not limited to resisting access to those portions of the records in respect of which confidentiality was claimed. The statutory respondents were unsuccessful in relation to all five of their points *in limine* that were raised in the answering affidavit. Some of these were simply not persisted with and of those that were not abandoned (i.e. non-joinder of the Minister of Environmental Affairs, non-compliance with internal appeal procedures and procedural requirements of PAIA), none were upheld by the court. It will be seen from the judgment itself that determination of these points (in favour of Biowatch) took up the majority of the court's time and formed the majority of its decision.

**Judgment, paras 12 – 14, 29, 32 & 38 (vol. 7, p. 616 – 618; 638-639, 641 - 643 & 650 - 651)**

20.3 The information sought in the application was sought from these respondents prior to the litigation, but they declined to provide access to it, despite the fact that the court concluded that they were legally obliged to do so. The court also concluded that Biowatch had established that the statutory respondents' "failure to grant [Biowatch] access to [the information to which access is sought] constituted a continued infringement of Biowatch's rights under

section 32(1)(a) of the Constitution.” The court also accepted that, in the circumstances, Biowatch had no option but to approach the court for relief.

**Judgment, para 66 (vol. 7, p. 668)**

20.4 In the circumstances, it is submitted that there is no basis upon which the ordinary rule in relation to costs should not have been followed in this case. The statutory respondents forced Biowatch to come to court to vindicate the Constitutional Rights to access to information.

20.5 Apart from the statutory respondents’ lack of success in relation to the defences raised in their affidavit, it is clear from the judgment that the first respondent did not properly fulfil his statutory obligations in responding to Biowatch’s requests for access to information. It was found that the first respondent’s response to the requests was “deficient” and “inadequate”. Even if the statutory respondents had been successful, it is submitted that their lack of concern for the rights to information of Biowatch and the public in general and their supine approach to the litigation would have justified an order of costs against them. Given that they were unsuccessful on the points raised, their reprehensible conduct is

certainly a factor which suggests that costs should have been awarded against these respondents.

**Judgment, para 21 (vol. 7, p. 626); Leave to appeal judgment, para 11(c) (vol. 8, p. 735 – 736); *Letsitele Stores (supra)* at 582E; *Silvermine Valley Coalition (supra)* at 492 – 493; *Treatment Action Campaign (supra)***

**21. Monsanto unsuccessfully sought to oppose the relief in its entirety**

21.1 It was Monsanto's position in the leave to appeal application that Biowatch was entitled in principle to the information but that Monsanto had been obliged to come to court to ensure that the relief granted was more narrowly framed than the relief sought and, specifically, to protect confidential information which might be included in the information that Biowatch requested. Monsanto argues the relief sought had been framed in such a broad manner that Monsanto could not determine which parts would be confidential.

21.2 This, however, was not Monsanto's original approach to the litigation. The original approach was that the application should be dismissed in its entirety. It was only very late in the day that Monsanto changed its approach in this regard.

**Monsanto AA, final paragraph (vol. 3, p. 306)**

- 21.3 Given that the court recognised Biowatch’s right in principle to access the documents, it is clear that Monsanto was not successful in opposing the relief sought in its entirety.

**Judgment, para 68 (vol. 7, p. 669)**

**22. Monsanto was not even “substantially” successful**

- 22.1 It appears from the judgment that Monsanto was unsuccessful in all of its defences except for one. In this regard:

- 22.1.1 Together with the other respondents, Monsanto unsuccessfully raised the defence of the applicability of the provisions of PAIA and Biowatch’s alleged non-compliance therewith

**Judgment, paras 25 – 37 (vol. 7, pp. 631 - 649)**

- 22.1.2 Monsanto also joined the statutory respondents in alleging that Biowatch was required, but failed, to exhaust the internal appeal procedures contained in the GMO Act. In this regard, Monsanto and the statutory respondents were entirely unsuccessful.

**Judgment, para 38 (vol. 7, pp. 649 – 651)**

- 22.1.3 Monsanto also contended that Biowatch was not acting in the public interest and did not have *locus standi* and was not successful on this point.

**Judgment, para 14 (vol. 7, pp. 618)**

- 22.2 It is submitted that it is evident from the judgment itself that the above issues were by far the most “hotly” contested of the issues before the court *a quo*. The fact that Monsanto (and the statutory respondents) were unsuccessful on these issues (which took up the first 40 pages of the 62 page judgment) clearly demonstrates that Monsanto was an unsuccessful party.
- 22.3 The one and only aspect in which it might be suggested that Monsanto was a successful party was in relation to the question of commercial confidentiality and privacy. The following submissions are made in this regard.
- 22.4 In its answering affidavit, Monsanto alleged that items (i), (ii), (iii), (iv), (vi), (viii) or (ix) and (xi) “potentially” contain confidential information, but that the requests were framed too broadly to

determine whether any portion of the information requested it might be confidential.

**AA, para 33 (vol. 3, p. 280)**

22.5 Of these eight items, three (i.e. items (ii), (ix) and (xi)) have already been dealt with above and were excluded on the basis that they were too vague or overbroad. They need not be dealt with further at this stage.

22.6 Monsanto's specific allegations in relation to confidentiality in respect of the five remaining items were as follows:

22.6.1 Items (i), (iii), (iv) of the request relate to risk assessments and applications for permits. According to Monsanto, risk assessments contain "confidential information ... the disclosure of which would be likely to cause harm to the commercial and financial interests of Monsanto. Specifically, each risk assessment contains information concerning the methods, techniques, technologies and structures of the plasmids that Monsanto has developed in order to genetically modify plants";

**AA, paras 38 & 50 – 52 (vol. 3, pp. 282 & 286 - 287)**

22.6.2 Item (vi) of the request (locations of trials and releases) was alleged to be confidential on the basis that Monsanto was “concerned about third party interference with such trials”

**AA, para 54 (vol. 3, pp. 287 - 288)**

22.6.3 In relation to item (viii) of the request (minutes of all meetings of the second respondent and the Advisory Committee to date), Monsanto only alleges that “it is reasonable to suppose that they include confidential information of Monsanto and other third parties”, despite its admission that it “has not had access to these minutes”.

**AA, para 55 (vol. 3, p. 288)**

22.7 With regard to these 5 items, it is clear (in the light of the Dunn J’s findings that the requests were sufficiently particularised) that Monsanto was not successful in its argument that it could not determine whether the information was confidential because it was not possible to tell what information was requested.

22.8 In this regard, it should be recalled that Monsanto only alleges that 23 permits have been issued to it. Since each permit application is

likely to contain similar types of documents, it is submitted it cannot reasonably be argued that the burden of identifying confidential documents among those ordered to be disclosed would be unduly onerous. Despite this, and despite being requested to do so by Biowatch's attorneys, Monsanto made no effort to attempt to engage with the other parties (including Biowatch and the statutory respondents) and indicate which documents it regarded as being confidential and which documents it did not object to Biowatch having access to.

**Monsanto AA, para 3 (p. 269); Annexure EPS16 (vol. 4, p. 350, line 13); Annexure EPS17 para 5 (vol. 4, pp. 351 – 352)**

22.9 To the extent, therefore, that Monsanto was successful on the question of confidentiality, it is quite clear that its attitude to the litigation in refusing to assist Biowatch and the other respondents to identify which documents were affected was a direct cause of the litigation on this point. As in the case of *Kent v Bevern & Co*, Monsanto should not be awarded its costs in these circumstances.

***Kent v Bevern & Co (supra) at 402; Nxumalo (supra) at 354E.***

22.10 It is submitted that Monsanto's lack success in resisting the relief sought by Biowatch in the application is also illustrated by reference

to the draft orders that were handed up at the hearing, read in conjunction with the court's final order.

22.11 The first draft order

22.11.1 In paragraph 1 of the first draft order, Biowatch made it clear that it only sought access to “the particulars set forth” in section 18(2)(a), (b) and (c) of the GMO Act and in Regulation 6(3) in respect of all granted authorisations and all pending applications. The draft order lists what such particulars should include and indicates which specific GMO's must be included.

**First draft order (supplementary volume, p. 1)**

22.11.2 Given that the particulars referred to in this subsection of the GMO Act (“the description of the genetically modified organisms, the name and address of the applicant, and the purpose of the contained use or release and the location of use; the methods and plans for the monitoring of the genetically modified organisms and for emergency measures in the case of an accident; and the evaluation of foreseeable impacts, in particular any pathogenic or ecologically disruptive impacts”) is information that “shall not be kept

confidential”, (and given that Monsanto did not seek to suggest that section 18(2) was for some reason inapplicable or invalid – in fact quite the opposite), it is submitted that this portion of the first draft order is carefully crafted to deal with the question of confidential information.

22.11.3 Paragraph 2 of the first draft order deals with information not covered by section 18(2) and provides that the first respondent should be given 30 days in which to determine which portions of the information sought is confidential as contemplated by section 18(2) of the GMO Act. The draft provides for the confidential information to be excised and the balance to be made available to Biowatch

22.11.4 It is submitted that this first draft order was a careful and *bona fide* attempt by Biowatch to ensure the protection of Monsanto’s confidential information. In particular, it is noteworthy that the draft order no longer contains the information sought in items (ii) or (xi) of the fourth request, which were two of the three items excluded by the judge on the basis of overbreadth.

22.11.5 Despite this display of good faith on the part of Biowatch, Monsanto continued to argue that the application should be

dismissed in its entirety. It did not take the opportunity to indicate why the draft order would not protect its confidential information or to limit the debate to the confidentiality issue.

22.12 The third draft order

22.12.1 It is evident from the third draft order (which contains Monsanto's comments on the second draft order) that Monsanto's final position at the end of the hearing was the following:

22.12.1.1 Although it agreed with the formulation of para 1.1 of the first draft order, it sought to confirm that information may be withheld in terms of section 18(3) of the GMO Act and that any decision made in terms of that section may be appealed;

22.12.1.2 Monsanto sought to remove the specific reference to the categories of information that should be provided by the first respondent in terms of section 18(2) of the GMO Act;

22.12.1.3 Monsanto sought to remove the reference to specific GMOs in respect of which information should be

provided by the first respondent; and

- 22.12.1.4 Monsanto resisted the proposed order entitling Biowatch to obtain information in relation to pending applications.

**Third draft order (supplementary volume, p. 11)**

22.13 The court's order

- 22.13.1 The final order granted by the Court did not follow the structure of the first or third draft orders, and its structure is clearly based on the fourth request.

**Court order, para A (vol. 7, pp. 674 - 676)**

- 22.13.2 It is noteworthy that the final order includes various aspects that Monsanto had sought to exclude in the third draft order. For example, Monsanto was not successful in reducing the order to the general terms of section 18 of the GMO Act and the judgment included all the specific information suggested by Biowatch in the first two draft orders.

- 22.13.3 On the question of confidentiality, the court did not follow the suggestions of either Monsanto or Biowatch as contained in

the draft orders. Instead of utilising the confidentiality provisions of section 18 of the GMO Act, the court chose to apply the grounds of refusal in PAIA. This is relevant because section 18 affords the statutory respondents wide and general powers to withhold information, whereas information may only be refused under PAIA if it falls into specific grounds of refusal. Of particular importance is the fact that section 46 of PAIA disallows reliance on the grounds of refusal where disclosure of the information would be in the public interest and “would reveal evidence of “an imminent and serious ... environmental risk”. On the whole, from Biowatch’s point of view, it is therefore preferable to have the confidentiality issue decided under PAIA than under the GMO Act.

22.14 It is clear from the draft orders that were handed up by the parties at the end of the litigation and from the court’s final order that Biowatch was ultimately granted greater access to information than Monsanto was prepared to give, even once it had softened its position at the end of the litigation. This means that Biowatch was largely and on the whole successful in its application.

**Argument on leave to appeal (vol. 8, p. 692, lines 6 – 12)**

22.15 In light of the above, it is submitted that Monsanto was an unsuccessful party in the litigation and that the decision to award costs in its favour constituted a departure from the ordinary rule that costs should follow the result. It is further submitted that no good reasons justify the exercise of the court's discretion in this manner and that the appeal court should therefore interfere with the costs order.

**23. Monsanto could have taken a different approach to the litigation**

23.1 Even if it is accepted for the purposes of argument that Monsanto was either wholly or partially successful in the litigation (which is denied), it is submitted that the court *a quo* misdirected itself in awarding costs in its favour against Biowatch.

23.2 It is submitted that, in the event of such a finding, the correct order should have been that Monsanto should pay its own costs in relation to the litigation. In this regard, it is submitted that:

23.2.1 Had Monsanto communicated with the statutory respondents and indicated in respect of which documents it claimed confidentiality, its concerns could have been fully addressed without the need for participating in the litigation. Instead,

Monsanto chose to take an entirely obstructive approach to the litigation.

23.2.2 Monsanto in fact refused to assist Biowatch in identifying the information in dispute more specifically and refused to provide Biowatch's attorneys with a list of the documents submitted to the statutory respondents and an indication of which portions were confidential.

**Annexure EPS16 (vol. 4, p. 350, line 13); Annexure EPS17 para 5 (vol. 4, pp. 351 – 352)**

23.2.3 The alternative approach that Monsanto could have adopted was exemplified by the approach adopted by Pannar who advised Biowatch which of the documents it alleged were confidential. This meant that it was not necessary for Biowatch to litigate against this party.

**Affidavit of Cullinan, paras 16 – 17 (vol. 6, pp. 527 – 528)**

23.3 Finally, in this regard, it is submitted that it is entirely incorrect to state (as the judge *a quo* does) that Monsanto was “compelled” to come court as a result of the broad manner in which Biowatch formulated some of the categories of information to which it sought access. There is no logical or factual basis for this suggestion. It is

relevant that, in summarising its judgment, the court *a quo* found, *inter alia*, that “Biowatch had no alternative remedy [other than instituting the litigation] to enforce its rights”. This conclusion is entirely contradictory to a finding that Monsanto was “compelled” to come to court.

#### **PART IV: THE CORRECT APPROACH TO COSTS IN THIS MATTER**

#### **24. Biowatch’s Costs**

24.1 It is quite clear not only that Biowatch was successful *vis a vis* the respondents that it had initially cited (the statutory respondents) but also that these respondents had acted in a reprehensible manner in relation to the litigation.

24.2 There is simply no good reason for not following the ordinary principle in relation to costs and ordering these respondents to pay Biowatch’s costs in the litigation. This is especially the case in light of the principles that should apply to costs in public interest litigation of this nature and section 32(2) of NEMA, which should have been applied to the current case.

24.3 In the circumstances, there are good grounds for this court to interfere with the first costs order and order that the first to third respondents should pay Biowatch's costs in the litigation.

25. **Monsanto's costs**

25.1 It is submitted that it has been demonstrated that Monsanto was not a successful party in the litigation. In the circumstances, (given that Monsanto chose to come to court of its own accord), no order should have been made in respect of Monsanto's costs. It is further submitted that Monsanto's interests were (or at least should have been) adequately protected by the Statutory Respondents, who raised the confidentiality point of their own accord. Since Monsanto did not give any detail regarding the precise documents or information over which it claimed confidentiality, it can hardly be said that it contributed meaningfully to the resolution of the dispute.

25.2 Even if this court were to find that Monsanto was actually the successful party and that Biowatch was unsuccessful *vis a vis* Monsanto, then it is submitted that this is a case in which the appeal court should intervene on the basis that the court erred in not taking into account its own finding that Biowatch had instituted the case out of a concern for the public interest in defence of

Constitutional rights. It is submitted that the court *a quo*'s ruling on costs is likely to have a deterrent effect in relation to future litigation of this nature. It is further submitted that the costs order is likely to have a significantly detrimental effect on Biowatch's ability to fulfil the public function set out in its trust deed. Finally, the court failed to take the provisions of section 32(2) of NEMA into account, which (according to the court in *Silvermine (supra)*) must now form part of the process of exercising the costs discretion. Failure to take these considerations into account illustrate that the judge *a quo* exercised his discretion "upon a wrong principle, ... or did not act for substantial reasons".

25.3 It is submitted that it is quite clear from Monsanto's actions that it would still have opposed the matter had Biowatch limited its claim to the relief eventually awarded (*cf Jonker (supra)*). This is made clear by its attitude to the draft orders proposed by Biowatch at the hearing.

25.4 Finally, it is simply not true that Monsanto was required to join the litigation because of the approach taken by Biowatch. In fact, the truth is that Monsanto was required to join the litigation because of the approach taken by the statutory respondents. Monsanto came to court in order to prevent the statutory respondents handing over

its confidential documents. The only way that such confidential documents might have been given to Biowatch would have been if the statutory respondents had not fulfilled its duties under the law to protect the confidentiality of such information (indeed, this was alleged by Monsanto itself in its answering affidavit). Biowatch was successful in its claim for access to the information which it sought from the statutory respondents. Although non-joinder was alleged by the statutory litigants, this was never ruled upon as Monsanto chose to intervene of its own accord.

**Monsanto AA, paras 62 – 70 (vol. 3, pp. 291 – 295)**

25.5 It should be noted that there is no obligation on a party such as Biowatch to approach a party such as Monsanto in advance in order to determine whether it would consent to the order sought and if so, on what terms. The fact that this is not done does not disentitle a party such as Biowatch from seeking and obtaining costs from Monsanto when it is successful in the application.

***cf Naylor and Another v Jansen; Jansen v Naylor and Others* 2006 (3) SA 546 (SCA) at paras 21, 27 and 30**

## **PART V: COSTS IN THE APPEAL AND CONCLUSION**

### **26. Costs in the appeal**

26.1 The general rule is that an appellant who achieves substantial success on appeal should be awarded his costs of appeal.

***Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A) at 854; Herold v Taxing Master and Others 1958 (1) SA 812 (A)***

26.2 Referring to the decisions in the *Norwich Union* decision and that in *Herold's* case *supra*, the Court in *Llama Restaurant Franchising Co (Pty) Ltd v Ivano (Pty) Ltd 1990 (1) SA 474 (C)* held at 476F-G that:

*“The general rule, stated above, is flexible and discretionary. ... A successful appellant may be awarded all of his costs of appeal, or some of them, or none. He may be ordered to pay some or all of the respondent's costs of appeal. The appropriate order depends on the exercise of the Court's discretion in all the relevant circumstances, of which substantial success is one.”*

26.3 It is submitted that if Biowatch is unsuccessful in the appeal, the court should exercise its discretion to make no order as to costs on the basis of the principles set out in the various Constitutional Court

precedents set out above in relation to litigation in the public interest.

26.4 Biowatch has been assisted in prosecuting the appeal on a pro bono basis by the Legal Resources Centre and by counsel. In the event that Biowatch is successful in the appeal, it does not seek a costs order in respect of the appeal.

## 27. Conclusion

It is accordingly submitted that the appeal should be granted and that paragraph D of the order of the court *a quo* should be replaced with the following order:

*“The first to third respondents are ordered to pay the applicant’s costs; save as aforesaid, no other order as to costs is made”.*

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