

committee by the first respondent. The application had been dismissed, with costs, and the appellants had then appealed against that decision in the Supreme Court of Appeal. That appeal was also unsuccessful. It does not appear that, when the question of costs was being argued before the SCA, the question of the provisions of s 21A was discussed nor, for that matter, was there reference to the first of the two principles on matters of costs, viz., the supremacy of the judicial discretion of the court of first instance in the awarding of costs. I cite this authority, however, as another illustration of the relevance of public interest concerning the awarding of costs. In para [35], LANGA, DCJ, as he then was, says the following:

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

That is the majority judgment in that case. Although, in his minority judgment, SACHS, J gave different reasons for concurring in the judgment to LANGA, DCJ (as he then was), he said nothing that suggested that he had a different view with regard to the view expressed concerning costs. In her dissenting minority judgment, O'REGAN, J did not, in suggesting that the appeal be upheld, allude to the question of costs.

[61] From the above, there is no doubt in my view, that the Constitutional Court adopts the trend that is in vogue in some foreign jurisdiction of the ordinary, not awarding costs against applicants in public interest litigation. Consequently, I find that the following statement by the Land Claims Court, in **Hlatshwayo** (*supra*), at para [18], summarises the attitude of the Constitutional Court as follows:

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

In my view, there is, more than a “trend,” a flexible practice by the Constitutional Court in this regard.

**Supreme Court of Appeal on Section 21A Public Interest**

[62] In **Western Cape Education Department and Another v George** 1998 (3) SA 77 (SCA), the Supreme Court of Appeal (the SCA) requested counsel for the appellants to prepare argument on the question, *in limine*, whether the appeal was not liable for dismissal in terms of s 21 of the Supreme Court Act 59 of 1959, on the basis that, as the section lays out, “the issues are of such a nature that the judgment or order sought will have no practical effect or result”. After hearing argument, the Court came to the conclusion that no practical effect or result would be served in hearing the appeal, which was only with regard to costs. HOWIE, JA (as he then was), in giving the judgment on behalf of the Court, reiterated at 84G, a “warning expressed in the matter of **Premier, Provinsie Mpumalanga en Ander v Globlersdalse Stadsraad** [1998 (2) SA 1136 (SCA), that practitioners keep the provisions of s 21A in mind not only at the stage of an application for leave to appeal but also thereafter (84G)”. Whilst this is a case in which the

provisions of s 21A were applied, it is important to examine the basis on which the Supreme Court of Appeal dismissed the appeal.

- [63] The respondent, George, had referred a decision by the appellant – refusing to accord her benefits of the house-owner allowance scheme – to the Industrial Court, in terms of s 18 of the Education Labour Relations Act 146 of 1993, for it to be declared an unfair labour practice. The industrial court found in the respondents’ favour, holding that the respondents’ refusal constituted an unfair labour practice. The appellant appealed to the Labour Appeal Court, which also dismissed the appeal but granted the appellant leave to appeal to the Supreme Court of Appeal, which is the decision in respect of which HOWIE, JA (as he then was) gave his judgment. Before the appeal was heard in the Supreme Court of the Appeal, the parties concluded a settlement agreement, which resulted in the respondent withdrawing her opposition to the appellant’s appeal before the SCA. By that time that the appeal was heard in the SCA, the agreement of the Council had already been published and the discrimination of which the respondent had complained had already been removed. The only issue remaining for decision was the question whether or not the appellant’s

conduct constituted an unfair labour practice. It was on that basis that the Court called upon the appellant's counsel to make submissions in respect of the provisions of s 21A.

- [64] The gravamen of the appellant's submissions, with regard to its continued pursuit of the appeal, in *George (supra)* was that it was essential to free the appellant of a stigma of having perpetrated an unfair labour practice. It was submitted that it was important for the Court to lay down a principle that, where, as was the case in that matter, negotiations were still in progress, it was legally inappropriate of an employee to take the issue before the Industrial Court for that Court to decide on it. Because the Education Labour Relations Act had already been repealed by the Labour Relations Act 66 of 1995, the SCA was of the view that the stigma feared by appellants was no longer justified. If anything, any would-be applicants for employment with the appellant would be encouraged by the change. They would, instead, be of the view that: "*The position is quite different now – equality has been achieved.*" Although the SCA held that: "*nothing demonstrates in this case that a finding that there was no unfair labour practice, whilst it might constitute subjective solatium for appellants, would bring about any objectively discernible practical advantages for them or*

*anyone else whether in the labour relations sphere or at all*", it significantly, for purposes of the present case, accepted that: *"To litigate with the motive to clear one's name is understandable (83H-I/J), even where the outcome of the judgment will have no practical effect on the relationship between the parties, except to reverse a costs decision by a lower court."* (Emphasis added)

[65] It is quite evident that, in determining whether the provisions of s 21A were applicable or not, the Court took with ... the public interest nature of the application as well as constitutional issues raised. Whilst, in accordance with the provisions of s 21A, the appeal failed, the application escaped costs on account of the stated nature of the application. The attitude of the SCA, with regard to the provisions of s 21A, is also discussed, later in my judgment, under topic on matters of great importance and the need to give guidance in respect of living ongoing relationships.

[66] Quite clearly, from the decisions I have cited and discussed above and others I have not discussed, the High Court also recognises and follows, in my view, the Constitutional Court's approach and that of the SCA concerning public interest litigants, with regard to costs related to such litigation. It is also in line with international trends in that regard.

[67] In my view, even if Monsanto, the fourth respondent, was the successful party, it ought, in the circumstances of this case to have been, denied its costs.

### **THE HIGH COURT**

[68] It is, in my view, evident from various decisions of the High Court of South Africa that that Court does not ordinarily mulct an applicant in a public interest matter with costs.

[ 69] There are numerous decisions cited in the appellant's heads of argument that I have not mentioned in my judgement, that are in support I have discussed or referred to in my judgement. It is, in

my view, not necessary for me to cite all of them. What is said in **The Institute for Democracy in South Africa vs African National Congress 2005 (5) SA 39©**, at paras [60]-[62], the judgment by GRIESEL, J, represents, in my view, sentiments expressed by the High Court in respect of public interest matters and those involving issues of constitutional importance. They are more about costs in public interest litigation than about s21A provisions. That was an application in which the applicant sought to gain access to records of donations, greater than R500 000.00, made to various political parties over a specified period. During his judgment, the learned Judge says the following in para [3], at 45E/F:

*“The three applicants bring the present proceedings in terms of s 38 of the Constitution on their own behalf: in the interest of all South African citizens; and in the public interest.”*

The professed aim of the application is stated as follows at para [1], at 45B-C/D:

*“[1] The professed aim of this application, as articulated by the applicants in their founding affidavit, is ‘to establish the principle that political parties, or at least those who hold seats in the national, provincial government legislatures, are obliged in terms of s 32(1) of the Constitution of the Republic of South Africa and s 11 of s 50 of the Promotion of Access to Information Act 2 of 2000 (PAIA), to disclose particulars of all the substantial donations they receive, on due and proper request for those particulars made by any other South African citizen’.”*

The learned judge came to the conclusion that “on [his] interpretation of existing legislation, the respondents are not obliged to disclose such records” (para [57], at 60E).

With regard to costs, GRIESEL, J writes as follows, at paras [60] and [61], 61E-G:

*“[60] The guiding principle in this regard appears to be that the question of costs in constitutional and public interest litigation remains a discretionary matter.*

However, parties who litigate to test the constitutionality of law or conduct usually seek to ventilate important issues relating to constitutional principle. Such persons should not be discouraged from doing so by running the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the petitioner.

[70] These principles have been applied uniformly where litigation is against an organ of State. The same principle apply in cases involving private litigants where a party litigates for public purposes and in the public interest.”

In making its order, the Court said the following:

“Order

[63] For the reasons set out above, the application is dismissed **no order is made as to costs.**” (Emphasis added).

[71] In *Nzimande v Nzimande and Another* 2005 (1) SA 83 (W), at para 75, the JAJBHAY, J recognises that where litigants seek to test the

*“implementation and application of a statute which has important socio-economic consequences ... [they] should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the applicant, provided that ‘the grounds of attack on the impugned statute are [not] frivolous or vexatious’ or a consequence of the litigant having ‘acted from improper motives or [because] there are other circumstances which make it in the interest of justice to direct such costs to be paid by the losing party’”,*  
(emphasis added).

#### **Environmental Litigation and Costs (and section 32 of NEMA)**

[69] The appellant’s heads of argument also list a number of cases relating to environmental issues, in which the same trend, with regard to public interest actions, has been followed.

[72] The appellant's reliance on this special category of cases is, no doubts, prompted, primarily, by the fact that the appellant, like the applicants in those cases, was preoccupied with environmental issues, in its application, where NEMA was the dominant Act. The principles enunciated in the cases cited by the appellant, in this regard, though they happen to refer to environmental litigation, are, in my view, no different from the general principles with regard to public interest litigation. Section 32(2) of the National Environmental Management Act, 107 of 1998 ("NEMA"), reads:

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

Cases involving environmental litigation include **Petro Props (Pty) Ltd v Barlow and Another 2006 (5) SA 160 (W)** at para [61]; **Silvermine Valley Coalition v Sybrand Van der Spey Boerdery and Others 2002 (1) SA 478 (C)**; **Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others 2005 (6) SA 123 (E)** – often referred to as the WESSA case – **Highchange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products, and Others 2004 (2) SA 393 (E)**.

[73] I shall discuss two of these cases. **Silvermine Valley Coalition** (*supra*) and **WESSA** (*supra*) are examples of where the exercise of the discretion, on the part of the Court, produced different results. In both cases, the Court was unhappy about the manner in which the application was brought before the Court. DAVIES, J said the following in that regard, in **Silvermine** (*supra*), at 493C-D/E:

*“The manner in which this case has come before this Court is unfortunate. Had the fourth respondent performed its environmental stewardship, it would not have been necessary for an NGO to have so acted. Unfortunately the manner in which the dispute was placed before this Court*

*leaves it with no other alternative than to rule on the basis of the relief sought. However, that does not mean that the Court should not exercise its discretion insofar as costs are concerned. In further the court of this particular conclusion it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in the manner designed to hold the State and indeed the private community accountable for the constitutional commitments of our new society, which includes the protection of the environments."*

The learned Judge concluded, at 493D, that:

*"... NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment,"* (emphasis added).

Although the application was dismissed, no order was made as to costs, save as to costs for an abortive urgent application brought

earlier by the applicant. Referring to costs of the two applications, the court said the following at 493E-F:

*“For this reason it will be an improper employment of the discretion of this Court in terms of s 32(2) of NEMA to award costs in favour of first respondent insofar as the application is concerned. The same unfortunately cannot be said of the premature and ill-advised application launched on 22 February where there was no reasonable justification for the urgency which was sought in that application before Josman, J.”*

[74] In **WESSA**, the applicant brought the application out of concern that the toxic levels of chemicals from a proposed construction of an incinerator being dangerously high. When the applicant eventually withdrew its application, the Court was called upon to decide the question of costs. It was submitted, on the respondent's behalf, that the ordinary common law principles concerning the awarding of costs should apply. **PICKERING, J** stated, at 131C, that that submission “loses sight of the **public interest and constitutional nature of the litigation** ... with the enactment of the Constitution, **the common law principles set out above are to**

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

The learned Judge referred to a large number of authorities, some of which have been discussed in this judgment, as well as in the majority judgment, with regard to costs in public interest litigation. He, nevertheless, in exercising his discretion in terms of s 32(2) of NEMA, awarded costs against the applicant, expressing himself as follows, at 144B, in that regard:

*“I am acutely aware of the above-named authorities as to the chilling effect of adverse costs orders in matters of this nature as well as the pertinent remarks of Davies J in the Silvermine case (supra). In my view, however, it would neither be fair nor in the interest of justice for the first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from inception.”*

**COMMENT ON SOME ASPECTS OF THE MAJORITY  
JUDGMENT**

[75] The majority judgment in the present appeal makes a comment with which I respectfully find myself in disagreement. It says, in para [33], at pages 56-57:

*“What is more, as counsel for Monsanto rightly submitted, is that section 21A of the Supreme Court Act 1969 does not bind the Constitutional Court, because the Constitutional Court does not hear appeals on costs orders. On this basis too, Sanderson is no authority for the proposition contended for.”*

I do not understand the significance of mentioning that the Constitutional Court does not hear appeals on costs orders as a way of explaining the **Sanderson** decision. In the first place, the Constitutional Court in **Sanderson, supra**, set aside the decision of the South-Eastern Cape Local Division, which had dismissed the appellant's application in that Court, which judgement had an adverse costs order against the appellant. As KRIEGLER, J puts it, the adverse costs order:

*“was in conformity with long a established practice in that Court, even in cases such as this, where the relief sought is tied up with a criminal case.”*

In the Constitutional Court, KRIEGLER, J said the following:

*“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 to costs should have been made against him even though the resort to the Constitution had failed and cited the judgment in this Court in *Motsepe v Commissioner for England Revenue [supra]* in support.”*

KRIEGLER, J then approved of the appellant’s reliance on *Motsepe (supra)*, (para [43], at 60B-D). What was said, thereafter, by KRIEGLER, J, in respect of costs, did not, in my view, negate the principle earlier stated about costs in cases of the nature of *Sanderson, supra* nothing was said to suggest that the constitutional court does not regard s 21 A a relevant consideration in matters before it, emanating from the lower courts.

[76] In any event, considerations of the provisions of s 21A part where a court of first instance has breached one or the other or both of the two basic principles in relation to the award of costs, the party against whom costs have been awarded is, on my interpretation of the authorities, entitled to appeal against such order, notwithstanding that such appeal is only in respect of costs. To use KRIEGLER, J's words, at para [44], 61B: "*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.*" The intervention of the Court of Appeal in the present case, is justified by, *inter alia*, the fact that the court *a quo* denied the appellant, the successful party, what would ordinarily be its costs against the statutory respondents, the unsuccessful parties.

[77] It can, in my view, be said without hesitation that there is a trend in the Constitutional Court's decisions that, like the instances I have mentioned in some international jurisdictions, ordinarily, protects public interest litigants from the risk of paying costs in the event of their actions being unsuccessful. Evidently, both the Constitutional Court, the SCA and the international jurisdictions I have referred to do not give parties an open ticket to litigate recklessly simply because they do so in what is ostensibly public

interest. In this regard, I am of the view that what was said in **Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (T) at 371E-F** is of general application, in all Courts. What RANCHOD, AJ said in that case is the following:

*“In the exercise of its (sic) discretion the courts have on occasion departed from the rule that the successful party should at all times be favoured with the costs order. Such a departure only occurs in exceptional circumstances. The major exception to the rule is one that deprives the successful party its costs. There is also a possibility that a successful party should pay the costs of the unsuccessful party. The latter is, however, extremely rare in practice whereas the former is not. ... In very special circumstances the successful party may be ordered to pay the costs of the unsuccessful party. An order to this effect is ‘very unusual (and) is very seldom given’. (See Cilliers Law of Court 3<sup>rd</sup> ed at 3.20.)”*

DUNN, AJ has, in my view, done exactly what is “very unusual”.

He has denied the successful party its costs, which is a possibility

... that, in exceptional circumstances, may, of course, happen. In

such a situation, the court of appeal, such as we are, is entitled to enquire as to the justification of such an order.

[78] In saying that there is no such “rule”, the majority judgment is, in my view, incorrect. Certainly, there is no inflexible rule. As already pointed out, ACKERMANN, J, in *Motsepe (supra)*, at para [30], cautioned against

*“awarding costs against litigants who seek to enforce their constitutional rights against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or ‘chilling’ effect on other potential litigants in this category”.*

In *Sanderson (supra)*, the remarks by ACKERMANN, J were endorsed, at para [44]. To the extent that KRIEGLER, J, in *Sanderson (supra)*, at para [43], 60E, referring to ACKERMANN, J’s, caution in *Motsepe (supra)*, said:

*“Ackermann J immediately proceeded to point out, however, that such an approach should not be allowed to develop into an inflexible rule”.*

he was not, in my view, warning against the acceptance of the existence of a "rule" which makes it free for litigants to challenge the unconstitutionality of statutory provisions where the merits of the approach to court are not "groundless". He was, instead, warning against a belief that such a rule is inflexible.

[79] The question as to why the Court *a quo*, in the present case, ordered costs against a successful party, the appellant, is, in my view, one of the issues for consideration. That relates to costs awarded against the appellant, in favour of the fourth respondent. The Court *a quo* found that the fourth respondent was successful in its opposition to the appellant's application. If, however, as is, in my view, the Court *a quo* in the present case was incorrect in finding that the appellant was the unsuccessful party, as against the fourth applicant, then the Court *a quo* has, in the words of the **Treatment Action Campaign** judgment, embarked on what is an "extremely rare practice", which calls for "very special circumstances" for an order of that nature to be given. It is simply "very unusual (and) is very seldom given".

[80] I find myself in respectful disagreement, once more, with the following, interpretation by the majority judgment, also in paragraph [33], at pages 55-56, of the decision in **Sanderson** (*supra*):

*“The Constitutional Court also set aside the High Court’s order as to costs. The reason for that was that litigation was ‘not a suit between private individuals’ but that it related directly to criminal proceedings where costs orders are not competent.”*

In saying that that was not a suit between “private” individuals. KRIEGLER, J was, in my view, emphasising that it was not an action with regard to public interest. That it related to “criminal proceedings”, was not, in my view, intended to confine the kind of relief that was ordered by the Constitutional Court. with regard to costs, to applications related to “criminal proceedings”. It was a statement of the facts of that case. As a matter of fact, the state had instituted criminal proceedings against the accused person, where “costs orders are not competent”. What is important, in my view, in the context of public interest litigation, is the fact that the applicant’s action against the state related to his “constitutional right”, which, because he was an accused person in that instance,

was in respect of "a fair trial". Had Mr Sanderson, for an example, unsuccessfully sued the state for damages arising out of what he genuinely believed was wrongful conduct, an assault on him by an employee of the state, during the course of employment of such employee, the mere fact that the defendant was the state would not have rendered Mr Sanderson's action a public interest claim.

[81] The following criticism of the appellant's submissions is made in the majority judgment, in paragraph 36:

*"The argument that Dunn AJ paid no, or insufficient, attention to the 'principle' or 'rule' or trend that costs are not normally awarded against an applicant who litigates in the public interest and with a view to protect the environment [this sentence is obviously incomplete], I have already pointed out that there is no such 'rule' and that it remains a matter for the exercise of the court's discretion"*  
 (emphasis added).

I have difficulty with this excerpt from the majority judgment, in that, in the very next sentence, the following is said:

*“In the present case it is clear that Dunn AJ was fully aware of the ‘rule’ or ‘principle’ or trend. In paragraph 15 of his judgment on the application for leave to appeal he mentioned that he was acquainted with the case law that Biowatch’s counsel had refer[ed] to because he himself was involved as counsel in **Democratic Alliance and Another v Masondo NO and Another [supra]**.”*

If, as is stated above, DUNN, AJ was aware of the “rule” or “principle” or “trend”, I do not understand why the majority judgment says “there is no such ‘rule’”.

[82] It appears to me that what is being criticised is the following submission in the appellant’s heads of argument:

*“11.1 In the notice of appeal, Biowatch takes issue with the decision on costs on the ground that ‘the learned judge misdirected himself ... in not giving new weight to the fact 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’.*

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

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

11.4 *It is clear, however, that the courts have consistently recognised that the ordinary principles in relation to costs should not be applied in public interest litigation" (reference to authorities has been omitted).*

The submission in paragraph of the appellant's heads of argument 11.4, to the extent that it says "the ordinary principles should not

be applied”, is, in my view, overstated. The appellant’s heads of argument, themselves, repeatedly refer to authorities to that effect. For instance, they emphasise what is said in **Institute for Democracy in South Africa** (*supra*), at para [60], that: “*The guiding principle in this regard appears to be that the question of costs in constitutional and public interest litigation remains a discretionary matter*” (emphasis added).

[83] I also have difficulty with the following further statement in the majority judgment, in respect of the **Sanderson** decision:

*“Kriegler J. who gave the judgment of the court, was also of the view, at 61A-B of the Board, that the appellant’s complaint ‘was a genuine complaint on a point of substance and should therefore not have been visited with the sanction of a costs order’ (para [33], page 56, emphasis added.)*

Whilst this is a correct statement of what Kriegler, J said, I understand the majority judgment to be using that statement as a basis for distinguishing the facts of the Sanderson decision from

those of the Biowatch case. That, in my view, cannot be a correct basis for distinguishing the two cases. From my understanding of the judgment of the Court *a quo*, there has not been the slightest suggestion by Dunn, AJ that Biowatch's complaint was not genuine. There would not, otherwise, have been a judgment in Biowatch's favour, on the merits, against the statutory respondents. It follows, from what I have said, that I disagree with the following passage in the majority judgment, also in para [33], page 56:

*"Counsel for Biowatch relied heavily on this [Sanderson] decision and contended that it provides proof of the basic principle that a court should ordinarily not make a costs order against the losing party which seeks to enforce or establish an important constitutional point or principle. I think that counsel reads more into the decision than is justified. What is of decisive importance in that matter was that the litigation related directly to criminal proceedings which the state initiates. The case is therefore not direct authority for the proposition contended for by Biowatch's counsel."* (Emphasis added)

My reasons for disagreeing are contained in what I have already stated earlier on, with regard to the **Sanderson** decision. The appellant's reliance on the Sanderson decision is, in my view, justified.

[84] Another aspect that has not been mentioned by counsel in their respective submissions, at all the stages of this case, by the Court *a quo* in respect of both judgments and by the majority judgment is what appears to me to be an anomaly, viz., that the first and fourth respondents seemingly did not communicate about the appellant's request. There is no doubt in my mind that, if they had so communicated the fourth respondent would have conveyed to the first respondent the perceived threat by the appellant's request to all or some of the fourth respondent's confidential information in the custody of the first respondent. It would then have been the easiest thing to do, in my view, for the first respondent to convey to the appellant such information. Such communication would have enabled the first respondent to inform the appellant of the fourth respondent's rights and concerns. If the appellant had heeded such concerns, it would not have been necessary for the fourth respondent to join as a party in the application. In that event, what is stated by the Court *a quo*, in para [43] of the

judgment, at 657 line 16 – 658 line 8 would have applied equally to such information. What the Court *a quo* says in that regard is the following:

*“But what is important about the Registrar’s viewpoint is this, namely, that if he had any doubt about the nature and/or validity of Biowatch’s request he was, in my view, enjoined to establish precisely what it was seeking and to assist it in its endeavours to achieve that. The Registrar was not entitled to adopt a passive role in that regard. If, after having engaged Biowatch, he had any doubt about the **bona fides of its request** and that he genuinely opined that it was **vexatious and oppressive or unintelligible** he could and he should have refused it on that ground. The fact that he did not do so is rather significant” (emphasis added)*

The Registrar (the first respondent) was, in my view, similarly not entitled to adopt a passive role with regard to what must have been known to him to be the fourth respondent’s rights and interests that needed protection. It is, in my view, highly unlikely that the first respondent did not inform the fourth respondent that the appellant was requesting information related to the fourth respondent’s activities, and