

Because other considerations also come into play, according to counsel, in regard to the costs order in favour of Monsanto ("the second costs order"), I shall later deal with counsel's submissions in regard to that order.

Counsel relied on *Merber v Merber* 1948 1 SA 446 (A) 452/3 as authority for the proposition contended for. In that part of his judgment GREENBERG JA said the following:

"In *Fripp v Gibbon and Company* (1913 AD 354), Lord DE VILLIERS CJ, said (at p 357):

'In appeals upon questions of costs two general principles should be observed. The first is that the Court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general

principle that to the successful party should be awarded his costs.'

In the present case the appellant, in order to succeed, must show that the Court *a quo*, in awarding the successful party his costs, failed to exercise a judicial discretion. It has repeatedly been said in our courts that an appeal tribunal will not readily interfere with an exercise of discretion by the Court *a quo* in awarding costs ...

In *Ritter v Godfrey* (1920, 2 KB 47) the Master of the Rolls said:

'The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial and this Court cannot interfere with his discretion.'

I presume that 'any grounds' mean any grounds on which a reasonable person could come to the conclusion arrived at. This passage was cited with approval by the *House of Lords* in *Donald Campbell and Co v Pollak* (1927, AC 732) by the Lord Chancellor (at pp 809 and 811) and by Lord ATKINSON (at p 814). In *Penny v Walker* (*supra*) this Court, in laying down what was meant by a judicial discretion referred to p 60 of the report of *Ritter v Godfrey* (*supra*). What ATKIN, LJ there said was:

'In the case of a wholly successful defendant, in my opinion, the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.'

The learned LORD JUSTICE was dealing with a case where the successful defendant had been deprived of his costs in

the Trial Court and not with a case where he had been granted his costs. What I have quoted does not therefore mean that in the instances mentioned, the successful party must necessarily be deprived of his costs but that it is only in these instances, which are commented upon at p 61 of the report, that the court is entitled to deprive him of his costs.

It seems therefore that, when a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule and if there are no such grounds, then ordinarily it will interfere. But when, as in the present case, the general rule has been followed, then the appellant must first show that there were grounds for departing from the rule and, if there are such grounds, that the trial Judge, in refusing to depart from the rule, has either fail to take such grounds into consideration or has acted arbitrarily in not giving effect to them by depriving the successful party of his costs. In either of these events the appeal court would be free to exercise its own discretion. The mere fact that the appeal court would have given more weight to the grounds

does not mean that the judge has acted arbitrarily, ie not with a judicial discretion.”

I think that at least three comments should be made about counsel's argument. The first is that a judge has a wide unfettered discretion to make a costs order after he/she had taken into account all the relevant factors or circumstances in the case. There is no “normal rule” or “general rule”. That was made clear by CLOETE JA in *Naylor (2)* at 23D-G and at 28D-F. This is a longstanding principle. In *Rondalia Assurance Corporation of SA Ltd v Page and Others* 1975 1 SA 708 (A) HOLMES JA, at 720C-D of the report, formulated this principle as follows:

“A Court making an order as to costs has a discretion, to be exercised judicially on a consideration of all the facts; and in essence it is a matter of fairness to both sides. The power of interference on appeal is therefore limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question; see *Blou v Lampert and Chipkin NNO and Others* 1973 1 SA 1 (AD) at p 15E-H.”

The second comment is that the power of the court of appeal to interfere with a costs order of a lower court does not depend on the question whether or not the court *a quo* had followed the "normal rule" to award cost to the successful party. If the successful party had been deprived of his/her costs by the lower court, the principle upon which a court of appeal will approach the matter remains the same. There is no talk, in such a case, of "ordinarily" interfering as opposed to interfering on rather narrow grounds in the case where a successful party has been awarded his/her costs. Counsel's argument is, therefore, wrong.

In *Naylor* (2) CLOETE JA explained why a court of appeal will only interfere with a costs order that was made by a lower court, under certain circumstances. The reason is simply, as was explained at 23F-24D of the report, that the lower court exercises a "strong or true" discretion and because of that a court of appeal can only interfere if the court *a quo* had not exercised its discretion judicially. That that did not happen, said CLOETE JA "can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons".

In this context it also has to be borne in mind, as explained by CLOETE JA in *Naylor* (2) at 28F-G of the report, "that the exercise of a narrow discretion necessarily involves a 'choice between permissible alternatives', and, accordingly, 'different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts'".

The third comment to be made is that in *Naylor* (2) the Supreme Court of Appeal was dealing with a matter where the court *a quo* had indeed not followed the "normal" or "general" rule and deviated therefrom. Despite that the Supreme Court of Appeal reaffirmed the principle set out above and did not approach the matter on the basis that it would "ordinarily interfere" as counsel for Biowatch would have it. The *Merber* case is therefore no authority for the proposition contended for by counsel for Biowatch. That is borne out by the fact that GREENBERG JA said that before a court of appeal would interfere with a costs order of a lower court, a court of appeal will enquire whether there were any grounds for the departure from the general rule and, if there are no such grounds, then "ordinarily it will interfere." It is therefore not a question of "ordinarily" interfering with the

exercise of the trial judge's discretion. Interference with the exercise of his/her discretion by a trial judge will only occur if there are acceptable reasons or grounds therefor.

22. The reasoning of CLOETE JA in *Naylor* (2) that a court of appeal will only interfere in certain circumstances with the exercise by a lower court of its "strong or true" discretion, which "is a discretion in the strict or narrow sense" according to the learned judge of appeal at 24B of the report, was affirmed as correct by the Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 1 SA 523 (CC) ("the SABC case"). At 540G (paragraph 39) the majority of the learned justices said the following:

"Where the discretion is a discretion in the strict sense, in that the Court had a range of legal choices open to it, an appellate Court will ordinarily interfere with the exercise of that discretion only in narrow circumstances."

In paragraph (40) of the majority judgment, at 541C of the report, the learned justices said that they are persuaded that the constitutional court should interfere only in narrow circumstances

with the exercise by the Supreme Court of Appeal of its discretion in terms of section 173 of the Constitution of 1996 not to permit live coverage by the SABC of the proceedings in the court at the hearing of the appeal. That meant that the power of the Constitutional Court to interfere was circumscribed and that that court could only interfere, as it was put in paragraph (41) of the judgment, at 541H-542A of the report, namely:

“Therefore the question for this Court is not whether we would have permitted radio and television broadcasting of the appeal in the circumstances of this case, but whether the Supreme Court of Appeal did not act judicially in exercising its s 173 discretion, or based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts. As CLOETE J formulated the test more laconically in *Bookworks*, the question is whether the Court committed some ‘demonstrable blunder’ or reached an ‘unjustifiable conclusion’.” (Footnotes have been omitted.)

23. It follows from all this that unless Biowatch can persuade this court that DUNN AJ had committed some “demonstrable blunder” or reached an “unjustifiable conclusion” this court has, firstly, no

power to interfere with the order that the learned acting judge made, and secondly, that no "exceptional circumstances" exist in terms of section 21A (3) of the Supreme Court Act, 1959, and that the appeal will have to be dismissed.

The grounds relied on by Biowatch for interference with the order of the court *a quo*

24. In regard to the first and second costs orders, ie the fact that Biowatch was not awarded costs against the statutory respondents and that costs were awarded in favour of Monsanto, counsel for Biowatch argued that DUNN AJ had acted capriciously in basing the orders on the manner in which the relief was formulated. In paragraph 13 of this judgment I have already dealt with the unorthodox manner in which Biowatch had applied for the information it sought.
25. In his judgment on costs, mentioned in paragraph 14 above, DUNN AJ criticised Biowatch for having adopted this unorthodox manner in requesting the advice it sought.

In his judgment on the application for leave to appeal the learned acting judge again referred to this aspect. In paragraph 11(c) of his

judgment on that application, the learned acting judge dealt with the submissions of Biowatch's counsel as to why a costs order should have been made in Biowatch's favour, at least against the statutory respondents. In essence it was argued that Biowatch was the successful party and should have been awarded its costs. DUNN AJ already held in paragraph 7 of that judgment that Biowatch had achieved substantial success against the statutory respondents. The learned acting judge then dealt specifically with the manner in which the relief was framed. In paragraph 12 of his judgment he mentioned "the lackadaisical approach" which Biowatch had adopted and "which showed that it expected the respondents and the court, as it were, to trawl through its various requests for information to find out precisely what information Biowatch wanted and in what form it sought such requests".

The learned acting judge continued to refer to some of the submissions of counsel at the hearing of the matter. Counsel called the request a "fishing expedition" and submitted that they were "catch all requests" which "were clearly vexatious and oppressive". There was "certainly substance in these submissions" or labels, said DUNN AJ.

I agree wholeheartedly with the standpoint of DUNN AJ. There is certainly no room, in my view, for the accusation that DUNN AJ had acted capriciously in relying on this ground for depriving Biowatch of its costs against the statutory respondents.

Biowatch's counsel practically reargued this particular ground on which DUNN AJ relied, before this court. I do not think that it would serve any purpose to traverse the issue again. In my view DUNN AJ in essence disapproved of the manner in which the relief was formulated in the four letters written by Biowatch, and in the notice of motion, which was never amended, and decided to deprive Biowatch of its costs against the statutory respondents as a mark of his disapproval of the conduct of Biowatch. In my view the learned acting judge was entitled to do that and I can find no fault with his decision.

26. In regard to Monsanto the court *a quo* of course also relied on the manner in which the relief was formulated. In addition to that the court also relied on the fact that Monsanto was compelled to come to court to protect its interests. In his judgment on the application for leave to appeal the learned acting judge further said, as I have mentioned in paragraph 15 hereof, that Monsanto had achieved

substantial success in obtaining an order that its confidential information be protected.

It was argued on behalf of Biowatch before this court that DUNN AJ had erred in this respect and that he ought to have found that Biowatch was the successful party. Monsanto was not even substantially successful submitted counsel.

In regard to both the grounds mentioned by DUNN AJ counsel for Biowatch submitted that he had misdirected himself.

As far as the issue of confidentiality of some of Monsanto's information that was supplied by it to the statutory respondents are concerned, counsel for Biowatch argued that Monsanto had not even achieved substantial success. Counsel's argument can be summarised as follows: Biowatch sought information from the statutory respondents, the only limitation to what it was entitled to was to be found in the provisions of section 36 of the Constitution of 1996 read with section 18 of the GMO Act; at an early stage of the proceedings Biowatch conceded that some measure of protection should be afforded to Monsanto and that attitude of

Biowatch is also evidenced in the draft orders that were handed to the court *a quo*.

In regard to the fact that Monsanto was compelled to come to court to protect its interests counsel for Biowatch submitted that DUNN AJ had also misdirected himself in making that finding. Monsanto could have taken a different approach, submitted counsel. It could, for instance have co-operated with Biowatch to refine the information sought by Biowatch and it could have relied on the statutory respondents to protect its interest.

27. It is clear from the papers that a fundamental dispute existed between Biowatch and Monsanto about the applicability of PAIA to the information sought by Biowatch. Monsanto was of the view that PAIA applied and that Biowatch should be non-suited because it had not complied with that Act. Biowatch, on the other hand, was of the view that PAIA is irrelevant. In the end the court *a quo* found that Monsanto was entitled to the protection afforded by Chapter 4 of Part 2 of PAIA.

In paragraphs 63, 64, 65, 66 and 67 of its answering affidavit Monsanto specifically invoked the provisions of section 18 of the

GMO Act and of Chapter 4 of Part 2 of PAIA and of section 36 of the Constitution in its quest to protect its confidential information.

In its replying affidavit Biowatch disputed Monsanto's allegations that it had furnished confidential, or commercially sensitive, information to any of the statutory respondents. Biowatch also disputed that Monsanto was entitled to rely on the statutory provisions mentioned by Monsanto in its affidavit.

I am not persuaded by the argument advanced by counsel for Biowatch that DUNN AJ was wrong in finding that Monsanto was substantially successful in obtaining an order protecting its confidential information. In my view Monsanto's counsel's argument that "Monsanto had won hands down" is correct as far as the issue relating to confidential information and its protection is concerned.

Biowatch is not assisted in any way by its reliance on the concession relied on by counsel and the draft orders that were handed to the court *a quo* during the course of the proceedings. DUNN AJ said that those orders did not reflect what was agreed upon between the parties. In any event, Biowatch never

abandoned any of the relief that it sought in the notice of motion, which was never amended. The draft orders were merely proposals that were made to the court *a quo* and cannot be invoked by Biowatch to show that the court *a quo* was wrong in finding that Monsanto was substantially successful.

28. I also agree with the court *a quo* that Monsanto was compelled to come to court in order to protect its interest. I do not, therefore, agree with Biowatch's counsel's submission that DUNN AJ had misdirected himself in this respect and that Monsanto should have been ordered to pay its own costs.

Counsel submitted, broadly summarised, that Monsanto did not engage any of the other parties and indicated to them which documents it regarded as being confidential and which documents Biowatch could have access to; that there was no duty on Biowatch to have approached Monsanto in advance in order to ascertain whether it was amenable to the order that Biowatch sought; that Monsanto could have relied on the statutory respondents who would have done their best to protect Monsanto's interest.

There is, in my view, no merit in any of these submissions. Biowatch did not join Monsanto as a party to the litigation. In paragraphs 14 and 15 of their answering affidavit the statutory respondents raised the point *in limine* that the order sought by Biowatch will affect the interests of, *inter alia*, Monsanto, an institution of which Biowatch was aware and which was known to it. This issue of non-joinder was eventually never decided upon because Monsanto joined the proceedings of its own accord. I think that the point of non-joinder was well taken. Monsanto clearly had an interest in the matter and Biowatch should have joined it initially. If regard is had to the opposing views held by Biowatch and Monsanto about the confidentiality of Monsanto's information, I do not think that it could reasonably have been expected of Monsanto at any stage of the proceedings to have engaged either the statutory respondents or Biowatch to assist any of them in identifying the information it claimed to be confidential. Monsanto was entitled, in my view, to expect Biowatch to show that it was entitled to the information that it sought. Counsel's submission, in my view, puts the cart before the horse; it claims not to have been under any obligation to approach Monsanto and

yet it expects Monsanto to have assisted it to identify confidential information. It was Biowatch who instituted the proceedings and it

was obliged, in my view, to persuade the court that it was entitled to the relief that it sought despite the objections raised by, in particular, Monsanto.

The argument that Monsanto could, and should have relied on the statutory respondents to protect its confidential information is equally without merit.

It is true, as was submitted by counsel, that the statutory respondents were obliged to protect the confidentiality of Monsanto's information which was furnished to them by Monsanto. It does not, however, follow from that that Monsanto can be expected to rely exclusively on the statutory respondents to protect its confidential information. In my view Monsanto, because of its interest in its confidential information, eg its trade secrets, had the right to join in the litigation in order to put its views before the court. It would have been grossly unreasonable to expect Monsanto to rely exclusively on the statutory respondents.

In any event, it is not clear to me on the papers as they stand, how it would have been possible for the statutory respondents to adequately identify precisely what information of Monsanto can be

classified as confidential so that the court could determine the issue. The statutory respondents would have had to obtain the necessary assistance from Monsanto. That reinforces the view that Monsanto was entitled to take part in the litigation.

Public interest litigation

29. Biowatch approached the court *a quo* on the basis that it was entitled to the information sought by virtue of the provisions of section 32 of the Constitution of 1996 and section 31 of the National Environmental Management Act, 1998, 107 of 1998 ("NEMA").

The reason why reliance was placed on section 32 of the Constitution was that PAIA was not yet of any force or effect at the time when the request for the information was made. Section 32 of the Constitution provides that everyone has the right of access to any information held by the state and any information that is held by another person and that it is required for the exercise or protection of any rights.

Section 31 of NEMA, insofar as it is relevant to the present matter, reads as follows:

"(1) Access to information held by the State is governed by the statute contemplated under section 32(2) of the Constitution: Provided that pending the promulgation of such statute, the following provisions shall apply:

- (a) every person is entitled to have access to information held by the State and organs of state which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances;
- (b) ...
- (c) a request for information contemplated in paragraph (a) can be refused only;

- (i) if the request is manifestly unreasonable or formulated in too general a manner;
- (ii) ...
- (iii) for the reasonable protection of commercially confidential information;
- (iv) ...
- (v) for the reasonable protection of personal privacy."

The court *a quo* rightly held that section 31(1) of NEMA ceased to apply, in its own terms, the moment that PAIA was promulgated. It was also of the opinion that "The attempt by Biowatch to rely on section 31 of NEMA in the present application was in any event misplaced"

Accepting, however, for present purposes, that Biowatch was entitled to rely on the section, I think that Monsanto's counsel's submission that Biowatch's request for information could have

been refused on the mere basis that it was "manifestly unreasonable or formulated in too general a manner" as provided in subparagraph (c)(i) of subsection (1), is correct. In this regard it is relevant to bear in mind that the court *a quo* had found that there was merit in the submission that the manner in which the request was formulated was vexatious.

30. Counsel for Biowatch contended that there is a definite trend in the judgments delivered by the Constitutional Court and the other courts of this country, not to make costs orders in matters in which a party seeks to establish an important constitutional principle or in matters where the protection of the environment is relevant. Counsel submitted further that the court *a quo* failed to have regard to this trend and in so doing misdirected itself because it failed to take relevant considerations into account. Had it not misdirected itself, submitted counsel, it would not have ordered Biowatch to pay Monsanto's costs; it would have made no order as to costs.
31. In support of his argument counsel also relied on section 32(2) of NEMA which reads as follows:

“(2) A court may decide not to award costs against a person who, or group of persons which, fails 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.”

Counsel for Monsanto pointed out, rightly in my view, that Biowatch had certainly not made “due efforts to use other means reasonably available for obtaining the relief sought”. Biowatch could, for instance, have made use of the internal appeal procedure provided for in section 19 of the GMO Act but it did not. On that basis alone, submitted counsel, could the court *a quo* have ordered Biowatch to pay Monsanto’s costs. That would have been a

justifiable ground not to exercise its discretion under section 32(2) of NEMA in Biowatch's favour. I agree with that submission.

32. For Biowatch to succeed on the main ground on which it relies for persuading this court that the court *a quo* had misdirected itself and that the second costs order should be set aside, Biowatch will have to show that the court *a quo* had committed a "demonstrable blunder" or that it had reached an "unjustifiable conclusion" to use the terminology of the majority judgment in the SABC case.
33. It can be accepted as correct that the Constitutional Court tends not to make costs orders in matters that come before it. The reason for this appears from paragraph 36 of the judgment of MOHAMED DP in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of certain provisions of the Gauteng School Education Bill of 1995*, 1996 3 SA 165 (CC) 182F-183C. The learned Deputy President furnished the following reason:

"A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons 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 petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.”

The cautious approach of the Constitutional Court is, however, merely a trend and not a rule. That was made clear by ACKERMANN J in *Motsepe v Commissioner for Inland Revenue* 1997 2 SA 898 (CC) 911E-G (par 30) where the learned justice said the following:

“[30] Mrs Motsepe did not seek an order for costs. The Commissioner, however, requested the Court to grant an order for costs, including the costs attendant upon the employment of three counsel, in the event of the