


/SG  
 IN THE HIGH COURT OF SOUTH AFRICA  
 (TRANSVAAL PROVINCIAL DIVISION)

DATE:

CASE NO: A831/2005

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <del>YES</del> /NO.	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO.	
(3) REVISED.	
14 June 2007 DATE	 SIGNATURE

In the matter between:

THE TRUSTEES FOR THE TIME  
 BEING OF THE BIOWATCH TRUST

APPELLANTS

And

THE REGISTRAR, GENETIC  
 RESOURCES

1<sup>ST</sup> RESPONDENT

THE EXECUTIVE COUNCIL FOR  
 GENETICALLY MODIFIED  
 ORGANISMS

2<sup>ND</sup> RESPONDENT

THE MINISTER FOR AGRICULTURE

3<sup>RD</sup> RESPONDENT

MONSANTO SOUTH AFRICA (PTY) LTD

4<sup>TH</sup> RESPONDENT

STONEVILLE PEDIGREED SEED  
 COMPANY

5<sup>TH</sup> RESPONDENT

D &amp; PLSA SOUTH AFRICA INC

6<sup>TH</sup> RESPONDENT

THE OPEN DEMOCRACY ADVICE  
 CENTRE

AMICUS CURIAE

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JUDGMENT

MYNHARDT, JIntroduction

1. This is an appeal against a costs order only. The appellant ("Biowatch") applied on notice of motion in the court *a quo* for an order directing the first to third respondents ("the statutory respondents") to provide it with certain information. The application was opposed by the first to third respondents. The fourth, fifth and sixth respondents were granted leave to intervene as respondents. They also opposed the application. The *amicus curiae* was also granted leave to take part in the proceedings.
2. The court *a quo*, per DUNN AJ, ordered the statutory respondents to provide access to the appellant to certain records, registers and documents under their control. The access which was granted to the appellant was, however, not unrestricted. In terms of the court's order the appellant can not gain access to documents etcetera, or parts thereof, in respect of which access can be refused in terms of Chapter 4 of Part 2 of the Promotion of Access to Information Act, 2000, 2 of 2000 ("PAIA").

3. In regard to costs the court *a quo* ordered the appellant to pay the fourth respondent's ("Monsanto") costs. No other order as to costs was made.
4. The appellant feels aggrieved about the fact that the court *a quo* had not granted a costs order in its favour against the statutory respondents and, also, about the fact that it was ordered to pay Monsanto's costs.
5. The appeal is before this court with the leave of the court *a quo*.
6. The appeal was opposed by the statutory respondents and by Monsanto. The fifth and sixth respondents in the court *a quo* and the *Amicus Curiae* did not take part in the proceedings in this court.
7. The appellant did not file the record of appeal timeously in terms of the rules of court. It applied for condonation thereof. That application was not opposed. An acceptable explanation for the non-compliance with the rules of court was furnished. The application will, therefore, be granted. All three parties were

agreed that the costs of the application should be costs in the appeal. Such an order will, therefore, be made.

The salient facts

8. Biowatch is a trust which is registered with the Master of the High Court at Cape Town. In terms of clause 5 of the trust deed its primary object is "to engage in and promote nature conservation activities".

In the founding affidavit Biowatch was described as "a national non-governmental organisation ("NGO") that acts in the public interest".

It takes a keen interest in what has been described as "the wide spread commercialisation of genetically modified organisms ("GMOs") in South Africa and the absence of civil society involvement in the determination of policy and law regulating their use, control and release. Biowatch can therefore be seen as a watchdog which keeps an eye on the experimentation with, use, control and release of GMOs to ensure that the rights of the people of South Africa to an environment that is not harmful to their health or well-being and to have the environment protected for the

benefit of future generations through legislative and other means, is not being infringed.”

Although it was disputed on the papers that Biowatch was acting in the public interest, I am prepared to accept, as did the court *a quo*, that it acted indeed in the public interest in instituting the proceedings in the court *a quo*.

9. The statutory respondents are functionaries under the Genetically Modified Organisms Act 1998, 15 of 1998 (“the GMO Act”).

The first respondent administers the GMO Act and may also exercise powers and functions assigned to him by the second respondent.

The second respondent has an advisory function in terms of the GMO Act and advises the first respondent on all aspects relating to GMOs. It is also vested with certain powers and duties under section 18 of the GMO Act relating to the disclosure of information which is not of a confidential nature.

The third respondent is, of course, in control of the Department of Agriculture in whose possession the information relating to GMOs is. In the answering affidavit the point *in limine* was raised that it was a misjoinder to have joined the third respondent as a respondent. That point was not upheld by the court *a quo*. It is, therefore, of no relevance in the appeal.

10. The fourth respondent, Monsanto, is described in the papers as “a diversified biotechnology company which is involved, *inter alia*, in the research, development and sale of genetically modified organisms in South Africa”. It is further stated that “Monsanto is ...one of the leading participants in the South African GMO industry”. The extent of Monsanto’s participation in the aforesaid industry is evidenced by the fact that “at least 23 GMO permits have been issued to Monsanto (by the statutory respondents) since January 2000”.

In its papers Monsanto claimed that its confidential information which it has furnished to the first and second respondents, is protected against disclosure to Biowatch in terms of, firstly, section 18 of the GMO Act and, secondly, sections 36, 37 and 43(1) of PAIA and, lastly, section 36 of the Constitution of 1996.

The court *a quo* found that Monsanto's confidential information is indeed protected by Chapter 4 of Part 2 of PAIA and that the first and second respondents could withhold information from Biowatch on any of the grounds of refusal of information specified in that chapter.

11. In the light of the fact that the fifth and sixth respondents did not take part in the proceedings in this court, I do not deem it necessary, or relevant, to refer to their role in the proceedings in the court *a quo*.
12. At the time that Biowatch launched the application on 22 August 2002, PAIA was already promulgated and had become of force and effect. It became of force and effect, generally speaking, on 9 March 2001.

Biowatch had, however, requested the information which it sought from the first and second respondents, during the year 2000 and February 2001. At that stage PAIA was not yet in operation.

The court *a quo* found that Chapter 4 of Part 2 of PAIA had retrospective effect and that the first and second respondents could rely thereon to refuse to disclose any of Monsanto's confidential information to Biowatch. That finding of the court *a quo* must be accepted as correct by this court for purposes hereof as there is no appeal against that finding.

13. In terms of prayer 1 of the notice of motion Biowatch's request for the information it sought was formulated in a rather unorthodox manner. The information sought was described as that appearing in four letters which were addressed to the statutory respondents and copies of which were annexed to the founding affidavit. It was further stated in the prayer that "insofar as such information has already been provided" in two letters which were addressed to Biowatch by the first respondent, that information need not be furnished. Copies of these two letters were also annexed to the founding affidavit.

At least Monsanto, in its papers, complained about the manner and format of the request for information as described in the notice of motion. Its main complaint was that there was an overlap between the different requests for the information and that Biowatch had

not properly defined the information that is sought so that it, Monsanto, was not able to identify precisely what information was sought by Biowatch. In paragraph 35 of Monsanto's answering affidavit, for instance, it was alleged that "the categories of information listed in that annexure (annexure EPS9, the fourth request) are defined in such broad and vague terms that it is impossible for Monsanto to determine precisely what they are intended to include". That complaint was repeated in paragraphs 60 and 72 of Monsanto's answering affidavit.

The court *a quo* eventually found that it was unnecessary for Biowatch to have included the first, second and third requests in prayer 1 of the notice of motion. In regard to the first request the court found that Biowatch had been furnished with the information sought therein by the time that the application was launched and that reference to that letter "can and should, therefore, be ignored". The court further found that the first and second respondents had not satisfactorily responded to Biowatch's request contained in its second letter but that that request for information was repeated in Biowatch's fourth letter or request. It was therefore also unnecessary to have included the second request in the notice of motion.

In regard to the third request for information DUNN AJ found that there were four deficiencies in the first respondent's response to it. Despite that the learned acting judge found that it was "also entirely unnecessary for Biowatch to have referred to its third request in the notice of motion since all the information sought by it is adequately catered for in its fourth request".

In regard to the fourth request, or letter, the court *a quo* found that Biowatch was entitled to access to the information sought therein except for four items mentioned in the judgment. Biowatch's access was, as I have already mentioned, restricted because the statutory respondents could refuse access to information on any of the grounds justifying refusal of access to information which are specified in Chapter 4 of Part 2 of PAIA.

The court *a quo*'s reasons for the costs order that it made

14. In his judgment DUNN AJ dealt very cryptically with the issue of costs. His reasons are to be found in paragraph 68 of his written judgment which reads as follows:

"[68] As far as costs are concerned, the general rule in litigation is that the costs should follow the result. However, although Biowatch has been partially successful in obtaining some of the relief sought, the manner in which some of its requests for information were formulated, as well as the manner in which the relief claimed in the notice of motion was formulated, has convinced me that it should not be granted a costs order in his favour in these circumstances. Furthermore, the approach adopted by it compelled Monsanto, Stoneville and D & PLSA to come to court to protect their interests. The issues were complex and the arguments presented by them were of great assistance. Stoneville and D & PLSA did not seek any costs order against the applicant. On behalf of Monsanto its counsel sought an order for costs against the applicant. In my view the applicant should be ordered to pay Monsanto's costs. No other order as to costs is warranted in the circumstances of this case."

15. Later, in his judgment on the application for leave to appeal, the learned acting judge said that Biowatch had achieved substantial

success against the statutory respondents. He also stated that he considered Monsanto to have achieved substantial success “because it all along contended that Biowatch did not have open sesame to such information and that its rights of access was subject to the provisions of PAIA and, at the very least, also subject to the limitations contained in the Genetically Modified Organisms Act, 1997 (Act 15 of 1997)”.

The contentions of the parties

16. Biowatch contended on appeal, broadly summarised, that the provisions of section 21A of the Supreme Court Act, 1959, 59 of 1959, do not stand in the way of its appeal and that this court can, and should, determine the issue of costs. It further contended that DUNN AJ had, in any event, misdirected himself in a number of respects and that this court is therefore entitled, and obliged, to determine the issue of costs afresh.

In the event of it succeeding on appeal, Biowatch does not seek a costs order in respect of the appeal. In the event of it being unsuccessful in the appeal, Biowatch has requested this court to make no order as to costs. The basis for this request was that Biowatch has been acting and litigating in the public interest and

that the litigation relates to important constitutional issues or principles.

Biowatch submitted that this court should uphold the appeal and that the costs order of the court *a quo* should be replaced with an order as follows:

"The first and third respondents are ordered to pay the applicant's costs; save as aforesaid, no other order as to costs is made."

The effect of such an order would, of course, be that Biowatch is afforded its costs as against the statutory respondents and that Monsanto will have to pay its own costs.

17. The statutory respondents and Monsanto contended, broadly summarised, that the court *a quo* had committed no misdirections and that no ground exists, therefore, for interfering with the discretion that was exercised by DUNN AJ. The appeal should, therefore, be dismissed pursuant to section 21A of the Supreme Court Act, 1959.

Both the statutory respondents and Monsanto asked for costs to be awarded against Biowatch in the event of the appeal being dismissed.

### Discussion

#### Section 21A of Act 59 of 1959

18. The first issue that needs to be discussed is the applicability or otherwise of section 21A of the Supreme Court Act, 1959 to the present case. The section reads as follows:

“(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(2)

(a) If at any time prior to the hearing of an appeal the Chief Justice or the Judge President, as the case may be, is *prima facie* of the view that it would be

appropriate to dismiss the appeal on the grounds set out in subsection (1), he or she shall call for written representations from the respective parties as to why the appeal should not be so dismissed.

- (b) Upon receipt of the written representations or, failing which, at the expiry of the time determined for their lodging, the matter shall be referred by the Chief Justice or by the Judge President, as the case may be, to three judges of the Division concerned for their consideration.
- (c) The judges considering the matter may order that the question whether the appeal should be dismissed on the grounds set out in subsection (1) be argued before them at the place and time appointed, and may, whether or not they have so ordered -

- (i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representation; or
  - (ii) order that the appeal proceed in the ordinary course.
- (3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.
- (4) The provisions of subsections (2) and (3) shall apply with the necessary changes if a petition referred to in section 21(3) is considered."

The section has an effect even at the stage when a litigant applies for leave to appeal.

In *Logistic Technologies (Pty) Ltd v Coetzee and Others* 1998 3 SA 1071 (W) (“the *Logistic Technologies* case”) CLOETE J, as he then was, held at 1075D-F of the report that the section “enables an appeal Court to dismiss an appeal which is directed solely at a costs order, for this reason alone. The appeal Court is not obliged to do so – the word ‘may’ in ss (1) confers a discretion; but the emphasis has changed ...”

At 1075G of the report the learned judge said that the present position is that “save in exceptional circumstances, consideration of costs is to be left out of account”.

At 1075I-J of the report the learned judge held that the result of the amendment to the section, which was effected in 1996, was “that unless an applicant for leave to appeal against a costs order only can satisfy the Court *a quo* that an appeal Court may reasonably find that exceptional circumstances exist, leave to appeal should be refused; and in determining this question, the approach laid down by the Appellate Division in such matters remains relevant in that a

failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance – but conversely, the mere fact that an appeal Court might, or even probably would, give a different order, would not”.

The purpose of the section is clearly to discourage appeals against costs orders only.

Until now there have been a number of cases where the courts have applied the provisions of the section and where appeals were dismissed because the issues have become moot and the judgment of the court of appeal would have had no practical effect or result. One such an example is the judgment in *Western Cape Education Department and Another v George* 1998 3 SA 77 (SCA) where, at 84G of the report, the court also reiterated the warning which was sounded earlier “that practitioners keep the provisions of s21A in mind not only at the stage of an application for leave to appeal but also thereafter”.

In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another*, 2005 1 SA 47 (SCA) the court also found that the issue between the parties had become

moot. There was, therefore, no purpose in persisting in the appeal. There were also no exceptional circumstances which would have justified the court of appeal to hear and determine the appeal. The appeal was accordingly dismissed in terms of section 21A.

*In Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 4 SA 506 (SCA) MPATI DP, who delivered the judgment of the court, said at 511C-D of the report, that “the section confers a discretion on this Court ... Where, for example, questions of law which are likely to arise frequently are at issue a court of appeal may hear the merits of the appeal and pronounce upon it.” In that matter the interpretation and application of a statute was an issue. That was a question of law which, in the opinion of the learned Deputy President, was likely to arise frequently. The court therefore exercised its discretion in favour of the appellants and considered the merits of the appeal.

19. In the present case this court is not called upon to consider the merits of the case in order to establish whether the judgment of DUNN AJ is right or wrong. There is no appeal against that part of the judgment. The appeal is directed, as I have indicated, solely against that part of the judgment that deals with costs. The

question is, therefore, whether there are exceptional circumstances, or any other reason, why this court should not apply section 21A and dismiss the appeal for that reason alone.

20. Counsel for Biowatch, Mr Moultrie, urged us not to dismiss the appeal pursuant to section 21A but to consider the appeal and to overturn the order of costs that was made by DUNN AJ. Counsel made the following submissions in this regard:

- (i) The costs order made by DUNN AJ involves a departure from a well established rule that costs follow the result. Section 21A does not automatically mean that the appeal should be refused on that basis;
- (ii) Insofar as section 21A makes an appeal on costs only impossible, or virtually impossible, the section is unconstitutional and in breach of the right of access to the courts in terms of section 34 of the Constitution of the Republic of South Africa, 1996;
- (iii) In terms of section 21A (2)(c)(i) the three judges who consider the matter prior to the hearing of the appeal, may

dismiss the appeal "with or without an order as to the costs incurred in any of the courts below";

- (iv) The question whether section 21A applies is a different one from the question whether or not a court of appeal can interfere in a costs order made by a lower court;
- (v) Biowatch, in any event, contends that there are special circumstances present in the instant matter which would justify this court to interfere with the costs order of DUNN AJ.

I now turn to discuss these submissions.

Ad (i)

Counsel relied on the judgment of SCOTT JA in *Naylor and Another v Jansen; Jansen v Naylor and Others* 2006 3 SA 546 (SCA) as authority for the proposition.

In that matter the Supreme Court of Appeal reduced the trial court's award of damages for defamation from R30 000.00 to R15 000.00. The defamation appeal was, save for this aspect,

dismissed. The plaintiff, Mr Jansen, had also sought, and obtained, an order for the arrest of the defendant, Mr Naylor, who was a peregrine of this country, prior to the institution of the defamation action. The trial judge ordered Mr Jansen to pay the costs of that application. The plaintiff appealed against that order to the Supreme Court of Appeal. SCOTT JA referred to this appeal as "the costs appeal".

The defendant's counsel in the costs appeal argued that the appeal should be dismissed in terms of section 21A of the Supreme Court Act 1959. SCOTT JA did not agree. At 558D-E of the report the learned Judge of Appeal said the following:

"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 to always been regarded as a substantive right enjoyed by an *incola*."

Later in his judgment, at 561C-F of the report, the learned Judge of Appeal held that the plaintiff "was entitled as of right to an order

for the arrest of *Naylor* to confirm jurisdiction” and that he had followed a well established practice in seeking the order on an *ex parte* basis. The trial judge had therefore “misdirected himself in his approach to the question of costs” according to SCOTT JA.

The *Naylor* case is therefore no authority for the proposition advanced by Biowatch’s counsel. If anything, it is authority for the proposition that a misdirection on the part of the trial judge constitutes “exceptional circumstances” which would justify a court of appeal to consider an appeal against a costs order only.

Ad (ii)

There is, in my view, no merit in this submission. The courts have held, time and time again, that the purpose of the section is to discourage appeals against costs orders only and to alleviate the workload of, especially, the Supreme Court of Appeal. See, eg the *Radio Pretoria* case at 50A-B, 55H-I and 56G-J.

The purpose of the section is, in my view, a legitimate one and to the extent that it limits the rights of a litigant to have recourse to a higher court, it is certainly not unconstitutional.

Ad (iii)

Counsel submitted that section 21A (2)(c)(i) shows that it is possible for a court to consider the costs order of a lower court despite the fact that the issues between the parties have become moot.

In this regard counsel relied on *Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en Andere* 2001 2 SA 806 (SCA) as an example that would support his submission.

In my view it is strictly speaking not necessary for this court to express any view on the meaning of the subsection relied on by counsel. The present case certainly does not fall under the subsection that counsel relied on; it is governed by subsections (1) and (3) of section 21A.

In any event, I should, however, mention that in the *Oudebaaskraal* matter the Supreme Court of Appeal found, at 812E of the report, that there were exceptional circumstances which justified the court to consider the issue of costs in the context of determining whether or not its judgment would have any practical effect or result if the appeal should succeed.

I cannot, therefore, accept counsel's submission.

Ad (iv)

In terms of the section a court of appeal will only consider an appeal against a costs order in a case like the present, where the appeal is against a costs order only, if there are exceptional circumstances present. If not, the appeal is doomed to failure. That much, I think, appears from the judgment of SCOTT JA in the *Naylor* case and the judgment of STREICHER JA in the *Oudebaaskraal* matter. Once it is found that exceptional circumstances exist, because, for instance, the trial judge had misdirected himself, as was found in *Naylor*, a court of appeal will be entitled to interfere in the order that was made by a trial court. In that sense then, the question whether exceptional circumstances exist is not different from the question whether or not a court of appeal is entitled to interfere with a costs order.

This approach was also adopted by CLOETE JA in *Naylor and Another v Jansen* 2007 1 SA 16 (SCA) [*"Naylor (2)"*].

At 22B-F of the report (paragraph 10 of the judgment) the learned Judge of Appeal said the following in response to an argument that the appeal, against a costs order, should be dismissed because of the provisions of section 21A.

“I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee and Others* to express the view that a failure to exercise a judicial discretion would (at least, usually) constitute an exceptional circumstance. I still adhere to that view – for, if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order simply because an appeal would be concerned only with costs; and that, obviously, cannot be the effect of the section.”

Inasmuch as a failure to exercise a judicial discretion, caused, for instance, by a misdirection on the part of the trial judge, would constitute exceptional circumstances in terms of section 21A, and a court of appeal would then be free to interfere with the costs order granted by the trial judge, it is clear that the question under

section 21A is no different from the question whether a court of appeal can interfere with a costs order granted by a trial judge.

I shall presently discuss the submissions of counsel for Biowatch about the applicability of the so-called traditional test that would justify inference with a costs order that was made by a lower court. It will then become clear, I believe, why counsel argued for a different test to be applied under section 21A.

Ad (v)

The special circumstances that Biowatch relied on are the following:

- (a) Misdirections on the part of the court *a quo*;
- (b) The parties have incurred costs and expenses for the purposes of the appeal, and have briefed counsel to argue the appeal;
- (c) The Constitutional Court has not yet spoken finally on the question to what extent public interest litigation is, or ought to be, taken into account as a factor;

(d) This court would not be giving a mere advisory opinion if the appeal is heard;

(e) The appeal is before this court with the leave of the court *a quo*;

In my view it is only circumstance (a) which has the potential of constituting exceptional circumstances. If the court *a quo* had misdirected itself, then it would not have exercised a judicial discretion. It follows, logically, that in such an event the order of this court, if the appeal is upheld, will have a practical effect or result.

I am not impressed with the other circumstances relied on by counsel. In regard to the costs and expenses that were incurred, the present case, like the *Radio Pretoria* case, is not comparable to the *Oudebaaskraal* case.

I shall, in what follows, confine myself to the misdirections, or other grounds relied on, for the contention that the order and

reasoning of DUNN AJ is flawed and that this court should correct it.

The "traditional" test for interference with costs orders on appeal

21. Counsel for Biowatch argued that the "traditional" test for interference with costs orders, as has been recently been formulated by the Supreme Court of Appeal per CLOETE JA, in *Naylor (2)*, applies only where a court has followed the ordinary rule that a successful litigant should get his costs. Where, however, a trial judge does not apply the ordinary rule, and deprives the successful party of his/her costs, a court of appeal will ordinarily interfere and apply its own judgment as to whether or not there are any grounds to depart from the general rule. Therefore, submitted counsel, would it be necessary in the present case to enquire which party was successful or substantially successful. That party, submitted counsel, should have been awarded its costs in accordance with the general rule that costs follow the result. On that basis, submitted counsel, should Biowatch have been awarded its costs against the statutory respondents and DUNN AJ erred in making the order that he did make.