

# Biowatch at the Constitutional Court

## INTRODUCTION

Biowatch is a South African non-profit organisation, that aims to ensure the just use of biodiversity and sustainable approaches to agriculture. Over the past eight years Biowatch has found itself in an extraordinary situation. What started in 2000 as a seemingly simple request for information from the Department of Agriculture about the status of genetically modified (GM) crops, has resulted in a lengthy legal process with Biowatch fighting for its survival.

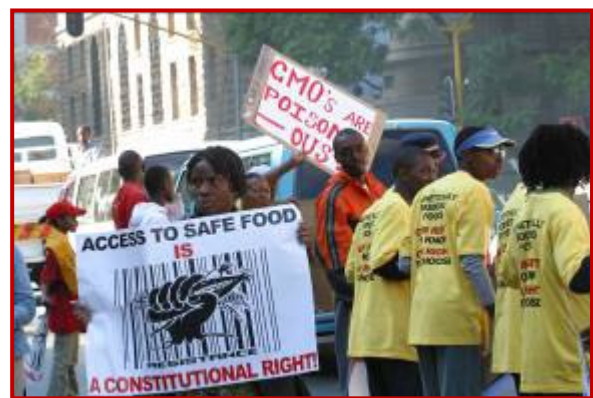
Although Biowatch substantially won the case in the Pretoria High Court, and the right to access this information, it was ordered by the judge (in a strange twist of events) to pay the costs of the multi-national company Monsanto, which had joined forces with the Department of Agriculture against Biowatch. This decision was upheld on appeal, although not with unanimous judgment. Biowatch is now preparing a further appeal for the case to be heard in the highest court of the land, the Constitutional Court.

What is the history? What are the issues? Who are the players? Why the focus on GMOs? This briefing provides the context to the case as well as some of the broader issues that concern civil society and public interest organisations.

## THE MAIN PLAYERS

### Biowatch SA

Biowatch South Africa is a small public interest NGO working in the field of biodiversity, food sovereignty and security, and social justice. It is an advocacy and research organization that also forges relationships with small farmers to demonstrate the viability of sustainable agriculture and the importance of seed security and farmers' rights.



Supporters outside the Pretoria High court in 2004

Photo: Oryx Media

### National Department of Agriculture

The National Department of Agriculture is represented by the Minister of Agriculture, and the Registrar and Executive Council (EC) who are both established under the Genetically Modified Organisms Act (GMO) Act no.15 of 1997. The Registrar is appointed by the Minister in consultation with the EC and is responsible for the administration of the Act. The EC is the primary GMO decision making body, made up of representatives of eight national departments. It has a history of approving GM applications uncritically, but recently has been more circumspect and has turned down applications such as GM maize for biofuels (a form of GM maize not suitable for human consumption).

### Monsanto South Africa (Pty) Ltd.

Monsanto, the agri-chemical and seed multi-national, has a history of involvement in the manufacture of chemicals used in chemical warfare. Now in the agri-biz sector, it has been at the forefront of pushing GMOs and its patent herbicides in South Africa. It joined the Department of Agriculture against Biowatch as a co-respondent in

the 2004 court case to protect its confidential business information.

### Legal Resources Centre (LRC)

The LRC is an independent, non-profit, public interest organisation which uses law as an instrument of justice. It acted on behalf of Biowatch in its appeal to the Pretoria High Court and will act for Biowatch in formulating an appeal for the case to be heard in the Constitutional Court.

### National Department of Justice and Constitutional Development

#### i) Pretoria High Court

Acting Judge Eric Dunn heard the initial case in 2004. His judgment given in 2005, stated that Biowatch had a constitutional right to the information it had requested, and that access to the information was in the public interest. Yet in an inexplicable twist, he ordered Biowatch to pay Monsanto's legal costs.

#### ii) Pretoria High Court (full bench)

In April 2007, Justices Mynhardt, Molopo-Sethosa and Poswa heard the appeal for the costs order against Biowatch to be overturned. In November 2007, a majority judgment upholding acting Judge Dunn's ruling, was written by Judge Mynhardt and confirmed by Judge Molopo-Sethosa. In May 2008 Judge Poswa handed down a minority, dissenting judgment, in favour of Biowatch's case.

### Civil society

There has been overwhelming support for Biowatch from civil society. The issues raised are clearly wider than Biowatch's particular case, and include the constitutional right to a healthy and safe environment and the potentially chilling effect that the judgment could have on public interest litigation in South Africa. Access to information, the right to know, the right to choose, public vs. corporate interest and the closing down of democratic spaces are all areas that can be affected.



Press briefing in Durban in support of Biowatch April 2007

Photo: Diakonia Council of Churches

(Presentations expressing political support and solidarity with Biowatch were made by from left: Patrick Bond, Director of the Centre for Civil Society (CCS), University of KwaZulu-Natal (UKZN); Dennis Brutus, CCS, UKZN; Thoko Makhanya, GM Free KZN; Nellie Bam, Diakonia Council of Churches; Vanessa Black, Earthlife Africa and Bobby Peek (not in photo), Director of groundWork.

## WHY THE CONCERN WITH GENETIC ENGINEERING?

Genetically modified (GM) or engineered (GE) crops are the result of the relatively new technology of genetic engineering, where genes from one living organism are inserted into another organism, usually a completely different species. It is a highly contested terrain with the multinational GM seed giants making claims of extraordinary, but untested, benefits for the technology. According to these claims, GM crops will feed the poor, increase yields, reduce poverty, address vitamin deficiencies, reduce the use of pesticides, etc. However, none of these claims have been proven. Questions have been asked as to why there are no environmental impact or socio-economic assessments for GM crops in South Africa, why there are non-existent or limited food safety tests, or why there is no research on the long term effects of patented GM seed on small-scale farmers. South Africa has the dubious reputation of being the first country in the world to grow a GM staple crop - white maize, commercially. Consumers rightly want to know why this was approved, how eating this maize affects their health, and why they are not able to exercise their right to choose non-GM foods through labeling of food products.

In South Africa, the first commercial permits for GM maize and GM cotton were granted by the Department of Agriculture in 1997. At that time, there was little public awareness and it was only in 1999/2000 that Biowatch started making enquiries about permitting procedures, risk assessments, environmental impacts, and impacts on small-scale farmers.

### The information received from the Department of Agriculture (as ordered by the court) shows serious shortcomings in the granting of GMO permits

In February 2005, acting Judge Dunn ruled that Biowatch should be given access to eight of the eleven categories listed in its request to the Department of Agriculture. A reading of a cross-section of these documents from December 1999 to February 2005 highlighted serious limitations in the process of granting permits:

- No reasons were given by the Executive Council (EC) for permits granted.
- No notification of EC decisions were provided to interested parties.
- A lack of effective public participation.
- No objective risk assessments, these were done by the company applying for the permit.

- No South African-specific risk assessments were conducted; instead the companies used studies from other countries' ecosystems.
- No environmental impact assessments or socio-economic impact assessments were conducted for any trial or commercial release of GM crops.
- No assessments were made of the risk to human health.

## THE COURT CASE

### How did the process unfold?

*2000 and 2001*

Information requested from the Department of Agriculture (DoA), but no response or highly inadequate response.

*2002 (August)*

Biowatch serves court papers on Minister of Agriculture, the GMO Executive Council and the GMO Registrar

*2003 (February)*

Monsanto joins the state as a co-respondent

*2004 (May)*

Case heard in Pretoria High Court

*2005 (February)*

Ruling by acting Judge Dunn - Biowatch granted access to most of the information, but must pay costs of Monsanto

*2005 (June)*

Biowatch granted leave to appeal against the costs order.

*2007 (April)*

Appeal heard by full bench of Pretoria High Court.

*2007 (November)*

Majority judgment (written by Judge Mynhardt and confirmed by Judge Molopo-Sethosa) dismisses Biowatch's costs order appeal. Biowatch is ordered to pay not only the legal costs of Monsanto for the initial application, but also the legal costs of the appeal for the Minister of Agriculture, the Registrar of Genetic Resources, the Executive Council for GMOs and Monsanto South Africa.

*2008 (May)*

Minority judgment (written by Judge Poswa) recommends:

- The order of costs against Biowatch should be set aside;
- The Minister of Agriculture, Registrar of GMOs and the Executive Council for GMOs should pay Biowatch's costs;
- The costs order in favour of Monsanto should be reversed.

*2008 (September)*

Appeal to the Supreme Court was dismissed with costs.

*2009 (February)*

Biowatch will appeal the costs order at the Constitutional Court

## Why did acting Judge Dunn award the costs in 2005 against Biowatch, while it was acting in the public interest and was substantially successful in its application?

Judge Dunn's judgment stated that Biowatch had a constitutional right to the information it requested, that access to the information was in the public interest, and that Biowatch had been forced to go to court to get access to the information. However, the Judge supported the argument that Biowatch had cast its requests so widely as to force Monsanto to come to court to protect its commercial confidential interests.

Biowatch explained the difficulties it faced in having to describe information without knowing whether it existed, but this was overlooked. Instead of following the general principle that awarding costs should follow the outcome of litigation, acting Judge Dunn ordered Biowatch to pay the legal costs of Monsanto.

No order was made regarding payment of Biowatch's legal costs, despite Judge Dunn confirming that Biowatch had been forced to go to court to get access to the information.

## Why did Monsanto come to court?

Monsanto stated that it was obliged to come to court to protect confidential business information, which may have been part of the information that Biowatch wanted. This argument was made despite the fact that there had been a successful negotiation between Biowatch and Pannar (Pty) Ltd, a seed company that voluntarily agreed to make documents available, with the confidential information omitted. Monsanto was not prepared to enter into similar negotiations.

Letters from concerned individuals were also sent to Monsanto USA requesting Monsanto to waive the court costs which would be unbearable to a small non-profit organisation. In a written response Monsanto noted that "we have committed to donate any costs recovered from Biowatch, in full, to an appropriate charity in South Africa for sustainable agriculture". Monsanto's advocate in the appeal hearing in April 2007 also made mention of wanting "the healing balm of costs".

## The minority judgment

Judge Poswa handed down a minority judgment in May 2008. *EnAct International*, a consultancy based in Cape Town, described the judgment as follows:

"...in a strongly worded and meticulously researched dissenting judgment released last week, Judge Poswa rejected the view of the majority that there was no rule that a winning party should be awarded costs and held that although a judge must apply this rule flexibly, he or she must have good reasons to depart from it. Judge Poswa found that Biowatch

had demonstrated that it was acting in the public interest and had been 'wholly successful' against the state and Monsanto and was accordingly entitled to its costs."

### **Leslie Liddell**, past Director of Biowatch

The introduction of genetic engineering into the food production system in South Africa, has taken place without the knowledge of the average citizen of the country. With this reality in mind, Biowatch has worked to promote transparency by those who make life altering decisions on our behalf. Alex Carey, an Australian social scientist said, "...the 20<sup>th</sup> century has been characterised by three developments of great political importance: The growth of democracy, the growth of corporate power, the growth of corporate propaganda as a means of protecting corporate power against democracy"

### **David Fig**, Chairperson of the Biowatch Board:

"The importance of this litigation is to prevent the state and large gene-touting companies from riding roughshod over our legislators' commitments to environmental and social justice. We hope the Constitutional Court will support the actions that Biowatch has taken in defence of the public interest, and use this case to ensure that justice is seen to be done. We cannot remain passive when a company with Monsanto's history continues to undermine South African civil society organisations whose record of challenging injustice is known far and wide."

The judgment can be viewed in its entirety at [www.biowatch.org.za](http://www.biowatch.org.za) under DOCUMENTS, ACCESS TO INFORMATION CASE.



Participants at the Diakonia Council of Churches Environmental Justice Course 2007, showing support for Biowatch

## **ON THE ROAD TO THE CONSTITUTIONAL COURT**

The option of an appeal to the Constitutional Court was opened by a dissenting judgment. Biowatch lodged an application to the Constitutional Court for leave to appeal against the order that it pay the costs of Monsanto South Africa (Pty) Ltd and the Minister of Agriculture, the Executive Council and the Registrar.

### **Further update: 17 February 2009**

On 17 February, Biowatch will appeal the costs order earlier granted against it by the Pretoria High Court at the Constitutional Court. This should be the final chapter in a long-standing legal battle over gaining access to information pertaining to the status of genetically modified crops in South Africa.

In the Constitutional Court, Biowatch and the LRC will be joined by three other non-profit organisations: the Centre for Child Law at the University of Pretoria, Lawyers for Human Rights and the Centre for Applied Legal Studies, who have an interest in the outcome of the appeal. They have joined in the proceedings as friends of the court.

Achmed Mayet of the LRC said that the issue of costs in public interest litigation was an important constitutional principle. 'It impacts on the constitutional rights of access to the courts, the environment and access to information, and if allowed to stand the court order of the court a quo will have a chilling effect on public interest litigation.

Rose Williams, of Biowatch said: 'What started in 2000 as a seemingly simple request for information from the Department of Agriculture about the status of genetically modified crops, has resulted in a lengthy legal process with Biowatch fighting for its survival. This case is not only important for those acting in the interests of the environment, but for all other public interest bodies.'

### **Support for Biowatch**

Over 200 individuals and organizations have sent in letters of support to Biowatch - see full list on [www.biowatch.org.za](http://www.biowatch.org.za). They include amongst others:

groundwork (SA), PELUM SA, Southern Africa Trust, Centre for Civil Society (UKZN, SA), COSATU (SA), HIVOS (International), University of Cape Town School of Public Health and Family Medicine (SA), The Treatment Action Campaign and the AIDS Law Project (SA), the University of Cape Town's Environmental Evaluation Unit (SA), Open Democracy Advice Centre (ODAC, SA), KwaNgwanase Farmers Association (KZN, SA), Diakonia Council of Churches (SA), Greenpeace International, the Berne Declaration (Germany), Dr Tewolde Gebre Berhan Egziabher (Institute for Sustainable Development, Ethiopia), Professor Graham Duthfield (University of Leeds), SAFEAGE (SA), Professor Phillip L Bereano (Washington Biotechnology Action Council, USA), the Organic Producers and Processors Association of Zambia, Nicholas Hildyard (The Corner House, UK), the Gaia Foundation (UK), African Centre for Biosafety (SA), GRAIN International, Alternative Information and Development Centre (AIDC, SA), Edmonds Institute (USA), Cardinal Wilfrid Napier (Catholic Archbishop of Durban, SA), SEED Trust (SA), Chee Yoke Ling (Third World Network, Malaysia), Chennells Albertyn Attorneys (SA), Claremont Mosque (SA), Diana Callear (Ecocert-Afrisco (Pty) Ltd), Find your Feet (UK), Dr Doreen Stabinsky (Greenpeace International), Dr Elizabeth Bravo (Accion Ecologica, Ecuador), Dr Melaku Worede (former director Ethiopian Gene Bank), Environmental Monitoring Group (SA), ETC Group, Kumi Naidoo (CIVICUS World Alliance for Citizen Participation, SA), Muslim Judicial Council (SA), Public Health Association of South Africa (PHASA), SA Faith Communities Environmental Institute, Wildlife and Environment Society of SA, South African Council of Churches, Timberwatch Coalition (SA), Earthlife Africa (SA, Namibia), Freedom of Information Programme, South African History Archive, GM Watch.