

referral being rejected or the sections in question not being held to be unconstitutional. In my view, one should be cautious in awarding costs against litigants who seek to enforce their constitutional right 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. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks."

In *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) the appellant applied to the High Court for a stay of the prosecution because of the unreasonable delay in finalising the proceedings. The High Court dismissed the application with costs.

An appeal to the constitutional court against the dismissal of the application was unsuccessful. The constitutional court also set aside the High Court's order as to costs. The reason for that was that the litigation was "not a suit between private individuals" but that it related directly to criminal proceedings where costs orders are not competent. KRIEGLER J, who delivered the judgment of the court, was also of the view, at 61A-B of the report, 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".

Counsel for Biowatch relied heavily on this 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 who seeks to enforce or establish an important constitutional point or principle.

I think that counsel read more into the decision than is justified. What was 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. What is more,

as counsel for Monsanto rightly submitted, is that section 21A of the Supreme Court Act 1959 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.

In the SABC case the Constitutional Court ordered the losing party, the SABC, to pay the costs of the respondents, except "the NDPP who litigates on behalf of the public" in the constitutional court itself. It also left the costs order that was made against the SABC in the Supreme Court of Appeal, undisturbed. This case shows, indisputably, that the making of a costs order against a losing party still remains a matter of discretion, even in the Constitutional Court, despite the fact that an important constitutional principle is involved.

34. Counsel for Biowatch contended that the High Courts follow the same trend as the Constitutional Court in matters in which aspects of public interest is involved. I accept that as correct. See *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 5 SA 39 (C) 61D-62B (pars 60-62); *Nzimande v Nzimande and Another* 2005 1 SA 83 (W) 107C-F.

35. Counsel for Biowatch also contended that section 32(2) of NEMA applies to the present case. Counsel is wrong. In this regard I refer to what the court *a quo* had held about the applicability of section 31 of NEMA, to which I referred in paragraph 29 hereinbefore, and to what I had said about section 32(2) of NEMA in paragraph 31 hereof.

Accepting, however, for argument's sake, that Biowatch could have relied on section 32(2) of NEMA, it is clear that our courts have held time and again that a court retains its discretion in regard to the making of costs orders in cases where a litigant litigates with a view to protect the environment.

*In Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 1 SA 478 (C) 491H-I DAVIS J said the following about the effect of section 32(2) of NEMA:

"This section confers a discretion on the Court with regard to costs. Even without this section, costs would be in the Court's discretion but the judicial exercise of the Court's ordinary discretion of costs is now made subject to certain

further guiding principles contained in the legislation. Section 32(2) frees the Court from the fetter of ordinary principles on the basis of compliance with certain conditions."

At 493C-E of the report the learned judge commented on the facts and circumstances that led to the litigation and motivated his conclusion that the applicant, who lost, should not be ordered to pay costs, as follows:

"The manner in which this case has come before this Court is unfortunate. Had fourth respondent performed its environmental stewardship, it would not have been necessary for an NGO to have so acted. Unfortunately the manner in which this dispute has been 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 support of this particular conclusion it seems to me 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.

For this reason it would 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."

In that matter it was also found by the learned judge, at 492J-493A of the report, that the applicant was "justified in taking the view that fourth respondent had not enforced the environmental laws as it was so mandated". The applicant had therefore acted in the public interest and "after a failure on the part of the authorities to protect the precious environment within the Cape Peninsula". (At 493B of the report.)

There were, therefore, weighty considerations in that case which counted in favour of the applicant and which militated against a costs order in favour of the respondents although the applicant had lost the case.

If, however, there are circumstances present in a case which would justify an adverse costs order against an unsuccessful litigant in this type of litigation, a court is fully entitled, in the exercise of its discretion, and despite the provisions of section 32(2) of NEMA, to make a costs order against an unsuccessful applicant. An example of such a case is *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 6 SA 123 (FCD) ("the WESSA case").

The applicant in that matter launched an application to review the second respondent's decision to grant to the third respondent permission to construct an incinerator. The applicant's fears about the levels of the toxic chemicals that would be present in the waste to be incinerated were later abated. Eventually the applicant withdrew the application. The court had to decide the question of costs.

The court found that the applicant had ignored the alarm bells that lined the road to litigation and that the applicant's conduct in launching the application was, objectively viewed, not reasonable. The fact that the applicant had acted out of the best of motives and

out of a very real concern for the environment and in the public interest, did not outweigh the fact that the application was unnecessary.

In the course of his judgment in the case PICKERING J referred to a large number of cases, including some of those that I have referred to, which dealt with the question of costs in public interest litigation. At 144A-B the learned judge expressed his conclusion and motivation for making a costs order against the applicant, as follows:

"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 of the pertinent remarks of DAVIS J in the *Silvermine* case (*supra*). In my view, however, it would neither be fair nor in the interests of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from its inception."

36. The question that has to be answered in the present case still remains. Did DUNN AJ commit a demonstrable blunder in ordering the applicant to pay Monsanto's costs?

On behalf of Biowatch it was contended, as I have already mentioned, that Biowatch was substantially successful and not Monsanto. I have already dealt with that argument. There is no merit in the argument.

In regard to the manner in which the relief was formulated and the court *a quo*'s disapproval thereof, I also deem it unnecessary to add anything to what I have already said about this.

In regard to 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, 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.

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 referred to because he himself was involved as counsel in *Democratic Alliance and Another v Masondo NO and Another* 2003 2 SA 413 (CC). In that case, incidentally, the constitutional court dismissed the appeal and ordered each party to pay its own costs in that court because "The issues at stake are important matters of public interest affecting local government structures throughout the Republic". The adverse costs order against the appellants in the High Court, where they also lost, was, however, left undisturbed by the Constitutional Court.

It was further argued that DUNN AJ had indicated to counsel during the course of argument of the application for leave to appeal that he had treated the applicant as an ordinary litigant and that that shows that he had failed to take into account that the litigation was so-called public interest litigation.

This argument must be seen in the proper context of what occurred during the argument stage of the application for leave to appeal. Towards the end of his argument counsel for Biowatch referred to an affidavit that was filed by Biowatch after DUNN AJ had handed

down his judgment. This affidavit dealt with the consequences of the costs order, according to counsel. Counsel submitted that DUNN AJ should admit the affidavit because it deals with the effect of the costs order on Biowatch. One of the misdirections relied on by counsel for Biowatch in respect of the costs order in Monsanto's favour was "the chilling effect that the order would have ...".

Counsel for the statutory respondents objected to the affidavit being put before the court *a quo*. The following discussion then took place between DUNN AJ and counsel for the statutory respondents:

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

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

COURT: But that is something that I did not take into account? I must say, you know, at face value I treated the applicant as a normal litigant. Is that wrong or should I have considered that this is an NGO and that it has to have, you know, search for funding ... (intervene)

MR RIP: Well, M'Lord, it was never raised on the papers, so your Lordship must exercise your judicial discretion on the facts before your Lordship. The fact that they are acting in the public interest was known and it was stated on the papers and your Lordship was aware of that and said so, in your judgment when you set out the history of the matter and the position of Biowatch, who they are and what they are attempting to achieve. So, your Lordship was aware of what Biowatch was and what Biowatch was trying to achieve and the purpose of a sort of watchdog tag that they gave themselves and the position that they had assumed, ..."

Counsel for Monsanto aligned himself with the argument of counsel for the statutory respondents that Biowatch can not be heard to say at that late stage of the proceedings that it never contemplated being deprived of costs and being faced with an adverse costs order. Counsel then made further submissions about, what he called, "the poverty defence" that was now being put before the court.

In his reply counsel for Biowatch once again made submissions to the court *a quo* about, what he called, "the poverty debate" in respect of which the supplementary affidavit of Biowatch was put before the court *a quo*.

In the event the court *a quo* did not rule on the admissibility or otherwise of the affidavit. In his judgment on the application for leave to appeal DUNN AJ also did not deal with this particular aspect.

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 costs order against a NGO might have “a chilling effect” that is something that is common knowledge. In the WESSA case 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 poverty debate” and the fact that Biowatch’s impecuniosity was not taken into account in its favour certainly does not mean that Biowatch has succeeded in showing that the court *a quo* had committed a demonstrable blunder.

During the course of the argument of counsel for the statutory respondents DUNN AJ also posed the question whether he had not treated the fact that Biowatch was forced to come to court by the statutory respondents to protect its constitutional rights, “too lightly”. He also posed the question whether he was “not wrong in not awarding them costs against the state?”.

These questions relate to the correctness or otherwise of the first costs order. They do not relate to the second costs order. It cannot therefore be argued by Biowatch that those questions show that the

court *a quo* had committed a demonstrable blunder in making a costs order in favour of Monsanto. This is further underscored by the fact that Biowatch's counsel conceded during his argument in the application for leave to appeal, that Monsanto was, at least in respect of one argument that it raised in its endeavours to protect its interests, successful because the court had upheld that argument. Counsel then went on to submit that Monsanto was unsuccessful in several other respects.

By making that concession counsel in effect conceded that there were grounds upon which a reasonable court could have made the costs order which the court *a quo* did make. That being so, there is all the more reason not to interfere with the exercise by the court *a quo* of its discretion.

### Conclusion

37. In my view Biowatch has not succeeded in showing that the court *a quo* had not exercised its discretion judicially in making the two costs orders. It follows, therefore, that the appeal falls to be dismissed.

Costs of appeal

38. Counsel for both the statutory respondents and Monsanto asked for costs orders against Biowatch in the event of the appeal being dismissed.

In my view there is no reason why this court should not accede to those requests.

Order

The following order is made:

1. The application for condonation of the late filing of the record of appeal, is granted;
2. The appeal is dismissed;
3. The appellant is ordered to pay the costs of the first, second, third and fourth respondents which costs will include the costs of the application for condonation of the late filing by the appellant of the record of appeal.



S J MYNHARDT  
JUDGE OF THE HIGH COURT

I agree

J M N POSWA  
JUDGE OF THE HIGH COURT

I agree



L M MOLOPA  
JUDGE OF THE HIGH COURT

A831/2005

Heard on:

23 April 2007

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Instructed by:

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Date of Judgment: