

(sic). But conversely the mere fact that an appeal court might or even probably would give a different order would not (sic). The test is, did your Lordship consider the relevant facts and did your Lordship exercise your discretion and did your lordship in the light of your discretion, rightly wrongly, come to the conclusion that your Lordship did. The test is not whether the conclusion is the correct conclusion, as seen from other sources, but whether or not all the factors were on the table at the time that your Lordship made that decision and we would submit ample facts your Lordship considered all the relevant facts. ... So that all those facts which my learned friend now says that you misdirected yourself at (sic), wherein your Lordship's mind when at the conclusion you come along and you say, and by saying, with respect, M'Lord the way we would read it, is that your Lordship is saying yes, normally all of this would lead to a cost order but there are certain other factors

that I am now taking into account which persuades me not to do that and your Lordship mentions what those factors are.

[Mr Rip now sings a different tune, viz. that the Court *a quo* took into account the public nature of the application. As can be gleaned from what follows, this now becomes the new approach which, in my view, differs from the initial approach. The discussion proceeds:]

COURT: *But I only mentioned one. Doesn't that, if I understand Mr Butler's argument, I only mentioned one. so, what really proceeded that one must ignore if I understand his argument.*

MR RIP: *Well, M'Lord that might be what he wishes to state. M'Lord, that is why we say it has been taken out of context ... I do not think your Lordship says it is only, only one. Your lordship says the manner in which some of the requested information were formulated as well*

as the manner in which the relief is claimed in the notes [notice] of motion was formulated. ... The fact is that your Lordship did exercise the discretion against the background of a detailed and reasoned judgment where your Lordship set out the relevant facts and on such a basis that there is no basis for another court to come and say, well you did not exercise your. ... The only way a court of appeal can interfere is that they can find that your Lordship did not exercise discretion judicially.

COURT: *But are there not reasonable prospects of a court of appeal coming to such a conclusion?*

MR RIP: *Well, we would submit not, M'Lord. Not, not on the basis that your Lordship, there may be an argument to be made out that this, the way your Lordship exercised your discretion might have led to a result which some other court might not support, M'Lord, but not that your Lordship did not exercise your discretion*

judicially, taken (sic) into account all the relevant ... (intervene)." (Page 705-712, emphasis added, with a lot of discussion, which is either repetition or of no significance particularly from Mr Rib's comments, deliberately omitted.)

[41] I have deliberately quoted at length from the discussion between DUNN, AJ and Mr Rip, who was making submissions on behalf of the statutory respondents, because of the importance of—

- (a) the initial concession by both the learned acting judge and counsel that the court *a quo* should have taken into account the fact that the appellant was acting in public interest; and
- (b) the need to determine, from the contents of the discussion, whether or not the Court *a quo* did, as a fact, take that aspect into consideration when making the costs award. During argument before us, Mr Snyckers submitted, on the fourth respondent's behalf, that DUNN, AJ's observations during argument around the question of public interest did not amount to a concession, on his part, that he had not, as a

matter of fact, considered the appellant's role as an NGO making an application in the public interest. In making this submission, Mr Snyckers was fortified by the following passage in DUNN, AJ's judgment, in paragraph [15] of his judgment on the application for leave to appeal; Vol 8, page 738:

“[15] As far as the cost order that I made against Biowatch in favour of Monsanto is concerned, I also considered that such an order was appropriate in all the circumstances. A failure to expressly articulate all the grounds in favour of not making such an order certainly do (sic) not mean that they were not considered. I am acquainted with the case law referred to by Mr Butler in his heads of argument, particularly since I was also involved in at least one of those cases, namely the Democratic Alliance and Another v Masondo N. O. and Another 2003 (2) SA 413 (CC) para 35. What does not appear in the case report is that the Constitutional Court also refused to reverse the

costs order made against the appellant ie the appellant before the Constitutional Court in the High Court. Although I do not think that another court will necessarily arrive at a different conclusion about the costs order in Monsanto's favour, I consider that this is also a ... case that might result in a different conclusion by another court."

- [42] MYNHARDT, J, in the majority judgment, explains DUNN, AJ's above remarks on the basis that they were uttered during what he, DUNN, AJ, referred to as "the poverty defence" which the appellant's counsel sought to place before him after he had given judgment, for him to consider with regard to costs. After, correctly in my view, pointing out that DUNN, AJ did not deal with the question of the admissibility or otherwise of the supplementary affidavit, the majority judgment proceeds as follows at para [36] pages 67-68:

"Accepting in Biowatch's favour that this Court can, and should, deal with the matter, I do not think that the impecuniosity of Biowatch, if that is a fact, provides a

ground or reason for holding that DUNN AJ had misdirected himself. To the extent that a court order against a NGO might have 'a chilling effect' that is something that is fairly common knowledge. In the Wessa case [Wild Life and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others 2005 (6) SA 123 (ECD)] PICKERING, J also referred to that particular aspect. The remark of the Court a quo that Biowatch was treated as a normal litigant should, therefore, be seen in the context of the 'the poverty debate' and the fact that Biowatch's impecuniosity was not taken into account in his favour certainly does not mean that Biowatch has succeeded in showing that the court a quo had committed a demonstrable blunder."

It appears, on my understanding of the above passage in the majority judgment, that it accepts that DUNN, AJ did not take into account the appellant's impecuniosity. I do not understand the import of the phrase "if that is a fact" and I do not think it should alter my understanding of the passage. I am, therefore, in agreement with the majority judgment that, as DUNN, AJ, himself kept saying, the Court a quo did not take into account the fact that

the appellant was an NGO when considering his judgment on costs. That, in my view, could only be in the context of the appellant acting, as an NGO, in the public interest. I do not, therefore, agree with the majority judgment that, that omission on DUNN, AJ's part does not show "that [he] had committed a demonstrable blunder". In my view, it demonstrates just that. It is in this context that I proceed in this judgment, to discuss how the question of costs in public interest actions has been considered in various courts, ie internationally and South Africa.

PUBLIC INTEREST

Public Interest Litigation and Costs in Foreign Jurisdictions

Canada

[43] In **Hlatshwayo v Hein 1999 (2) SA 834 (LCC) para 24**, it is stated that Canada "shares our general rule that costs follow the result". That, indeed, appears to be the case, as will appear from the authorities that follow. However, there is a growing trend to depart from the general rule, in some foreign jurisdictions, in litigation involving matters of general interest. In **Mabar v Rodgers Cable Systems Ltd (1995) 25 OR (3d) 690 (GD)** the following is stated at 703b:

“There will always be debate about what is the public interest, but it is fair to characterise this proceeding as a public interest suit. While the ordinary costs rules apply in public interest litigation, those rules do include a discretion to relief 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.” (Emphasis added)

[44] The Court then went on to say the following:

“The matter was considered in depth by the Ontario Law reform in its report on class actions (1982), where the following summary was given of the court’s discretion in this area (vol. III, p. 649):

‘While the general rule is well established in our legal system, there are well accepted exceptions that justify a denial of costs to a victorious party, even where there has been no misconduct by him or his lawyer. In some cases, a successful party may not be awarded costs where the issue determined is novel,

*where the court has been asked to interpret a new or ambiguous statute, or where the action is a "test case". The existence of certain exceptions indicates that **the general rule is not immutable**, but a rule that, however deeply entrenched, occasionally defers to special considerations dictating that its application is inappropriate."*

Finally I refer to the following passage by the Court:

"In my view, it is appropriate in this case to exercise my discretion in favour of the applicant and to make no orders as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdiction 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. It is true that many of the cases in which an unsuccessful public interest litigant has been relieved of the cost order have involved suites against the government, and the respondent here is a private entity. However, the

respondent does enjoy the substantial benefit and protection of a statutory monopoly in the provision of its services to the public, and this application was brought in relation to an important aspect of the terms on which that monopoly is enjoyed. While the targets of public interest litigation are certainly entitled to the protection of the rules of court it should not be forgotten that those rules include a discretion to relieve the loser of the burden of paying the winner's party and party cost. As observed by Fox, supra and by the Ontario Law Reform commission report, supra, public interest litigants are in a different position than parties involved in ordinary civil proceedings. The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interest." (Emphasis added)

- [45] It would seem that public interest litigants in Canada, do, indeed, enjoy universal protection in respect of costs, where they have lost their claims. In the journal **McGill Law Journal / Review De Troit De McGill**, the following appears:

“A more recent Nova Scotia case directly considered the impact of security for costs on public interest litigation. In *Coalition of Citizens for a Charter Challenge v Metropolitan Authority Kennett, supra* not 24 at 749, the plaintiffs challenged the constitutionality of a waste incinerator on the grounds that the resulting damage to public health and to the environment would contravene section 7 and 15 of the *Charter*. The defendant requested security on the basis that the citizens’ group was a ‘nominal plaintiff’. Glube, J, stated that there is ‘apparently no case law supporting the position that a public interest group is a “nominal plaintiff” and therefore should provide security for costs.

‘To order security for costs where a public interest action arises would, as was argued on behalf of the Coalition, have “serious and chilling results”. It would affectively [*sic*] end any such actions. It would be anomalous to grant standing and then effectively bar the action by ordering security for costs at this time.’” (Emphasis added)

[46] Writing about costs in Canada, L Friedlander, in "L Friedlander – Costs", says "public interest litigation will not frequently produce significant financial gain for the plaintiffs and the risks of litigation are therefore increased". There can be no doubt, therefore, that the question of impecuniosity is a matter of curial importance in public interest litigation. The author further states, at page 62 of the same journal that, "public interest litigation is also discouraged by the potential obligation to provide security for costs". He then goes on to say:

"The obligation to provide security for costs may bring impending litigation to a halt if the plaintiff does not have adequate financial resources. Defendants may thus ask for security as a stalling tactic." (Page 63)

[47] What is stated by REID, J in **John Wink Ltd v Sico Inc (1987)**, **57 O.R. (2d) 705, 15 C.P.C (2d) 187 (H.C.J.)**, quoted on page 64 of Friedland's article, is, in my view, apt. It reads:

"[U]nless a claim is plainly devoid of merit, it should be allowed to proceed ... While the adoption of this standard might allow some cases to go to trial and that the trial will

prove should not have proceeded, nevertheless, the danger of injustice resulting from wrongly destroyed claims that should have been permitted to go to trial is to my mind a greater injustice.”

[48] In his book, “Costs and the Public Interest Litigant” (1995, 40 McGill Law Journal 55), Friedlander, with reference to “public interest litigation”, observes that:

“... public interest litigation will not frequently produce significant financial gain for the plaintiffs and the risks of litigation are therefore increased. The use of the English Rule (costs-in-the-cause) to discharge cases in which the possibility of pecuniary gain is insufficient to counterbalance the costs of litigation means not only that all types of litigation will be reduced, but also that public interest cases will be discouraged in a manner disproportionate to other types of litigation. This will be due to the minimal likelihood that potential success will offset financial risk.” (Vol. 40, page 62-63, emphasis added.)

The author refers to the judgment in **Coalition of Citizens for a Charter Challenge v Metropolitan Authority**, (1993), 122 N.S.R. (2d) 1, 103 D.L.R. (4th) 409 (S.C.T.D), in which GLUBE, J is reported to have said the following:

“To order security for costs where a public interest action arises would, as was argued on behalf of the Coalition, have ‘serious and chilling results’. It would effectively [sic] end any such actions. It would be anomalous to grant standing and then effectively bar the action by ordering security for costs at this time.”

[49] In **British Columbia (Minister of Forests) v Okanjan Indian Band** [2003] 3 S.C.R. (SCC) the following is stated, at paragraphs 27 and 28:

“27. Another 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 the 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 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.

28. *Courts have referred to the importance of this objective on numerous occasions. In Canadian Newspapers Co v Attorney-General of Canada (1986), 32 D.L.R (4th) 292 (Ont H.C.J.), Osler J. opined that 'it is desirable that bona fide challenge is not to be discouraged by the necessity for the applicant to bare the entire burden' (pp. 305-6), while at the same time cautioning that 'the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged' (p.306)."* (Emphasis added)

United Kingdom

[50] In **R (Corner House Research) v Secretary of State (UK) for Trade and Industry [2005] 1 WLR 2006** per BROOKE, LJ, at para 41, the Court of Appeal stated the following, in paragraph 41:

"41. Some of the authorities ... demonstrate a trend towards protecting litigants, who reasonably bring public law proceedings in the public interest, from the liability to (sic) cost that falls, as a general rule, on an unsuccessful party."

Privy Council

[51] In **Belize Alliance of Conservation Non-governmental Organisations v The Department of the Environment (First Judgment of the Privy Council Appeal No 47 of 2003)**, the applicant, generally referred to as Bacongo, sought certain information with regard to environmental matters from the Department of the Environment, which the department refused to furnish. In that regard the Court commented as follows:

"The respondents' reluctance to disclose information to Bacongo (even when it is highly material and not obviously

confidential) has been a regrettable feature of this case. No doubt the respondents regard Bacongo as a most troublesome thorn in their flesh, but their unhelpful attitude can only have tended to create the Bacongo's suspicion, and perhaps also its determination to press on with the litigation." (Paragraph 15, emphasis added.)

The Chief Justice gave judgment against Bacongo but, in doing so, "recognised the Bacongo as having acted with the commendable public spirit (paragraph 17). Consequently, he made no order as to costs." Bacongo proceeded to the Court of appeal, where the appeal was dismissed. Once more, there was no order as to costs.

The respondents' reluctance in that case, to disclose information is, in my view, not unlike that of the first and fourth respondents' reluctance in the present case. More important, in my view, however, is the two Courts' approach of not awarding costs to the successful respondents, recognising that the applicant had "acted with commendable public spirit".

Australia

[52] In an article attributed to the Law Reform Commission, entitled "Costs Shifting – who pays for Litigation?" ALRC TS (1995), the following appears under a heading "COSTS ALLOCATION RULES AND PUBLIC INTEREST LITIGATION":

"13.8 Costs allocation rules can significantly influence the bringing and conduct of public interest litigation and test cases. In particular, the costs indemnity rule generally has a deterrent effect on this type of litigation.

13.9 In an address to an International Conference on Environmental Law in 1998, Justice Toohey stated:

'There is little point in opening the doors to the Courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with

devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.'

13.10 *Some jurisdictions have introduced systems of one-way fee shifting where a party found to be acting in the public interest, usually the plaintiff, is able to recover costs if successful but pay nothing if unsuccessful.*

13.11 *The Commission considers that the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules."*

(Emphasis added)

[53] From the above, it can confidently be said that the question of public interest litigation and the need to have it encouraged by not awarding costs against litigants, even if they should lose the action, is a matter of concern in other jurisdictions, internationally.

What is the Position in South Africa Concerning Public Interest Actions?

[54] In the appellant's heads of argument for application for leave to appeal this aspect, as indeed other aspects, is elaborately and, in my view, eloquently dealt with. It is discussed in respect of the approach of the Constitutional Court, other South African courts and environmental litigation and costs with regard to s 32 of NEMA, which approach I find quite practical and useful.

Constitutional Court

[55] It is submitted, correctly in my view, on behalf of the appellant, that the Constitutional Court has approved of the two basic principles with regard to the award of costs. For that submission the appellant relies on **Ferreira v Levin NO and Others; Vryenhoek and Others** (*supra*) at para [3]. It is stated therein 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.

and that, whilst the general principles are:

“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.” (Emphasis added)

I find myself in agreement with the further submission, on the appellant’s behalf, that:

“the Constitutional Court has proceeded to develop a growing jurisprudence relating to costs orders in constitutional and public interest matters.” (Emphasis added)

[56] Reference is made in the applicant’s heads, to a number of judgments by the Constitutional Court, in which the losing party was not mulcted in costs (**Ex parte Gauteng Provincial Legislature: In re Dispute Concurring Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995**, 1996 (3) SA 16 (CC) at para [36]; **Motsepe v Commissioner for Inland Revenue** 1997 (2) SA 898 (CC) at paras [31]-[32], at paras [36]-[32]; **Sanderson (supra)**, at

para [44]; **Democratic Alliance and Another v Masondo N.O and Another** 2003 (2) SA 413 (CC), at para [35] **City of Cape Town and Another v Robertson and Another** 2005 (2) SA 323 (CC), at para [79]).

[57] Reference will be made here, at random, to two of these Constitutional Court decisions.

In **Sanderson v Attorney-General, Eastern Cape** 1998 (2) SA 38 (CC), the Constitutional Court was dealing with an application by an accused person whose prosecution had been excessively delayed, for which delay he sought to have the prosecution stayed, on the basis that it had been excessively delayed. The Constitutional Court stated that the focus of the Court's enquiry was not on the general disadvantages suffered by the appellant in consequence of the serious charges preferred against him and the consequences flowing from them, but rather on the delay and the prejudice it caused to him. The Court, nevertheless, held that, on the facts of the case, it was not an appropriate case for a stay of prosecution. The Court considered, *inter alia*, the following aspects; that the appellant was not in custody in all that time, that he continued working, that postponements were to dates which

suiting him and that that did not require him to frequently attend court and that he was legally represented and could have opposed the postponements much more energetically than had been done when the request therefor were made. The appellant's appeal against an earlier dismissal of this application by the High Court was, therefore, dismissed by the Constitutional Court. In dismissing the application, the High Court had made an adverse costs' order against the appellant.

[58] Concerning "public interest", KRIEGLER, J, giving the judgment of the Court, stated the following in para [37], 57H-58B:

"[37] ... Since time immemorial it has been an established principle that the public interest is served by bringing litigation to finality and, of course, quite apart from the general public, there are individuals with a very special interest in seeing the end of a criminal case. ... Ordinarily the interest of all concerned are best served by getting on and getting done with the case as quickly as reasonably possible ..." (Emphasis added).

Alluding to the question of costs, KRIEGLER, J said the following, in para [43], at 70A:

*“[43] This judgment cannot conclude without something being said about costs. The dismissal of the appellant’s application in the High Court carried with it an adverse order for costs. That was in conformity with [a] long-established practice in that Court, even in cases such as this, where leave sought is tied up with a criminal case. On appeal to this Court the respondent supported that approach as far as the costs in both Courts is concerned. The appellant, however, advanced the contention that, as the proceedings in the High Court had been an extension of the criminal case, which violated the appellant’s fundamental right, no order as costs should have been made against him even though the resort to the Constitution had failed and cited the judgment of this Court in *Motsepe v Commissioner for Inland Revenue* [1997 (2) SA 898 (CC)] 1997 (6) BCLR 692] in support. In my view the citation is apt and the proposition well founded. The observations of*

Ackermann J, on behalf of the Court, in the passage cited are directly in point:

'... one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against this state, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an undue inhibiting or "chilling" effect on other potential litigants in this category.'

Ackermann J immediately proceeded to point out, however, that such an approach should not be allowed to develop into an inflexible rule which might induce litigants

'... into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the cause for doing so may be or how remote the possibility that this Court will grant them access.'

In fact, in that case, an adverse costs order was granted against the unsuccessful individual in order to

'... disabus(e) the minds of potential litigants of the notion that they can approach this Court without any risk of having an adverse costs order being made against them, no matter how groundless the merits of such approach.'

At the time the costs order in this case was made that judgment had not yet been reported. We had, however, already alluded to the possibly dangerous 'chilling' effect of an adverse costs order in constitutional cases. [Ferreira v Levine NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC) 1996 (4) BCLR 441].

[44] *The observations in Motsepe and Ferreira were based on policy considerations that apply with equal force to other courts. Ordinarily the dismissal of a*

*claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to the criminal proceedings, which are instituted by the State and in which costs orders are not competent; and a cause of action is that the State allegedly breached an accused's constitutional rights to a fair trial. Although the appellant failed to establish the constitutional claim he advanced, it was a genuine complaint on a point of substance and should therefore not have been visited with the sanction of a costs order. However 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.*

[45] *In the result, the appeal is dismissed, save that the order in the High Court directing the appellant to pay*

the costs of those proceedings is set aside.”

(Emphasis added)

There was no reference to s 21A in **Sanderson** (*supra*), probably because the provisions thereof were not alluded to during argument by counsel. Whatever the reason is, I am of the view that this judgment is relevant to the provisions of that section.

[59] Although, in dealing with the question of costs, in para [44], the learned judge of the Constitutional Court alludes to the suit “[not being] between private individuals: [but, instead, relating] directly to criminal proceedings, which are instituted by the state”, it is, in my view, quite evident that the ratio of the decision in this regard is the fact that the appellant’s complaint was based on an alleged breach of his “constitutional right to a fair trial” and that his “was a genuine complaint on a point of substance”. KRIEGLER, J also referred to “public interest”, in paragraph [37] of the judgment.

[60] In **Democratic Alliance and Another v Maseko NO and Another** 2003 (2) SA 413 (CC), the appellants had brought an application before the High Court in Johannesburg, challenging the constitutionality of the appointment of the current mayoral