

about the threat and actual commencement of legal proceedings, by the appellant, in that regard.

[85] During argument before us counsel for the statutory respondents and counsel for the fourth respondent relied heavily on **WESSA**. They submitted that the Court *a quo* was correct in its decision on costs, because, in the words of the Court *a quo*, in para [68] of the judgment, “the manner in which some of the requests for information were formulated, as well as the manner in which the relief claimed in the notice of motion was formulated”. The circumstances under which PICKERING, J, in **WESSA**, ordered the applicant to pay the costs of the respondents in that case are, in my view, different from those pertaining in the present case. Firstly, the applicant in **WESSA** withdrew the entire application. Secondly, for reasons discussed fully and in detail by PICKERING, J, at 132I-143H/I, the Court came to the conclusion that the applicant, in launching the application, had acted unreasonably. In a detailed discussion and analyses of the facts, in more than ten pages, the learned Judge gave clear reasons for his conclusion.

[86] In a very detailed analysis of the evidence, PICKERING, J painstakingly explains the flaws in the conduct of the applicant's various functionaries in the investigation of the levels of a toxic chemical (hexavalent chromium) in waste that was to be incinerated by the third respondent. I cannot possibly do justice to PICKERING, J's reasons by trying to sum them up in this judgment. It is, nevertheless, worthwhile to cite a portion in the judgment that demonstrates one of the applicant's glaring flaws:

"The concerns of raised by Dr Chernaik were dealt with by Albertyn at the public participation meeting held on 31 January 2003, the second of which is annexed to the founding papers as annexure WJ and which is annexed to the final scope and report as part E. The following appears therein:

'Mr Albertyn drew a concept diagram on the flip chart of the Pelt's process showing how tannery waste for incineration was removed from the process, prior to the treatment of hides with chrome. In view of this method, the tannery waste for incineration would only contain innate chromium in the hides, as they were

received, and would not contain excess chromium as the waste would be removed prior to the introduction of chromium chemicals for the treatment process. In view of this, Dr Chernaik's comments that the reported chromium content of the waste is implausibly low, is not relevant as in the new process the chromium content, as reported in the scope and report would be very low." (137G-H/I)

The learned Judge emphasised that:

"It is common cause that both Reeves and a member of the applicant's attorneys were present at the meeting. Neither of them, however, addressed any query to Albertyn as to the process whereby the waste would be removed prior to the introduction of chromium chemicals" (emphasis added, 137I).

[87] Moreover, the applicant in the **WESSA** case, by virtue of having withdrawn its application, was the unsuccessful party. The award of costs against it was in keeping with the first of the two basic principles with regard to the question of costs. **PICKERING, J**

adequately explained why he was not allowing the applicant the benefit of having brought a public interest action, the implications whereof PICKERING J was acutely aware. Biowatch, the appellant, on the other hand and according to the Court *a quo*, was the successful party in respect of the statutory respondents. That leads me to the question that I said I would return to, viz. whether, the appellant, indeed, was the unsuccessful party *vis-à-vis* the fourth applicant.

The provisions of s 21A may be overlooked where the judgment deals with a matter of great importance or where there is need to set a pattern for future guidance in a given on-going relationship

[88] It seems to me that there is a fourth exception, wherein an appeal may be brought notwithstanding the provisions of s 21A. That is, in rare instances, where the judgment deals with a matter of great importance or where there is need to set up a precedent for future guidance in an ongoing relationship.

In dealing with this aspect, the warning given in **Grobiersdalse Stadsraad** (*supra*) should be heeded: The issue dealt with must be such that it can be said to be "living" and not merely of

academic interest. As an illustration of this proposition, I refer to two cases.

- [89] In **Natal Rugby Union v Gould 1999 (1) SA 432 (SCA)**, the respondent had challenged the results of an election at which the retiring president (P) had been elected, in preference to the respondent. The name is Parkinson. I have adopted the approach in the head note where only the first letter of the name(s) is used). Although P attended and chaired the meeting at which the elections were being conducted, he ensured that one V, who as the appellant's general manager, conducted the elections. At such meeting, on 3 March 1995, P was elected by 45 votes. On 29 March 1995 the respondent brought a review application in the Natal Provincial Division, alleging that the election was invalidated by procedural irregularities, *inter alia*, in that P had either appointed V as chairperson during the meeting or had himself remained chairperson. He, accordingly, sought to have P's election as president set aside and that there be a re-election. His application was successful and an application for leave was noted by the appellant and postponed to a later hearing. The appellant decided to convene a special general meeting in order to have a fresh presidential election, which meeting was duly held on

15 May 1995. At such meeting he recused himself from the meeting and was duly elected by seventeen votes to eleven. On 27 March 1996, the appellant's application for leave to appeal was granted. The appeal was proceeded with, notwithstanding that, by that time, he had already been elected as president, at a meeting in respect whereof the respondent had had no complaints. The issues at stake were:

"The parties' competing contentions on appeal gave rise to the following questions:

(a) Whether the 3 March 1995 election of P was invalidated by

(i) his appointment of V, or himself being, chairman of the meeting throughout the election process and/or

(ii) the voting being by secret ballot instead of by way of a show of hands

(b) *Whether the right to appeal was not in any event preempted by the appellant having, in effect, complied with the order appealed against.*

(c) *Whether the appeal could be entertained at all if, in a sense, the only issue concerned to costs in the court a quo” (437G-H/I).*

[90] The decision of the Court *a quo* was set aside. It is not necessary, for purposes of this judgment, to go into the details on the reasons given for the SCA's decision, especially in respect of (a). It is (b) and (c) that are relevant to this judgment. The Court *a quo*, in setting aside P's election, had held that, by remaining at the meeting, even though the election was conducted by V. P had chaired the proceedings. By remaining as chairperson of the meeting, so the Court *a quo* held, P violated the principle that one should not act as a judge in one's own cause. He was, therefore, disqualified by his interest in the outcome of the election and, in that sense, he was "legally disqualified" in terms of clause 15 of the appellant's constitution having failed to absent himself. The SCA held that the appellant's constitution did not, in the expression "legally disqualified", mean or imply that what was

expected of P was his physical "absence" from the meeting where the election was conducted. In that regard, the SCA said:

"The type of legal incapacity which the Court below held to have existed is not dealt with by the constitution at all. This has distinct significance. It is commonplace in associations and clubs that the retiring office bearers are eligible, and offer themselves for re-election. That the framers of the constitution knew that is scarcely open to doubt. Yet the strong possibility of a retiring president's being chairman of the general meeting at which his re-election was on the agenda did not cause them to attach any proviso or condition to the requirement that the president be chair or to his freedom to vote. There is therefore nothing in the express terms of the constitution which supports the Judge's conclusion that 'absence' includes legal disqualification."

(441C-F)

The SCA concluded that, on the facts of the case, notwithstanding authorities upon which the Court *a quo* relied, which the SCA discussed, P's conduct, as chairperson, during the presidential

election did not involve any decision-making of a judicial or quasi-judicial nature (442B).

[91] Because, in setting aside P's election, the Court *a quo* had ordered that the election, thereafter, be "in terms of (the) constitution", that meant in terms of the constitution as interpreted by the Court *a quo*, P recused himself at the subsequent meeting, on 15 May 1995. He was re-elected, in his absence. The SCA held that such precautions as were adopted at the meeting of 15 May 1994, in accordance with the order of the Court *a quo*, "were unwarranted" and that, according to the appellant's constitution, P was entitled, as chairperson, to act as such and also to cast his deliberative vote at the meeting. With regard to the vital question as to whether the appeal could be entertained at all if, in essence, the only issue concerned costs in the Court *a quo*, the SCA uttered the following, at 445I-446B:

"Had there been no appeal the judgment of the Court below would in all probability have continued to influence the procedure adopted in respect of office bearers elections at future union meetings. There was, of course, nothing irregular or unfair in the procedures adopted at the

re-election meeting, viewed purely in isolation, without regard to the constitution. But the union does have this constitution. It is the chosen instrument by which the union's affairs are to be regulated and the union, its office bearers and council members are entitled to have it interpreted in order to guide them for the future. In the circumstances I consider that the determination of the appeal will, quite apart from the issue of costs in the Court below, have a 'practical effect of or results' within the meaning of s 21A of the Supreme Court Act." (Emphasis added)

On the question with regard to whether or not the right of appeal had been preempted by the holding of elections in a manner that complied with the order of the Court *a quo*, HOWIE, JA (as he then was) said the following at 444F:

"... I find that the decision to hold the re-election was consistent with administrative considerations and certainly not inconsistent with the intention to appeal."

PLEWMAN, JA, in **Coin Security Group v SA National Union for Security Forces** 2001 (2) SA 872 (SCA), at 875H-I, explained the decision in **Natal Rugby Union (supra)** thus:

“The members of the [Natal Rugby Union] had, as a result of the litigation, been left ‘disturbingly but understandably divided [using Howie, JA’s words]’ with regard to the meaning and effect of their constitution. This was felt to be a ‘living issue’ – sufficiently so for the exercise of the Court’s discretion in the manner in which it was exercised.”

(Emphasis added)

Dismissing the appeal in **Coin Security Group (supra)**, PLEWMAN, JA said, at para [11], 877A-B:

“The Court would be asked to confirm a rule which interdicted, for the future, acts committed in the course of an industrial dispute which was finally resolved between the parties by the dismissals in 1997 and in which all the perpetrators have long since gone their separate ways.”

HOWIE, JA, in **Natal Rugby Union (supra)**, added the following:

“(The section was amended subsequent to the grant of leave in this case but in the result it is unnecessary to decide if the section in its pre-amended or post-amended form would have applied.)”

In my view, the amendment does not affect the Court’s interpretation with regard to circumstances where, as on the facts of that case, a “*practical effect or result*” could mean the need to give an interpretation “*in order to guide*” proceedings of an organisation “for the future”, where that problem was a living issue. My view in this regard is fortified by the decision of the SCA in the **Merak S: Sea SCA Melody Enterprises SA v Bulktrans 2002 4 SA 273 (SCA)**, which was after the amendment of s 21A.

[92] In **Merak S: Sea Melody Enterprises SA** (*supra*), the appellant had applied for a reduction in the amount of a bank guarantee given by it to secure the release of its ship, the **Merak S**, from arrest, and for an order calling upon the respondent, at whose instance the **Merak S** had been arrested, to furnish the appellant with counter-security for the claims it intended bringing against the

respondent. The Court *a quo*, in the Durban and Coast Local Division granted the appellant leave to appeal to the Supreme Court of Appeal. Before the appeal was heard, however, it appeared that the respondent was no longer proceeding with its claim in the London Arbitration, which was the basis on which the vessel had been attached, whereafter the appellant obtained an order for the return of the bank guarantee. The appellant did not withdraw its appeal to the SCA, which resulted in the application of the provisions of s 21A being in issue. In that regard, the Court stated the following, at 276G/H, para [4]:

"[4] In view of the importance of the questions of law which arise in this matter, the frequency with which they arise and the fact that at the time of the decision in the Court a quo and of the granting of leave to appeal those questions were, as Mr Shaw for the appellant put it, 'live issues', I am satisfied that this is an appropriate matter for the exercise of this Court's discretion to allow the appeal to proceed: cf Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others 2001 (2) SA 872 (SCA)

at 875 (para [8]) and Natal Rugby Union v Gould [supra],” (emphasis added).

[93] In **Land en Landbou Ontwikkelingsbank van Suid-Afrika v Conradie 2005 (4) SA 506 (SCA)**, the provisions of s 21 A(1) of the Supreme Court Act as amended, were discussed by the SCA. Mpati DP, deals extensively with the section in paragraphs [6]-[14], at 510H-514B. It is, in my view, not necessary for the facts of that case to be set out as the principle emerges without difficulty from the following excerpts. After restating the well-known principle, in para [6], at 510I-511B/C, that: *“this Court will not make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between the, a practical result could be achieved in other respects”*, party. MPATI, DP stated the following:

“[7] As was said in Coin Security (at 875 in para [8]), however, the section confers a discretion on this Court. See also President, Ordinary Court Marshal, and Others v Freedom of Expression Institute and Others 1994 (4) SA 682 (CC) (1999) (11) BCLR

1219 at 687 (SA) in para [13]. ... for example, questions of law, which are likely to arise frequently, a court of appeal may hear the merits of the appeal and pronounce upon it. The Merak S: Sea Melody Enterprises SA (supra) at 276 in para [4].

[8] *In the present matter counsel argued, in addition to the submission mentioned in para [5] above, that in dealing with the merits of the appeal this Court may consider, and give guidance on, the requirements to be met by an owner or person in charge of the property in order to persuade a court, in eviction proceedings, have with regard to the provisions of s 8(1)(a)-(e) of the [Security of Tenure Act 62 of 1977, the] Act, that the termination of the occupier's right of residence was just and equitable. A further submission by counsel was that this Court, if it hears the appeal, would have occasion to consider the extent of the duty of the owner or person in charge to adduce the necessary averments and evidence to make out a case in relation to every provision to which a*

court must apply its mind in deciding whether an eviction order is justified'.

The learned Deputy President then quoted s 8(1) of the Act and then proceeded as follows:

"It is clear from these provisions that the result of their consideration will depend upon the facts of which was the case no guidance can thus be given as to what requirements are to be met by an owner or person in charge to prove that determination of an occupier's rights of residence was just and equitable nor is it possible for this court to consider, in the ..., the extent of the averments to be made and the evidence to be adduced by an owner or a person in charge to make out a case for an eviction order each case ... on its own facts.

[10] *There is, however, a further submission by counsel viz that the questions of law at issue here are of considerable importance and are likely to arise frequently. Reliance for its submission was sought in the Merak S case (supra) in para [4], where*

Farlem JA said [the learned deputy president then cites what is stated in that paragraph]:

'The purpose of s 19(3) of the Act (which subjects eviction orders granted by a magistrate to automatic review by the Land Claims Court), so counsel argued, is to create a ... of precedents to be followed by magistrates' courts when they deal with eviction proceedings. That being so, an erroneous decision of the Land Claims Court on questions of law that are like to arise with frequency should not be allowed to stand.'

[11] *The present matter concerns the application of the concept of 'just and equitable' as those words appear in s 8(1) of the Act. (The subsection is quoted in full in para [a] above.) It appears that an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable. In considering whether the termination of an occupier's right of residence is just and equitable*

a court must have regard to 'all relevant factors' and in particular those listed under items (a) to (e) of the subsection."

After discussing the consequence of all that, the learned Deputy President proceeded, at paras [13] and [14], at 513E/F-514B, to discuss, in detail, why he was of the view that "the approach of the court **a quo** was clearly erroneous". He then concluded as follows:

"The issue ... concerns the interpretation and application of the Act and is thus a question of law. I have no doubt that counsel is correct in his submission that it is likely to arise frequently. There is already a previous reported judgment (Mayor NO v Tambani (supra) [2002 (5) SA 811 (LCC)]) where a similar approach as that followed the instant case was adopted. In my view, the present is an appropriate matter for this court to exercise its discretion in favour of the appellant and to consider the merits of the appeal. Had the appellant not proceeded with the appeal, the judgment of the court below would in all probability have been followed by itself, as it did in the Mayor NO v Tambani decision, and by magistrates' courts. Cf Natal

Rugby Union v Gould (supra) at 444I-445B” (emphasis added.)

[94] The SCA did not, in my view, disagree, in *George (supra)*, that “a judgment could be given **providing a practical guideline for the solution of similar legal questions in future**” 83J, but found, on the facts of the case, that “considerations point the other way” (83J). In other words, it would be pointless for the SCA to define what is or is not an unfair labour practice where the legislature has removed the possibility of any future actions based on an alleged unfair labour practice. Had the position been otherwise, the SCA would, in my view, have entertained the appeal, although it would have had no practical effect on the relationship between the parties, in view of the settlement agreement, except the possible reversal of the costs order. The appellants would, therefore, not have been hit by the provisions of s 21A if the Education Labour Relations Act was still in place as that would, in my view, have been in keeping with **Globiersdalse Stadsraad (supra)**.

[95] In the light of the above three decisions, and, arguably, also **Naylor 1**, it is my view that the appellant was entitled, on this ground alone, to proceed to the Court of Appeal for a decision on the question of costs, as it would not, in essence, be only about costs. The appeal entails the question as to whether there is a rule, in this country, with regard to the question of costs in public interest and the constitutional matters. The majority judgment is of the view that there is no such rule and I disagree. In my view, the question whether there is such a rule is, in itself, is a living issue which requires determination by the SCA.

Was Biowatch the successful party?

[96] In my view, unlike DUNN. AJ, PICKERING, J made it very clear in his judgment that he was aware of the public interest litigation approach, with regard to costs, and gave his reasons, fully, as to why he was not going to adopt that route. He then concluded his judgment thus:

"In all the circumstances I am of the view that, objectively viewed, applicant's conduct in launching the application was, regrettably, not reasonable. I use the word regrettably advisedly, because it is quite clear that in bringing the

application the applicant acted out of the best of motives arising out of its very real concern for the environment. It wished, in the public interest, to prevent the installation of a waste disposal system which it considered would be gravely harmful to the environment and to human life. However, in the light of all the circumstances pertaining at the time the proceedings were instituted and of which circumstances applicant, had it exercised due care, should have been aware, its concerns had already been met and the application was therefore unnecessary. I am acutely aware of the above-mentioned authorities as to the chilling effect of the adverse costs orders in matters of this nature as well as of the pertinent remarks of DAVIS J in the Silvermine case (supra). In my view, however, it would neither be fair nor in the interest of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which is doomed to failure from its inception."

(14311/1-144B)

In Biowatch's case, its application was not "doomed to failure", right from its inception and did not fail. The "SUMMARY" of the

judgment, contained in para [66] of DUNN, AJ's judgment in this regard, is instructive. It reads:

“[66] To summarise then: Biowatch has, in my view, established that it has a clear right to some of the information to which access was and is now requested; that the Registrar's failure to grant it access to such information as it was legally entitled to constituted a continued infringement of Biowatch's rights under section 32(1)(a) of the Constitution; that Biowatch had no alternative remedy to enforce its rights; that Biowatch should not be non-suited for the inept manner in which the information sought in its fourth request, as well as in its notice of motion, is formulated; and that the Registrar would be entitled to refuse access to certain records, or part thereof, in terms of the grounds for refusal contained in Chapter 4 of Part 2 of PAIA. (Page 57)”

[97] It should be mentioned, in passing, that PICKERING J evidently did not agree with the sentiments expressed by DAVIS J in **Silvermine** and, what is more, with his decision, in spite of the

Court in **Silvermine** holding that *“the manner in which [that] dispute [had] been placed before [the] Court [left] it with no other alternative but to find against the applicant”*.

[98] Although the decisions in both **Silvermine** and **WESSA** related to applications based on the provisions of s 32 of NEMA, with regard to environmental matters, in respect of which that Act specifically provided guidance to the courts when it comes to the question of costs, the principles applied are, in my view, identical to those applied in all other public interest matters. On the facts in **WESSA**, it is understandable, in my view, why the Court mulcted the applicant with costs in a public interest application. The application was to be “doomed to failure from its inception” and that was adequately illustrated in the Court’s analysis of the facts.

CONCLUSION

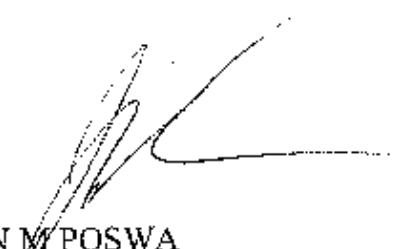
[99] As a general conclusion on the question of an appeal in respect of costs only, I ally myself with the following submission by the appellant’s counsel, in the heads of argument, in paragraph 10.10:

*“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** [that] the same policy considerations ‘apply with equal force to other courts.’” (Emphasis added)*

Although I have arrived at the conclusion that the appellant is wholly successful against the statutory respondents and the fourth respondent, I take into account that the appellant does not seek a costs order against the fourth respondent. In the circumstances, I am of the view that the correct order should be as follows:

1. The appeal succeeds;
2. The order of costs against the appellant is set aside;
3. The first, second and third respondents are ordered to pay the appellant’s costs, including costs of the application for leave to appeal and costs of this appeal;

4. The costs order in favour of the fourth respondent is reversed.
5. No other costs order is made.


 J N M POSWA
JUDGE OF THE HIGH COURT

When I expressed my dissent from MYNHARDT, J's (majority judgment, that was based on an unsigned draft thereof. It has transpired that the page numbering in the edition that Mynhardt, J and MOLOPA, J ultimately signed is not always identical with that of the draft. By the time I discovered this change, I had gone too far with my judgment, to effect the necessary changes. I am satisfied, however, that the excerpts I have relied on or referred to in the draft of the majority judgment are retained in the signed draft.

Heard on: 23 April 2007

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Date of Judgment: 05 May 2008.