behalf of the appellant. The submissions are correctly made, in my view. What should be borne in mind when dealing with the dictum by Atkin, LJ, in Ritter Godfrey (1920, 2 K.B. 47, at 60), regarding instances when "a wholly successful party" may be denied costs, is what Greenberg JA said in *Merber* (*supra*), at 453. He stated that, even in those instances, it does not

> "*mean that in the instances mentioned [quoted in his judgment on the same page, 453], the successful party must necessarily be deprived of his [or her or its] costs but that it is only in these instances ... that the Court is entitled to deprive him [her or it] of his [her or its] costs. It seems, therefore, that when a successful party has been deprived of his [her or its] costs in the trial,* ***an appeal court will enquire*** *whether there were any* ***grounds for departure*** *from the general rule, and if there are no such grounds, then* ***ordinarily*** *it will interfere*".

It is, in my view, evident form the above excerpt, that a "wholly successful party", such as the applicant was in my view, is entitled to appeal against that decision, so as to place the court of appeal in

a position where it "will enquire whether there were any grounds for departure from the general rule".

[23] What I consider to be an important observation, especially in respect of the current appeal, is the submission made on the appellant's behalf, viz., that "there is no general presumption against interference with cost orders on appeal" (para 6.2 of the appellant's heads of argument). In particular, it should, in my view, be emphasised that the "traditional" test that the judicial discretion of the court of first instance with regard to the awarding of costs will not be readily interfered with on appeal, even where the appeal court would have come to a different conclusion as to costs, is subject to another important "general principle", which was stated in **Fripp and Gibbon** (*supra*) at 357, as being "that to the successful party should be awarded his costs". As "a general rule", a successful party should have its costs and the discretion of the court of first instance "is not unlimited" in that regard, (**Fripp and Gibbon and Co** (*supra*) at 357). As long ago as 1913, therefore, when judgment was passed in ***Fripp v Gibbon & Co (supra)***, there were "*numerous cases in which courts of appeal [had] set aside judgments as to costs where such judgments [had] contravened the general principle that to the successful party*

should be awarded his costs". (**Fripp and Gibbon and Co** (*supra*) at 357.

[24] In **Naylor and Another v Jansen 2007 (1) SA 16,** CLOETE JA dealt with a case in which WILLIS, J, of the Johannesburg High Court, had ordered the defendants, in an action for damages arising from defamation, to pay the plaintiff's costs. When he initially made that order, WILLIS, J was unaware of the defendants' without-prejudice tender which preceded the trial. Such tender came to be known after the defendants' appeal before the Supreme Court of Appeal had also been finalised. In the latter Court, the initial award of R30 000.00 damages, in the plaintiff's favour, was reduced to R15 000.00. The first Supreme Court of Appeal decision, involving Naylor and another, on the one hand and Jansen, on the other hand, is generally referred to as **Naylor 1**, whilst the second one is referred to as **Naylor 2**. It is, in my view, important to fully understand what happened in both **Naylor 1** and **Naylor 2,** in order to appreciate the cost principles and the application of s 21A discussed in **Naylor 2**.

[25] As I have already stated, neither WILLIS, J nor SCOTCH, JA, in **Naylor 1**, were aware of the defendants' without-prejudice tender made before the commencement of the trial. Rule 34(12) provides:

> *"If the Court has given judgment on the question of costs in ignorance of or tender and it is brought to the notice of the Registrar, in writing, within 5 days of the date of the judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this sub-rule contained shall affect the court's discretion as to an award of costs."*

Mr Naylor was the CEO of Atomaer (RSA) (Pty) Ltd, the second defendant in the Court *a quo*, before WILLIS, J. Atomaer, a foreign company, had appointed Mr Jansen as its local manager and it had a work relationship with Iscor, relating to negotiations in connection with the joint development of technology by both the second defendant and Iscor. Mr Jansen enjoyed a good relationship with Iscor Management. When, on his return to South Africa, Mr Naylor had discovered that Mr Jansen had breached his service contract in various respects, he confronted Mr Jansen who, according to CLOETE, JA, "was less than frank about what he had

done" (19E). The second defendant suspended Mr Jansen and, consequently, the latter was unable to attend a scheduled meeting between the second defendant and Iscor. Mr Jansen's absence at the meeting was explained by Mr Naylor and such explanation is recorded in the minutes as follows:

> "*Mr Naylor informed the meeting that Mr Jansen of the South African Local Office has been suspended from his position because* ***he had misappropriated Atamoaer Funds*** *to a company of which he holds a directorship*" (emphasis added).

That announcement was believed by those present, including a Mr Bezuidenhout, Iscor's engineering manager at Vanderbijlpark, who subsequently telephoned Mr Jansen asking him why he stole and also informing him "that he was a *persona non grata* at Iscor" (19G). WILLIS J had found that the words used at the meeting were defamatory of the plaintiff, Mr Jansen, in that he was described as a thief, a finding that was upheld by SCOTT JA in the SCA.

[26] Because both Courts were unaware of the defendants' without prejudice tender, the defendant duly gave notice of the order to the Registrars of the Johannesburg High Court and the SCA , retrospectively. SCOTT JA;

> "*initially directed that, if the parties did not reach agreement on the question of costs, each party was to submit a draft of the order it contended should be made, together with submissions in support thereof; and that the draft and submissions were to be served on the other party, who, if he wished, might file a reply.*"

When the matter was argued before WILLIS, J, he did not alter the cost order that he had made in favour of Mr Jansen. He, however, granted defendants leave to appeal against his refusal to alter the costs order. Consequently SCOTT, JA altered his previous direction and substituted it with one to the effect that the issue of the cost of the earlier appeal would be considered at the same time as the appeal from WILLIS, J's judgment.

[27] In **Naylor 2**, when these two appeals were considered, CLOETE, JA also considered the implications of Rule 34(12) on

the discretion of the judge *a quo*, with regard to the question of cost. In paragraph [14] of his judgment, CLOETE, JA says the following:

> "*[14] Ordinarily the purpose behind Rule 34 would cause the Judge to order the defendant to pay the plaintiff's costs incurred up to the date of the offer, and that the plaintiff to pay the defendant's costs thereafter. That does not mean, however, that there is a 'rule' to this effect, from which departure is only justified in the case of 'special circumstances', as suggested in* ***Van Rensburg v AA Mutual Insurance Co Ltd [1969 (4) SA 260 (E) at 336 in fine – 367B] and Mdlalose v Road Accident Fund [2000 4 SA 876 (N) at 885B-C].*** *All it means is that the exercise of the Court's discretion as to costs in this way would usually be proper and unimpeachable and failure to do so would, if unjustifiable, amount to a misdirection. But it needs to be emphasised, as the proviso to Rule 14(12) makes clear, that the Rule does not dictate this result, even provisionally. When the law has given a Judge an unfitted discretion, it is not for*

this Court to lay down rules which, while purporting to guide the Judge, will have the effect only of fettering the discretion. If, therefore, there are factors which the trial Court, in the exercise of its discretion, can and legitimately does decide to take into account so as to reach a different result, a court on appeal is not entitled to interfere – even although it may or even probably would have given a different order. The reason is that the discretion exercised by the court's giving the order is not ***a 'broad' discretion****, (****or a 'discretion in the wide sense'*** *or a 'discretion loosely so called') which obliges the Court of first instance to have regard to a number of features in coming to its conclusion, and where a Court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the Court below, simply because it considers its conclusion more appropriate. 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 a 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 mind to bear on the question or did not act for substantial reasons.*** *Put differently, an appeal Court will interfere with the exercise of such a discretion only where it is shown that*

> *'... the lower court* ***had not exercised its discretion judicially,*** *or that it had been* ***influenced by wrong principles or a misdirection on the facts*** *or that it reached a* ***decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'''*** (a quotation from ***National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** 2000 2 SA 1 (CC) [2000] (1) BCLR 39, at para [11]).

[28] CLOETE, JA then emphasised in para [15], that the trial judge, WILLIS, J, "was acutely aware of the fact that he was exercising a discretion. He was also aware of the parameters of that discretion." He then cited some passages to confirm that WILLIS, J's awareness of the fact that he was exercising a discretion and of all the parameters thereof. WILLIS, J emphasised that "in defamation actions, the **quantum** is largely irrelevant" and that "it is well-settled law that, in defamation actions, the **quantum** most often, essentially takes the form of a **solatium**". CLOETE, JA further demonstrated how the Court *a quo* stressed that, more than the amount of damages awarded to him or her, a party that comes to court in an action for damages does so "in order to clear his or her name and reputation" and that it is "relatively unimportant, in the greater scheme of things", what "the actual *quantum* that is ultimately awarded" to him or her is. CLOETE, JA also cited WILLIS, J's following remark:

> *"it seems clear from the particulars of claim, never mind the ordinary principle that is applicable in matters such as this, that the plaintiff came to the High Court,* ***inter alia****, but perhaps most importantly for him, to vindicate his reputation."* 25C-D.

WILLIS, J had also emphasised in his judgment that no acknowledgement of debt accompanied the defendants' tender, neither was there acknowledgment that a defamatory statement had been made and, more particularly, that the statement had been made wrongfully. Moreover, so WILLIS, J had emphasised, the tender contained no apology, which, in his view, is relevant to the exercise of the discretion with regard to costs because the defendants had tendered R15 500.00 and the award of damages in the amount of R30 000.00 had been reduced by the SCA to R15 000.00 WILLIS, J specifically dealt with that situation as follows:

> *"It seems to me that, although the plaintiff ultimately succeeded in proving damages in an amount of R15 000.00, whereas the defendants had tendered R15 500.00, the plaintiff nevertheless needed to persist with the action in order to vindicate his reputation, more especially his reputation 'generally and within the industry within which he operates'. Accordingly, I am satisfied that, in this particular case, a judicial exercise of a discretion requires me not to vary the cost order which I made on*

31 October 2003 in this matter.'" (Quoted by CLOETE, JA at para [15], at 25F.)

Reacting to criticism, by counsel before the SCA, of some of the remarks by WILLIS, J, which it appeared to be common cause were "open to some criticism", CLOETE, JA remarked as follows in para [16]:

> "*But what is important is not so much whether these remarks state the law completely accurately in the unqualified form in which they were made, but the purpose for which they were made. The golden tread running through the trial Judge's entire reasoning process, which ultimately led to his decision to exercise his discretion as he did, was that Jansen was obliged to come to court to clear his name. I am unable to fault this approach.*"

[29] Apart from restating the general principle with regard to the discretion of the court of first instance on the question of the award of cost to a successful party, **Naylor 1** (*supra*) is a good example of how a successful party was denied costs, contrary to the general principle in that regard. What is more important, in my view, is

the fact that it illustrates the need to indicate reasons why that has been done. The fact of the matter is that Naylor and the second defendant succeeded in reducing the damages by half, on appeal, and yet were not awarded cost of the appeal. SCOTT, JA, in **Naylor 1**, para [18], 557 sums up his reasons for not awarding costs to Naylor and his co-appellant, as follows:

> "*[18] To sum up, none of the defences raised by the defendants can be sustained and, to this extent, the appeal must fail. The limited success achieved on appeal, namely, by the reduction of the amount of R30 000.00 to R15 000.00, does not, in my view, justify an order cost in favour of the defendants. Jansen, it will be recalled, abided the judgment of this court.*"

Although I have already given reasons for the decision of the SCA, in **Naylor 2**, not to reverse the Court *a quo's* decision to refuse the plaintiffs their costs, I do think it is appropriate to sum them up as follows:

1. Cloete JA states that;

"Several of the defences raised at the trial by Naylor and Atomaer were abandoned on appeal. In particular, it was no longer in issue that the words reflected in the Iscor minutes of the meeting had been uttered by Naylor; and the defence of justification was not persisted in (20E-21A)."

2. Defences which were persisted in were rejected by the SCA in **Naylor 1**.

3. Although the amount of damages ordered by the Court *a quo* was reduced from R30 000.00 to R15 000.00, the reasoning of the SCA, in making the reduction in **Naylor 1**. was that, as Cloete, JA puts it in **Naylor 2;**

"... although Jansen had not been guilty of stealing money from Atomaer and diverting it to a company in which he had an interest (the sense in which this Court held the Iscor employees would have understood the words uttered by Naylor). Jansen had breached the duty of good faith he owed to Atomaer; that conduct, like theft, involved dishonesty; there was

a direct link between the making of the defamatory statement and Jansen's conduct; and the trial Court should have taken this conduct into account in accessing the damages awarded. (Para [7], 21B-C)."

4. Jansen did not resist the appeal by the defendants with regard to the damages award, had not as much as been represented at the SCA but had elected to abide the judgment of the Court (para [1], 549A-550A, **Naylor 1**).

These are substantive reasons as to why there was departure from the one of the two general principles with regard to the question of cost, viz., the second one, that the successful party should, as a general rule, have his or her costs.

5. Willis, J was fully conscious of the fact that he was exercising his discretion with regard to the question of cost and gave reasons for his departure from that general rule. On the contrary, Dunn, AJ did not, in his judgment when dealing with costs, mention the question of public interest action, and give reasons, therein, why he was disregarding that factor.

[30] In ex parte **Gauteng Legislature: Gauteng School Education Bill 1996 (3) SA 165 (CC),** which is a Constitutional Court decision, of course, MAHOMMED, DP, as he then was, referred with approval, at 185F-G, to

> "*the well-known rule in the Supreme Court [now the High 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 cost of the successful party*".

For that proposition he relied on **Fripp and Gibbon and Co** (*supra*) and **Merber v Merber** (*supra*) **at 452.** He went on to say "there are obviously attractive grounds of policy which supports such an approach in ordinary litigation between litigants in the Supreme Court and in the Magistrate's Courts". KRIEGLER, J concurred in that judgment, at 185J, and order, as couched by MAHOMMED, DP.

[31] What emerges from the authorities is that, whilst the first principle, if one can so describe it, on the question of costs is that the judicial

officer has a discretion whether to award or not to award cost, such discretion is subject to a second principle, if one can describe that as such as well, viz., that, in exercising his or her discretion, the judicial officer must be aware that, ordinarily, the party that is wholly successful in an action or application is awarded costs. In other words, the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for a reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case. Both the first and the second principles are contained in what was said in **Merber v Merber** (*supra*) and cases that have followed and applied that decision, many of which have been discussed in this judgment.

[32] There is no doubt that the present appeal is one in respect whereof the successful party, especially with regard to the appellant against the statutory respondents, was deprived of what would ordinarily be its costs. I shall later deal with the question whether or not the Court *a quo* was justified in holding, in respect of Monsanto, the fourth respondent, that it was the successful party. To the extent that, therefore, the Court *a quo*, in the present case, deprived

Biowatch of its costs against the statutory respondents, the appellant was, in my view, entitled to approach this Court and to request it to "enquire whether there were any grounds for this departure from the general rule". I would, therefore, allow the appeal.

SECTION 21A PROVISIONS

[33] The conclusion I have reached above does not, however, dispose of the issues in this appeal. A word has to said about the provisions of s 21A of the Supreme Court of Appeal Act, with regard to the entertainment of an appeal whose results would have no practical effect except in respect of costs. This is more so, in the event of my conclusion, with regard to the exercise by the Court *a quo*, in general and on the facts of this case, being incorrect. According to the section, except in "exceptional circumstances", costs should not be used as one of the measures of determining whether or not an appeal will have a practical effect. The section is set out in full in paragraph 18 of the majority judgment and will, except for subsection 3, not be repeated in this judgment. Subsection 3 reads:

> "*(3) Save* ***under exceptional circumstances****, the question whether the judgment or order would have no*

practical effect or result is to be determined with reference to consideration of costs." (Emphasis added)

[34] The phrase "exceptional circumstances" is not defined in the Act. SCOTT, JA dealt with that phrase in **Naylor 1, at 558C-D/F** in paragraph **[22]**, where he said the following:

> "*[22] Ms Robinson, who argued the costs appeal on behalf of Naylor, contended* ***in limine*** *that this Court, in the exercise of its discretion in terms of s 21A of the Supreme Court Act 59 of 1959, should decline to entertain the appeal, as the result will have no practical effect save in respect of costs which, in terms of the section, are to be left out of account save under 'exceptional circumstances'. I cannot agree. As will appear from what follows, the circumstances in the present case are exceptional, as the order granted by the Court* ***a quo*** *involves not only* ***a departure from a practice that is well established****, but also an inroad in what has hitherto always been regarded as a substantive right enjoyed by an incola.*

> *I should add that the point taken is somewhat surprising, as it appears from the judgment of the Court* ***a quo*** *granting leave to appeal that both counsel were in agreement not only that leave should be granted but that it should be granted to this Court"* (emphasis added).

In *Premier, Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA), the Court gave the purpose of s 21A as being, primarily, to alleviate the heavy workload of Courts of appeal (1143A-C). Because the judgment is in Afrikaans, I quote from the head note, which appears to the a correct rendition of what is said in the text. It is stated that the section;

> *"sets a direct and positive test; will the judgment or order have a practical effect or result? Given the object and clear meaning of this formulation, the question is whether the judgment in the case before the Court will have a practical effect or result and not whether it might be of importance in a hypothetical future case. Appeals should be submitted for adjudication only if there will be a real, practical effect or result of a judgment of the Court of Appeal."*

The Court warned practitioners to always bear in mind the existence of s 21A and its aim.

[35] There are three aspects all of which are present in this appeal, that, in my view, amount to the "exceptional circumstances" contemplated in s 21A. Firstly, I am of the view that where the trial court has departed from one or both of the "two general principles" mentioned in **Fripp and Gibbon and Co** (*supra*) and endorsed in, *inter alia*, **Merber and Merber** (*supra*), justification for the court of appeal to "enquire whether there were any grounds for this departure from the general rule[s]" constitutes an exceptional circumstance for purposes of also s 21A. That, in my view, is akin to what SCOTT, JA held in respect of the Court *a quo's* departure, in **Naylor 1**, from what had hitherto always been regarded as a substantive right enjoyed by an *incola*.

What amounts to an exceptional circumstance in this case, in my view, is that of the Court *a quo* denying the appellant costs against the statutory respondents, in the one instance, and awarding costs against the appellant and in favour of the fourth respondent, in the other instance. In the Court *a quo*'s own judgment, the appellant

was wholly successful against the statutory respondents. Concerning the fourth respondent, I am of the view that the appellant was wholly successful there as well. Even if it was not, its success against the statutory respondents and yet being denied costs justifies an enquiry by the court of appeal.

Secondly, it is where a party is acting in the public interest. Even on the assumption that the factual basis on which the Court *a quo* made those adverse orders is correct, the very idea of mulcting the appellant in costs in circumstances where it is, admittedly and in the Court *a quo*'s own judgment, acting in the public interest and in pursuit of rights and obligations contained in s 32 of the Constitution of the Republic of South Africa, 1996 (the Constitution), constitutes exceptional circumstances.

Thirdly, it is where litigation concerns matters of importance that frequently arise with regard to questions of law. or in interpretation of statutes and in interpretation of clauses in constitutions of private bodies; provided the judgment of the SCA will have practical effect or result.

A brief discussion of each of the three instances that, in my view, constitute exceptional circumstances for purposes of s 21A follows.

Departure from One or the Other or Both of the General Principles

[36] **Naylor I** is a typical example of when, although the only issue for consideration is one of costs, the provisions of s 21(a) will, nevertheless, not be deterrent to such an appeal. There was departure, by the Court *a quo*, from a well established practice, as explained by SCOTT, JA.

[37] Before dealing with public interest as a basis for bringing an appeal against costs, inspite of the provisions of s 21A, it is, in my view, important to consider the attitude of the first to the fourth respondents with regard to the appellant's claim that it was, in making the request it made to the first to third respondents and making its application in court, acting in the public interest. I have already referred to the point *in limine*, on behalf of the first to the third respondents, in which the appellant's *locus standi* was challenged. The fourth respondent, on its part, contended that the appellant's right of action, if any, was governed by PAIA. Alternatively, if PAIA was not applicable, the right of access to

information was governed by item 23(2)(a) of Schedule 6 to the Constitution. Only during argument did counsel for the fourth respondent concede, during the course of his own address, that item 23(2)(a) of Schedule 6 of the Constitution lapsed with the enactment of PAIA. That, therefore, meant that the appellant was entitled to bring the application in terms of s 32 of the Constitution. In its judgment, the court *a quo* dismissed the statutory respondents' point *in limine* with regard to the appellant's *locus standi* (judgment para [15]), for reasons fully set out in paragraph [14] of the judgment. Objections to the appellant's *locus standi*, on behalf of the fifth respondent, based on the provisions of s 18 of the GMO Act and s 31(1)(c) of NEMA – details of which objections are discussed fully in paragraphs [36] and [37] of the judgment – as well as an objection based on the appellant's failure to take the Registrar's refusal to provide the appellant with information it required – also dealt with in para [37] of the judgment – were dismissed by the Court *a quo*. All three counsel who made submissions, i.e. on behalf of the statutory respondent, the fourth respondent and the fifth respondent, respectively, advanced substantive submissions, backed with ample authority, in a manner that was clearly designed to kill the application from the outset. The Court *a quo*'s judgment with

regard to these various objections, itself, covers quite a number of pages in a very well-reasoned discussion of each and everyone of the points raised.

[38] In the course of its judgment, in dealing with the submission made on behalf of the fifth respondent to the effect that the Registrar was protected by the provisions of the GMO Act from furnishing the information sought by the appellant (judgment, pages 648/9, para [37]), the court *a quo* made it clear that it considered the appellant's request for information to be in the exercise of a constitutional right. In this regard the court *a quo* said the following:

> "*In other words the Registrar is not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMO Act, if such disclosure is aimed at giving effect to the right to access of information enshrined in section 32(1)(a) of the Constitution. Our constitutional dispensation after all enjoins the State – acting through its appointed officials – to positively respect, protect, promote and fulfil the rights in the Bill of Rights Chapter of the*

Constitution. To interpret section 18(1)(a) of the GMO Act in the aforementioned fashion, which in my view it should be, would also be in keeping with the constitutional imperative of interpreting legislation in a manner that promotes the spirit, purpose and objects of the Bill of Rights." (Footnote references are omitted)

[39] In its notice of appeal, dealing with the court *a quo*'s failure to order payment of costs by any of the statutory respondents, the appellant submits, *inter alia*, that:

"*3. The learned judge misdirected himself:*

3.1 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 interest of protecting the environment, and to uphold constitutional rights."

[40] During the application for leave to appeal Mr Butler, on behalf of the appellant, sought to draw the Court's attention to further affidavits that had been submitted on behalf of the appellant to

focus on the consequences of a costs order on the appellant, an NGO (non-governmental organisation). Mr Rip, on behalf of the fourth respondent, objected to the late introduction of such affidavit, submitting that the appellant should have done so during the hearing of the application. The following important and interesting discussion then took lace between the Court *a quo* and Mr Rip:

"COURT: *Can't one, Mr Rip, infer from the fact that this is an NGO that needs funding from outsiders, is that not, can't I take account of that in any event?*

MR RIP: *Your Lordship* ***probably you could have taken that into account*** *in any event that, it is a body that deals with public funds or ... (intervene)*

COURT: ***But that is something that I did not take into account.*** *I must say, you know,* ***at face value I treated the applicant as a normal litigant.*** *Is that wrong or should I have considered that this*

is an NGO and that it has to have, you know such for funding ... (intervene).

<u>*MR RIP*</u>: *Well, M'Lord it was never raised in the papers, so your lordship must exercise your judicial discretion on the facts before your lordship.* ***The fact that they are acting in the public interest was known and it was stated on the papers*** *and your lordship was aware of that and said so, in your judgment when you set out the history of the matter and the position of Biowatch, who they are and what they are attempting to achieve. So, your Lordship was aware of what Biowatch was and Biowatch was trying to achieve and the purpose of a sort of watchdog tag* ***that they gave themselves*** *and the position that they had assumed, but to try and take it now further, as they wish to do in these affidavits and come down to very specific contractual relationships which they have outside (sic). That was not before the Court and with the greatest of respect, there is*

absolutely no reason why it was not before the Court. The simple answer, to come now and simply say, oh, we are flabbergasted, we never expected in our wildest dreams that we would not have a cost order made against us or something like that, is without any justification." (Page 705-706)

[One gets the impression, up to now, that Mr Rip submits that the public interest nature of the application was not considered when costs were argued. The discussion goes further, from page 707, thus:]

"<u>COURT</u>: *But, I could just ask you this.* ***What concerns me is, did I not, where a party comes to Court to protect its constitutional rights did I not, you know, treat that too lightly****? They were obliged to come to court. Your clients obliged them to persist with the application ... Am I not wrong in not awarding them costs against the State?*

[One gets die impression, up to now, that Mr Rip agreed with the Court, that the public interest nature of the application was not considered when costs were argued.]

<u>*MR RIP*</u>: *Well, M'Lord, we would submit that your Lordship was not wrong in doing that because, M'Lord, ... But, M'Lord, the point I am trying to make is whether your Lordship was wrong or not at this stage, is irrelevant.* ***The question is did your lordship judicially apply your mind to that discretion*** *and if you have, if you did that,* ***whether you did it wrongly or not then they do not have any grounds for leave to appeal****. As my learned friend has himself quoted, that the, at page 3 from Cloete's judgment and in determining this question an approach laid down by the Appellate Division such matters remains (sic) relevant in that* ***the failure to exercise a judicial discretion would at least usually constitute an exceptional circumstance****. A failure to exercise a judicial*