

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

CASE NO. A831/05

In the matter between -

THE TRUSTEES FOR THE TIME BEING OF  
THE BOWWATCH TRUST

Appellants  
(Applicants *a quo*)

and

THE REGISTRAR, GENETIC RESOURCES

First Respondent

THE EXECUTIVE COUNCIL FOR  
GENETICALLY MODIFIED ORGANISMS

Second Respondent

THE MINISTER FOR AGRICULTURE

Third Respondent

MONSANTO SOUTH AFRICA (PTY) LTD

Fourth Respondent

STONEVILLE PEDIGREED SEED COMPANY D

Fifth Respondent

& PL SA SOUTH AFRICA INC THE OPEN

Sixth Respondent

DEMOCRACY ADVICE CENTRE

Seventh Respondent

---

#### FOURTH RESPONDENT (MONSANTO) 'S HEADS OF ARGUMENT

##### 1. INTRODUCTION - THE CONTEXT IN WHICH THE ORDERS APPEALED AGAINST WERE MADE

1.1 The appellants ("Biowatch") filed comprehensive written argument, spanning 90 pages. The fourth respondent

("Monsanto") will in these heads endeavour fully to address the relevant contentions advanced by Biowatch, whilst seeking to limit undue elaboration, mindful of the dictates of Rule 49(15).

1.2 Biowatch launched an application in which it sought access to information from the first three respondents (whom Biowatch has called "the statutory respondents" in its heads of argument). This information included information that Monsanto had supplied to the statutory respondents under the statutory obligations imposed by the Genetically Modified Organisms Act 15 of 1997 ("the GMO Act").

1.3 The application for information demanded "the information requested in" and then listed four annexures to the founding affidavit, "save insofar as such information has already been provided in" and then listed two other annexures to the founding affidavit.<sup>1</sup>

1.4 The annexures listed in the notice of motion as containing the demanded information comprised portions of a series of correspondence between Biowatch and the statutory respondents, containing argument, general questions, references to categories of information, questions and statements not specifically concerned with the existence of

<sup>1</sup> Notice of Motion par. 1, RI-2. Reference to pages in the appeal record will be designated as "R2" referring to "Record page 2".

information, references to earlier discussions and requests not

contained in the annexures, and the like.<sup>2</sup>

1.5 To identify the information claimed in the application, it was necessary to read all the correspondence of which the listed annexures formed part, cull from them identifiable requests for identifiably specified information, read the two documents of correspondence comprised by annexures EPS8(4)<sup>3</sup> and EPS8(6)<sup>4</sup>, cull from the latter correspondence identifiable items of information supplied in them, match these items with the identifiable requests culled from the annexures reflecting the information demanded in the notice of motion, determine in respect of each such match which portion of supplied information sufficiently provided the information requested, identify what information was yielded by such exercise as that still "outstanding", and thereby identify the information demanded in the notice of motion.

1.6 The court a quo observed of this manner of proceeding:

"[Biowatch's] approach seems to have been to expect the respondents and the court to read through all the

<sup>2</sup> Annexure EPS8(1), R161; EPS8(2) R162-3; EPS8(5), R167-168; annexure EPS9, R190-193.

<sup>3</sup> RI 65-166.

<sup>4</sup>R169-170.

correspondence and to divine precisely what information is requested and what outstanding;"<sup>5</sup> and

"I specifically invited attention to the lackadaisical approach Biowatch adopted, 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".<sup>6</sup>

1.7 The court found that there was "certainly substance" in the submissions that this manner of proceeding was "clearly vexatious and oppressive" and amounted to a "fishing expedition".<sup>7</sup>

1.8 Biowatch did not join Monsanto as a respondent in its application, despite the fact that, in what it has called the "second request" in its heads of argument, Biowatch referred to risk assessments done on products of Monsanto identifying Monsanto by name, namely "Monsanto Bt Cotton" and "Monsanto BT Maize".<sup>8</sup>

<sup>5</sup> Judgement paragraph 42, R656.

<sup>6</sup> Judgment on leave to appeal, par. 12, R736.

<sup>7</sup> Judgment par. 42, R655-656.

<sup>8</sup> RI 62 lines 30-31.

1.9 Monsanto's concern that the application swept up in its wide ambit information commercially confidential to Monsanto, and harmful to its interests if made available without protection, compelled it to intervene in the proceedings, as no allowance whatsoever was made in the application for respecting confidentiality or excluding information that was confidential. These concerns were articulated in the answering affidavit filed by Monsanto, in particular the problem associated with knowing which of Monsanto's confidential information might be affected by the vague, incoherent and broad sweep of the demand in the notice of motion.<sup>9</sup>

1.10 Biowatch replied by denying that its relief was in any way inappropriately framed<sup>10</sup> and relying on a demand that had been sent by Biowatch to Monsanto to provide an inventory of all documents in possession of the statutory respondents furnished by Monsanto, and to identify in them which documents contained confidential information, as if this demand for comprehensive discovery on the part of Monsanto would in some sense alleviate the burden created by the impossible terms in which Biowatch deemed it fit to seek relief.<sup>11</sup> Significantly, however, the replying affidavit acknowledged that the "bulk" of Monsanto's answer was concerned with protecting

<sup>9</sup> AA pars. 36-49, R281-286; pars. 51-52, R286-287; par. 53, R287, par. 54, R287-8; par. 55, R288; and par. 57, R289-90.

<sup>10</sup> RA par. 6, R311.

<sup>11</sup> RA par. 6, R312, with reference to annexures comprising the responses received from Monsanto in correspondence.

commercially sensitive information,<sup>12</sup> and then "as a departure point" the deponent stated that she "disputed] the alleged commercial sensitivity of the information sought", advancing several grounds for this dispute.<sup>13</sup>

- 1.11 Ultimately, after a hearing during and after which various contending draft orders were bandied about (upon which Biowatch places heavy reliance in its heads of argument, something to be considered below), an order was made that differed vastly, in substance and in form, from the relief that had been sought by Biowatch, and that afforded protection to Monsanto's confidential information.<sup>14</sup> As stated by the court a quo in the judgement on leave to appeal:

"the difference between the relief initially sought and the relief granted is obvious. First, the information to which access was granted is fully specified in the order and, secondly, the right of access to such information is also specifically limited so as to entitle the Registrar, the Council and the Minister to invoke in appropriate circumstances the provisions of Chapter 4 of Part 2 of the Promotion of Access to Information Act 2000 (Act 2 of 2000)("PAIA").

<sup>12</sup>RApar.23,R316.

<sup>13</sup>RA par. 24, R317-321.

<sup>14</sup>Order as discussed and contained in judgment pars. 67 to 69, R668 to 673.

1.12 The court made no order as to costs as between Biowatch and the statutory respondents, and, as to the *Us* between Biowatch and Monsanto, ordered Biowatch to pay Monsanto's costs, as the approach adopted by Biowatch (discussed above) compelled Monsanto to come to court to protect its interests.<sup>15</sup>

1.13 Biowatch appeals against these costs orders only. In its written argument, Biowatch refers to the absence of any costs award as between itself and the statutory respondents as "the first costs order" and the award to Monsanto of its costs as "the second costs order". Monsanto addresses only the appeal against "second costs order", being the order to which its interests relate.

2. APPEALS AGAINST COSTS ONLY - THE LEGAL FRAMEWORK AND THE PROPER APPROACH

2.1 It is now beyond room for dispute that appeals that are directed against costs awards only are governed by the provisions of s21A of the Supreme Court Act 59 of 1959. These appeals are not only subject to the section; they are governed by the section. This starting principle of the applicable legal framework is entirely ignored by Biowatch.

<sup>15</sup> Judgment paragraph 68, R669; order (d) R673.

however, submitted that s21A governs the applicable approach a court must follow when confronted with such an appeal. It is this approach, and engagement with the relevant and pertinent case law in question, that is absent from Biowatch's argument.

- 2.5 The test to be applied under section 21 A, with respect to appeals against costs awards only, has been authoritatively laid out and applied in *Logistics Technologies, Universal Storage Systems and Naylor and Another v Jansen* 2007 (1) SA 16 (SCA), which contains the most recent and authoritative exposition of the law, particularly at paragraph [14].
- 2.6 The first vital point to note is that the test whether the court of appeal should interfere with the costs award made a quo does not differ under section 21A depending on whether the "normal rule" was applied (i.e. that costs follow success, or any other "normal rule" as to costs) or whether the "normal rule" was not applied a quo.
- 2.7 This is necessary to emphasize and to be elaborated given the argument advanced by Biowatch that the extremely high standard of deference entailed by the test applicable to appeals against costs awards does not apply when the costs award at issue was a departure from the "normal rule" that costs follow success.

2.8 This contention on the part of Biowatch finds no support at all in the cases expounding the appropriate tests under s21A, nor does the authority on which reliance is placed for the proposition itself support it.

2.9 Biowatch bases its contention on two foundations:

2.9.1 an interpretation of the decision in *Merber v Mer/ber* 1948 (1) SA 446 (A); and

2.9.2 the notion that it was held in *Naylor and Another v Jansen*; *Jansen v Naylor and Others* 2006 (3) SA 546 (SCA) ("*Naylor 1*")

2.9.2.1 that whenever there is a departure from a well-established practice, this would warrant interference on appeal with a costs award a quo; and

2.9.2.2 that a departure from the "normal rule" of having costs follow success would entail precisely such a departure from a well-established practice.

- 2.10 Both above propositions, and both premises of the second supposition, are clearly incorrect.
- 2.11 First, the attempt to reinterpret the decision in *Merber v Merber* 1948 (1) SA 446 (A), as "on a close examination" having in fact laid down a rule that "the traditional test for interference with a costs order on appeal only applies where the court a quo has exercised its discretion not to apply the ordinary rule that a successful litigant should be awarded his costs" (heads par. 6.6), is based on a startling misreading of the relevant passage in *Merber*. The passage is quoted at p22 of the heads as supposed support for the notion that, "[w]here, however, the court *a quo* does not apply the ordinary rule, then 'ordinarily it will interfere' (heads par. 7.3), and that this means the court of appeal would then immediately 'apply its own judgment as to whether there are any grounds to depart from the general rule' (par. 7.4.2).
- 2.12 This reading entirely ignores the important qualification in the very sentence a portion of which Biowatch invokes. The sentence reads "[w]hen 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*".

2.13 It needs no belabouring that an inquiry "whether there were any *grounds for a decision*" is a strikingly different inquiry from one whether the decision was correct. When one considers that Greenberg JA in *Merber* helpfully clarified "I presume that 'any grounds' mean any grounds on which a reasonable person could come to the conclusion arrived at" (at 453), a passage cited in *Logistics Technologies* at 1074B, then it is clear that the contentions advanced in support of a different test as applicable when the impugned costs award entails awarding them against the substantially successful party, and particularly that this entails mere substitution of the discretion of the appeal court for that of the trial court, cannot be taken seriously.

2.14 As to the second proposition (the reliance on *Naylor 1* and the two premises comprising this proposition), the following:

2.14.1 First, *Naylor 1* did not hold a departure from a well-established practice by itself to have constituted an exceptional circumstance allowing the court on appeal to entertain the appeal. It held:

"...[t]he 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

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

2.14.2 It was this inroad into the substantive right of an *incola* that amounted to a fundamental misdirection such as would vitiate the exercise of a strong discretion, rendering it exercised upon a wrong principle (see the finding at pars. [30] and [31] of *A/ay/or 1*).

2.14.3 Secondly, and quite fundamentally, The reason why there were exceptional circumstances in *A/ay/or 1* had nothing to do with the mere exercise of a discretion not to award the "usual" cost order in favour of the successful party. At issue was the right of an *incola* to confirm jurisdiction by arrest of the person of a *peregrinus*, and a cost order that, despite this, the *incola* should pay the costs of the arrest application as a request to submission to the court's jurisdiction would have been accepted. The deviation in question differed *toto caelo* from the court's well-recognised discretion not to award costs to the successful party, the exercise of which can hardly be regarded as "a departure from a practice that is well established", let alone an "inroad into what has hitherto always been regarded as a substantive right enjoyed by an *incola*." Indeed, ordering costs against the successful

*party when circumstances are thought to warrant it is itself a "well-established practice".*

2.15 *The best illustration that the mere fact that a costs award departed from the "default" position does not create a different test on appeal is the decision in "A/ay/or 2" (2007 (1) SA 16 (SCA)). In this case, what was at issue was the operation of the principle, enshrined in Uniform Rule 34, that a successful plaintiff whose judgment does not beat a tender made by the unsuccessful defendant usually pays the costs of the defendant from the date the adequate tender was made. This principle has greater claim to being regarded as a "rule" than the default position of awarding costs upon success (so much so that the SCA in Way/or 2 cited cases that had wrongly held the principle to constitute a rule from which deviation was not allowed save under certain jurisdictional facts<sup>17</sup>). Despite this, and despite the fact that the court a quo had self-avowedly deviated from this "rule" and had awarded the relevant costs to the plaintiff whose judgment was beaten by the tender, the SCA made it clear that the test for interfering with a costs award under s21A remained that recognised in Logistics Technologies, namely whether any grounds existed upon which a reasonable court could have exercised its discretion in that way. There was no hint of a suggestion that the mere fact that the default rule of thumb had*

<sup>17</sup> See *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) and *Mdlalose v Road Accident Fund* 2000 (4) SA 876 (N).

not been followed allowed the appeal court to substitute its own discretion. Quite to the contrary, in the following passage<sup>18</sup> that neatly encapsulates the tests to be applied in the instant appeal and therefore deserves full quotation, the following was held:

"Ordinarily the purpose behind Rule 34 would cause the Judge to order the defendant to pay the plaintiffs costs incurred up to the date of the offer, and the plaintiff to pay the defendant's costs thereafter. That does not mean, however, that there is a 'rule'<sup>1</sup> to this effect, from which departure is only justified in the case of 'special circumstances', as suggested in *Van Rensburg v AA Mutual Insurance Co Ltd* and *Mdlalose v Road Accident Fund*. All it means is that the exercise of the Court's discretion as to costs in this way would usually be proper and unimpeachable, and failure to do so would, if unjustifiable, amount to a misdirection. But it needs to be emphasised, as the proviso to Rule 34(12) makes clear, that the Rule does not dictate this result, even provisionally. Where the law has given a Judge an unfettered discretion, it is not for this Court to lay down rules which, while purporting to guide the Judge, will have the effect only of fettering the discretion. If, therefore, there are factors which the trial Court, in the exercise of its discretion, can and legitimately does decide to take into account so as to reach a different result, a Court on appeal is not entitled to interfere - even although it may or even probably would have given a different order. The reason is that the discretion exercised by the Court's giving the order is not a 'broad' discretion (or a 'discretion in the wide sense' or a 'discretion loosely so called') which obliges the Court of first instance to have regard to a number of features in coming to its conclusion, and where a Court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the Court below, simply because it considers its conclusion more appropriate. The discretion is a discretion in the strict or narrow sense (also called a 'strong' or a 'true'<sup>1</sup> discretion). In such a case, the power to interfere on appeal is limited to cases in which it is found that the Court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the Court of first instance

<sup>1</sup> Paragraph 14, footnotes omitted.

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. Put differently, an appeal Court will Interfere with the exercise of such a discretion only where it is shown that

'... the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.

2.16 The following quotation from A/ay/or 2<sup>19</sup> also addresses Biowatch's argument so appositely as to warrant reproduction here:

The second main attack on the judgment was in regard to its overall effect. The first of two arguments in this regard was succinctly thus stated in the heads of argument:

'[The trial Judge] declined to apply the normal rule. Instead, he formulated a new rule and a new set of principles' [and] his findings constitute radical departures from existing law.'

This argument is misplaced. It ignores the nature of the discretion vested in a trial Judge when it comes to deciding on an appropriate award of costs. As I have already pointed out, there is no "normal rule"<sup>1</sup>. Nor did the trial Judge formulate a 'new rule'. Nowhere did the trial Judge suggest that the approach which he followed was the only approach which could legitimately be followed, or that it should be followed in similar matters. And the fact that he followed the approach which he did creates no precedent binding on Judges called upon to exercise the same discretion in future. If another Court, in exactly the same circumstances as pertain in the present case, were to exercise its discretion in favour of ordering the plaintiff to pay the defendant's costs after the offer, this Court would, similarly, not interfere. The reason is that the exercise of a narrow discretion necessarily involves a 'choice between permissible alternatives', and, accordingly, 'different judicial officers, acting reasonably,

<sup>19</sup> Paragraph 21, footnotes omitted.

could legitimately come to different conclusions on identical facts'.

2.17 The idea, therefore, that a different test on appeal applies when the impugned costs order constituted a departure from a "normal" costs award, is entirely untenable in the light of the governing authority.

2.18 It may be borne in mind that Biowatch's argument in favour of a different test is premised on the notion that the court *a quo* departed from the "normal" rule in respect of awarding costs to Monsanto, i.e. that it awarded costs to the unsuccessful party. The court *a quo*, however, did nothing of the sort, and, as to the relevant *Us* between Monsanto and Biowatch, held Monsanto to have been the substantially successful party in any event.<sup>20</sup>

2.19 In respect of the relevant *Us*, this was clearly correct (as will be considered briefly below to the extent appropriate). But more importantly, it can hardly be contended that there were no grounds upon which the court *a quo* could reasonably have arrived at this conclusion, as was indeed frankly conceded by

<sup>20</sup> Monsanto was held successfully to have come to court to protect its interests (judgment par. 68, R669). In the judgment on leave to appeal, it is made clear beyond doubt that Monsanto was indeed regarded as having achieved substantial success (par. 7, R732-3: "But I also consider that Monsanto achieved substantial success, because it all along contended that Biowatch did not have open sesame to such information and that its right 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)."

could legitimately come to different conclusions on identical facts'.

2.17 The idea, therefore, that a different test on appeal applies when the impugned costs order constituted a departure from a "normal" costs award, is entirely untenable in the light of the governing authority.

2.18 It may be borne in mind that Biowatch's argument in favour of a different test is premised on the notion that the court *a quo* departed from the "normal" rule in respect of awarding costs to Monsanto, i.e. that it awarded costs to the unsuccessful party. The court *a quo*, however, did nothing of the sort, and, as to the relevant *Us* between Monsanto and Biowatch, held Monsanto to have been the substantially successful party in any event.<sup>20</sup>

2.19 In respect of the relevant *Us*, this was clearly correct (as will be considered briefly below to the extent appropriate). But more importantly, it can hardly be contended that there were no grounds upon which the court *a quo* could reasonably have arrived at this conclusion, as was indeed frankly conceded by

<sup>20</sup> Monsanto was held successfully to have come to court to protect its interests (judgment par. 68, R669). In the judgment on leave to appeal, it is made clear beyond doubt that Monsanto was indeed regarded as having achieved substantial success (par. 7, R732-3: "But I also consider that Monsanto achieved substantial success, because it all along contended that Biowatch did not have open sesame to such information and that its right 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)."

counsel for Biowatch in argument in the application for leave to appeal.<sup>21</sup>

### Public Interest Litigation - the Principles applicable on appeals as to costs

2.20 That leaves the main ground upon which Biowatch relies for seeking to reverse the costs awards a quo, namely the contention that the court a quo should have followed the increasing trend in public interest litigation to decline to make costs awards against litigants who unsuccessfully seek to enforce rights or to advance the public interest.

2.21 The main problem with such an argument is that Biowatch does not contend, nor can it contend on the clear law on the issue, that there is a rigid rule that renders it a "demonstrable blunder"<sup>22</sup>, or a misdirection of the sort that would vitiate the judicial exercise of a strong discretion, to fail to follow the trend in question in all cases.

<sup>21</sup> Counsel for Biowatch in the application for leave to appeal conceded that there were grounds upon which Monsanto could have been held to have been substantially successful and could submit nothing more ambitious in this regard than that it was "debatable" whether Monsanto or Biowatch achieved substantial success - see R698, line 26 to R699, line 19. Indeed, counsel stated "I take no quibble, M'Lord, with respect, with the proposition that Monsanto came to court to protect certain interests that it had, but it raised at least one argument which your lordship upheld and that, to that extent it was successful" (R699, lines 10-13).

•This is now the authoritative test for considering whether a ground vitiating the exercise of a strong discretion is present - see *Booiwvorks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 808B, the full court decision in *B & W Industrial Technology (Pty) Ltd and Others v Baroutsas* 2006 (5) SA 135 (W), and the endorsement of the Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecution and Others* 2007 (1) SA 523 (CC), par. [41].

- 2.22 The question, as is made clear repeatedly in the cases cited above dealing with s21A and appeals against costs awards, is not whether it would have been desirable for the court a quo to have followed the trend. The questions are: were there any grounds upon which a reasonable court could have made the award it did, and was the exercise of the discretion not to follow the trend vitiated by demonstrable blunder?
- 2.23 That the trend itself is still a matter of discretion is most recently affirmed in the decision of *Nzimande v Nzimande and Another* 2005 (1) SA 83 (W) at par. [75], relied upon by Biowatch in par. 11.9 of its heads of argument.
- 2.24 It is useful to consider the statutory provision upon which Biowatch relies for its ostensible entitlement to immunity from costs, namely section 32(2) of the National Environmental Management Act 107 of 1998 ("NEMA").<sup>23</sup>
- 2.25 The provision makes it clear that it confers an enabling discretion upon a court to follow the trend, instead of requiring it to do so.<sup>24</sup> Furthermore and significantly, it circumscribes the conditions for the exercise of this enabling jurisdiction - i.e. it makes its existence subject to the existence of jurisdictional

<sup>23</sup> The provision is quoted in full on p40 of Biowatch's argument.

<sup>24</sup> This was conceded by counsel for Biowatch in argument on leave to appeal R701,

facts, including that the applicant "had made due efforts to use other means reasonably available for attaining the relief sought".

2.26 In the instant case, it was argued that the failure on the part of Biowatch to use the internal appeals process laid down in PAIA and that provided for by the GMO Act was fatal to the competence of the relief sought. This was not accepted, but it was accepted that it was open to Biowatch to employ such avenues.<sup>25</sup> It had declined to do so. The clarification, paring down and rendering subject to protection of confidentiality of the relief sought that was ultimately yielded in this application would most likely if not undoubtedly have been achieved had such avenues been diligently explored. Biowatch has not even addressed an argument, in its reliance on the applicability of s32 of NEMA, on why it should be taken to have explored all such avenues for the discretion it complains not to have been exercised even to have been empowered by the section in the first place.

2.27 Whether such failure would have rendered the empowering discretion in s32 of NEMA not applicable at all or not, it would certainly constitute a reasonably justifiable ground in itself why the court a quo could have declined to follow the trend enacted in that empowering provision.

<sup>25</sup> As to the internal appeal procedure in PAIA, see par. 32 of the judgment R641-643, and as to the GMO Act, par. 38, R649-651, where it was found that the failure to employ the GMO internal appeal procedure was "not necessarily destructive of the relief sought by it in this application."

2.28 Furthermore, and most critically, the Constitutional Court has itself made it clear that the trend should not be regarded as creating a rigid rule (that costs should never be awarded against those who litigate in the public interest or to enforce constitutional rights), because if it did, it would invite the notion that litigation could be embarked upon in such cases with absolute impunity.<sup>26</sup>

2.29 Were this court to uphold the appeal on the basis that it was a demonstrable blunder not to have absolved Biowatch from any risk of costs, which it would need to do to uphold the argument, it would be undermining the strong caveat issued by the Constitutional Court and be encouraging applicants, in particular those seeking all sorts of information from all manner of parties, to invoke the right to freedom of information, and to pay no heed at all to taking care to identify with some precision the information at issue or to avoid putting other parties to unnecessary expense in seeking to protect their own rights to privacy and confidentiality in the manner of going about the litigation, as any attempt to curb such excesses through what would ordinarily be an appropriate costs award would be imperilled and liable to be reversed on appeal on the basis of

<sup>26</sup> See in particular the discussion in *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) paras. [31] to [32], and the discussion in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), paras. [43] and [44].

*the kind of immunity that Biowatch appears to be advancing for itself.*

2.30 *The one instance on which Biowatch relies for a reversal of a costs award on the basis of the application of the principle in question, namely the Sanderson decision,<sup>27</sup> is no authority whatsoever for such an argument.*

2.30.1 *First, as pointed out above, the court was at pains to point out that the particular instance of awarding costs in constitutional matters that was before it (a very particular instance considered immediately below) was not to be mistaken for a "rigid rule" that applied in all cases;*

2.30.2 *Second, and fundamentally, the Court in Sanderson specifically found it "necessary" to intervene in the cost award below because it entailed visiting costs upon a criminal accused with respect to an application that was properly viewed as an extension of criminal proceedings instituted against him by the State, in which sphere costs awards are not competent at all as a matter of law.<sup>28</sup>*

*"It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by*

<sup>27</sup> Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC).

<sup>28</sup> Paragraph [44].

*the State and in which costs orders are not competent; and the cause of action is that the State allegedly breached an accused's constitutional right to a fair trial."*

2.31 *Even if the trend in question could wrongly be read as a rule, to be applied save in circumstances warranting deviation from the rule, this would still beg the question whether the grounds upon which the court a quo granted costs in favour of Monsanto, as seen in the context set out above, could reasonably be regarded as "any grounds" upon which a reasonable court could base the decision. After all, even in the formulation of the trend itself, the Constitutional Court indicated that the trend should not appropriately be followed in cases where the constitutional attacks were inter alia vexatious "or there are other circumstances which make it in the interests of justice to direct that such costs should be paid by the losing party".<sup>29</sup> And examples abound where the manner in which the litigation was conducted warranted a costs award that deviated from the trend (again, leaving aside completely the strict test on appeal as to the existence of such circumstances).<sup>30</sup>*

<sup>29</sup> *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), the passage quoted on p30 of the *Biowatch* argument.

<sup>30</sup> *Two examples suffice, namely Motsepe (above) and Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others* 2005 (6) SA 123 (E).

2.32 Whatever the default position (whether it be that the substantially unsuccessful party pays the costs of the substantially successful party, or that the losing party is ordinarily not ordered to pay costs in constitutional litigation in the public interests), the relevant test on appeal remains the same - were there grounds upon which the costs award could reasonably have been based? And was there a demonstrable blunder in making the award? These inquiries are notably absent from the Biowatch approach, which concentrates instead on a strained argument that it was the successful party and therefore ought not to have paid Monsanto's costs, and on the existence of a trend in South Africa and elsewhere ordinarily not to order costs against losing parties in matters where constitutional rights are sought to be enforced in the public interest.

2.33 The trend in question was in any event not ignored by the court a quo. It was relied upon in argument as to costs in the main application;<sup>31</sup> and the court a quo was specifically mindful of the trend and aware of the cases referred to given the involvement of the judge a quo as counsel in one of the matters in question in the Constitutional Court.<sup>32</sup> Indeed, the court pertinently pointed out that the approach adopted by the Constitutional Court in that matter militated strongly against upholding an

<sup>31</sup> See the reference to this fact in the argument on leave to appeal, R717, line 2-6.

<sup>32</sup> See judgement on leave to appeal par. [15], R738-739.

appeal against costs merely on the basis of the applicability of the general trend in the case in question: In *Democratic Alliance and Another v Masondo N.O. and Another* 2003 (2) SA 413 (CC), the appellants, as applicants *a quo*, had sought to enforce constitutional principles concerning the membership of Mayoral Committees. They were unsuccessful *a quo* and costs were awarded against them. They appealed unsuccessfully, and the Constitutional Court specifically applied the tendency invoked by Biowatch in this appeal by not awarding costs in the appeal against the appellants. In other words, the Constitutional Court specifically recognised that the case was an appropriate one for the application of the trend (and presumably that no exceptions existed rendering it appropriate to deviate from the trend). But, and this is stressed by the court *a quo* in the instant case, the Constitutional Court refused to reverse the costs order *a quo* merely because of the applicability of the "public interest" principle to the instant matter. In other words, the approach of the Constitutional Court in *Masondo* made it clear that there was no rule that costs should not be awarded in cases such as Biowatch contends the instant to be, and that, if awarded, should be reversed on appeal on that ground alone.

2.34 As the court *a quo* remarked in the context of the argument on the applicability of the trend, "a failure to expressly articulate all

the grounds in favour of not making such an order certainly do[es] not mean that they were not considered."

2.35 In any event, the proper test has been enunciated clearly above: it is not whether there were other legitimate factors that the court a quo could have relied upon or considered in making a different costs award; it is whether there were any grounds upon which the award that was made could reasonably have been made, or whether there was any demonstrable blunder in making it.

3. WERE THERE ANY GROUNDS FOR THE COSTS AWARD IN FAVOUR OF MONSANTO?

3.1 Given the central contention advanced by Biowatch, namely that the deferential approach to costs awards on appeal does not apply when the costs award in question constituted a departure from the "normal rule" that costs follow success, it naturally goes to some lengths to seek to establish that it was indeed the substantially successful party.

3.2 The error of the central contention has been dealt with above.

- 3.3 Of course, to the extent that the court a quo was correct to have considered Monsanto to have achieved substantial success, the argument advanced by Biowatch would even by its own lights not apply.
- 3.4 Given the nature of the applicable test expounded above, it is not critical to determine, in the *Us* between Biowatch and Monsanto, who was the substantially successful party.
- 3.5 This is so for the simple reason that costs awards, as a well established practice, are often made as a mark of disfavour with the manner in which a matter has been litigated, particularly when this has caused unnecessary expense on the part of the litigants, entailing an element of vexatiousness in effect.<sup>33</sup> Such vexatiousness does not imply a lack of bona fides, but concentrates on the objective effect of the oppressive step on the litigants burdened by it.<sup>34</sup>
- 3.6 In the instant case, as discussed above in the section on the context of the orders, the court had held there to have been "certainly substance" in the submission that the manner in which

<sup>33</sup> There are many types of litigation waste of differing and varying degrees of vexation that have caused costs awards to be made. A useful collection of these well established instances can be found in the discussion in Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* (4<sup>th</sup> Edition), at 710 to 715, collecting authorities under the headings "causing unnecessary litigation or raising unnecessary defence", "failure to limit or curtail proceedings and costs", "misconduct by a party", "vexatious proceedings", "reasonable conduct of unsuccessful litigant" and "negligence of successful party".

<sup>34</sup> See the seminal and of-cited decision *In re Alluvial Creek* 1929 CPD 532 at 535. See for example *Reeder v Softline Ltd & Another* 2001 (2) SA 844 (W) at 847H.

the relief sought had been framed was "clearly vexatious and oppressive".

- 3.7 The broad and arrogant sweep of the request in the notice of motion recalls the broad generality condemned by the Supreme Court of Appeal as a vexatious abuse of process in a subpoena duces tecum in *Beinash v Wixley* 1997 (3) SA 721 (SCA). The following features of the subpoena that were significant in rendering it an abuse are apposite when compared with a consideration of the raft of correspondence annexed to the notice of motion in the instant case and the demand that the information requested in it, save for what is to be determined to have been provided already, is to be provided:

"The first is the generality and wide ambit of the demands contained in the subpoena. The language used is of the widest possible amplitude, including within its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any of the issues which require determination in the main proceedings. The possible permutations are multiplied with undisciplined abandon by a liberal and prolific recourse to the phrase 'and/or'<sup>1</sup>. Its potential reach is arbitrarily expanded by the demand that the documentation must be produced whether it be 'directly or indirectly' of any relevance to a large category of open-ended 'matters'....No attempt is made to have regard to the specific requirement of Rule 38(1) of the Uniform Rules, which expressly requires that a subpoena duces tecum shall 'specify' the document or thing which the witness concerned is required to produce. The demand in the impugned subpoena includes the production of documentation which is said to arise from or 'in relation to the conduct or the activities' of the first and second defendant 'in or about the affairs or winding up' of conglomerates of companies such as the 'Masterbond group', with its notoriously complex and protracted

history, and other groups such as 'the Alphabank group, National Properties Ltd, Interboard Ltd and Steiner Services (Pty) Ltd'.

The second conspicuous feature is that it is left to Wixley to make a judgment as to what he should or should not produce. He has continually to carry the risk of criminal sanctions in making that judgment. The impugned subpoena does not identify the particular documents which Wixley is required to produce. It leaves it to him to search and determine how any of the thousands of documents involved might or might not be related in some direct or indirect way to the 'matters' which appear to concern Beinash. It must be oppressive to put a witness who is not even a party to the main proceedings under this kind of very generalised and onerous duty."

- 3.8 A crucial factor that is overlooked by Biowatch is the role played in the determination of its application by the costs awards it seeks to appeal. In *Beinash*, the vexatiously wide terms of the demand vitiated the process and rendered it ineffective in law. This was what the respondents in the instant matter argued should be the result of the manner in which Biowatch had framed its demand too. Not only had it refrained from employing statutory appeals procedures that could and probably would greatly have assisted in narrowing the issues and rendering its demands coherent; it launched court proceedings demanding on a scale and in a manner described as "lackadaisical" by the court a quo.<sup>35</sup> The court, however, having held there to be certainly substance in the submission that the demand was vexatious, and conceding that statutory avenues were open to Biowatch but had not been followed, held that it was not

<sup>35</sup> Judgment on leave to appeal par. 12, R736.

appropriate for these reasons to "non-suit" Biowatch. The court held that it would not serve the interests of justice if Biowatch were to be non-suited solely on the basis of the manner of framing its demands, and then indicated that the proper approach to dealing with these issues would follow in the judgment.<sup>36</sup>

3.9 The costs awards are then made in this context and in the light of that finding.<sup>37</sup>

3.10 It cannot be overstressed that the environmental legislation invoked by Biowatch, namely s31(1)(c) of NEMA,<sup>38</sup> specifically provided that a request for information could be refused on the mere basis that it was "manifestly unreasonable or *formulated in too general a manner.*"

3.11 It is manifest that orderly and sensible enforcement and recognition of a right to access to information entails the imperative of regulating the manner in which demands are made and discouraging unnecessarily oppressive or broad demands that create burdens, expense and inroads into rights of those whose information is at issue or who holds the information at issue. This is why the power to refuse a request based squarely

<sup>36</sup> See judgment paragraph 44, R658.

<sup>37</sup> At paragraph 68 of the judgment, R669.

<sup>38</sup> Which was correctly held to have ceased to operate, on its own terms, the moment PAIA was promulgated-judgment par. 36, R645-6.

*on the broadness of its framing was specifically enacted in NEMA.*

3.12 *Instead of dismissing the application, however, the court a quo turned to what has aptly been described as the "healing balm of an appropriate order as to costs".<sup>39</sup>*

3.13 *It is precisely this ability of an appropriate costs order, in the discretion of the court, to act as the "healing balm" that would address defects in litigation that cause waste and expense, that allows a court to decide not to non-suit a litigant for such defects, but rather to apply the healing balm.*

3.14 *In the instant case, the costs awards appealed against were applied as a healing balm of that kind, as a quid pro quo for the decision not to non-suit Biowatch for the manner in which it had framed its relief. Had the court a quo been constrained by some special kind of immunity on the part of Biowatch against a costs award, it would have been less free to decide not to non-suit it, absent the healing balm of an appropriate costs order.*

3.15 *It is precisely the ability of costs awards to act as such a healing balm, as part of a well-established and recognised practice, that animates the frequent mention, in the jurisprudence surrounding*

<sup>39</sup> *Mhvaiutzi v Van derMerve & Another 1970 (1) SA 609 (A) at 626F.*

constitutional costs awards, of vexatious litigation and other similar circumstances as occasions when it would be appropriate indeed not to follow the trend of declining to award costs in such cases.

3.16 These are substantial and compelling grounds upon which the court a quo could reasonably have made the costs award it did make, quite apart from the question of success, and easily meet the legal test for a costs award that ought not to be interfered with on appeal, as set out above.

3.17 When it comes to success, however, it is important to distinguish the *Us* between Biowatch and the statutory respondents, on the one hand, and that between Biowatch and Monsanto on the other hand.

3.18 The striking characteristic differentiating feature of Monsanto's participation in the proceedings (compared with that of the other respondents) is the fact that the "bulk" of its concern (as recognised in the Biowatch replying affidavit, as pointed out above) was with protecting its confidential information from the majestic and vague sweep of the Biowatch demand.

3.19 In this, the only distinguishing respect, it was resoundingly successful, as against Biowatch's contention disputing the

confidentiality and refusing to identify any of the documents with sufficient particularity to allow Biowatch to identify that which was confidential. The notice of motion makes no provision whatsoever for protecting confidentiality. The court order makes all the surviving and specified requests subject to confidentiality.

- 3.20 It has already been pointed out that counsel for Biowatch conceded in the application for leave to appeal that there were grounds for holding Monsanto to have been successful and that, at best, it was debatable whether Biowatch or Monsanto was successful.
- 3.21 The approach adopted by Biowatch to the issue of success in its notice of appeal is also significant, and an eloquent illustration of the fact that it acknowledges the difference in the *Us* between Biowatch and the statutory respondents, and that between Biowatch and Monsanto.
- 3.22 Biowatch argues that it was the substantially successful party, both in respect to the *Us* between it and the statutory respondents, and in respect of the *Us* between it and Monsanto.
- 3.23 It argues that the judge a quo deviated from the "general rule" in not awarding costs to Biowatch as the "successful party" in both these //Yes. It contends that the statutory respondents (*but not*

*Monsanto*) ought therefore to have been directed to pay the costs of Biowatch.<sup>40</sup> So strongly does it contend thus that it brings the appeal against "the first costs order" to achieve such order. Yet it contends that the appropriate order in respect of the *Us* between itself and Monsanto would have been to have made no award as to costs at all.<sup>41</sup> This eloquently captures the recognition on the part of Biowatch that whatever success it achieved against the statutory respondents was not relevant to the peculiar *Us* created between itself and Monsanto in respect of which Monsanto achieved substantial success, in being compelled to join as a respondent to protect its confidential information from being affected by the impossibly broadly framed orders sought by Biowatch.

3.24 This renders it irrelevant that Monsanto joined in the arguments advanced by the statutory respondents in their defence against the claim. That was the *Us* between those parties. The peculiar *Us* between Monsanto and Biowatch, the reason for Monsanto's participation, was its need to protect its confidential information, a need fulfilled by the order ultimately granted.

3.25 Biowatch approaches the question of what was at issue between the parties on a curious basis. It is constrained for its contention that it achieved substantial success against

---

•\*\* Notice of Appeal, par. 6.1, R749.<sup>41</sup>  
Notice of Appeal par. 6.2, R749.

Monsanto to rely, not upon the notice of motion that constituted its claim and the affidavits that resisted the claim and replied to such resistance, but on draft orders bandied about between the parties at the hearing and thereafter, none of which yielded consensus.<sup>42</sup>

3.26 The draft order referred to in the Biowatch argument, which for the first time made provision for determination of confidentiality in terms of section 18(2) of the GMO Act<sup>43</sup> can hardly serve to define the claim upon which Biowatch's success or failure on this issue must be measured. Biowatch makes the submission<sup>44</sup> that the "four requests" found wrapped up in the correspondence annexed to the notice of motion and said to contain the information demanded comprised "part of the same inquiry" and not "discrete causes of action". Whatever the merits of this proposition, no justification or authority is offered for the non sequitur that follows, "It would therefore be entirely inappropriate to judge Biowatch's relative success on the basis of the exercise of identifying what relief was sought in the Notice of Motion".<sup>45</sup>

<sup>42</sup> See judgment on leave to appeal par. 6, R732.

<sup>43</sup> See Biowatch argument par. 17.3, p63.

<sup>44</sup> Biowatch argument par. 16.6, p59.

<sup>45</sup> Biowatch argument par. 16.6, p59.

3.27 Biowatch does make the submission that a concession in its replying affidavit "clearly demonstrated" that "some form of protection was required for confidential information".<sup>46</sup>

3.28 This flies in the face of the elaborate dispute in the reply, dealt with above, of the confidential nature of any of the information. The "concession" in question is the rather trivial one, following upon elaboration of why no confidentiality protection at all inheres in any of the information, contained in paragraph 26 of the reply,<sup>47</sup> that even if the information sought contains extremely sensitive information that is not in the public domain *and that does not affect the expression of the inserted genes*, relating, for example, to the methodology used to develop the GMO, the applicants would have no objection if such limited information were deleted from the relevant documents, and the balance of the information supplied" (emphasis added). The grudging limited amenability, expressed for the first time in reply, purports to exempt any information that in any way "affects the expression of the inserted genes", and does so in the context of an argument that insists that none of the information in question is confidential, partly because of the argument that it "affects the expression of the inserted genes". In addition to the dispute already referred to, Biowatch specifically, pertinently and

<sup>46</sup> Argument par, 17.2, p62.

<sup>47</sup>R321-322.

absolutely denied, in its replying affidavit<sup>48</sup> the central contention by Monsanto that "Monsanto's confidential information in the possession of the first and second respondents is protected against disclosure to Biowatch and other third parties in terms of various statutory and Constitutional provisions".<sup>49</sup> This was precisely the protection that the court order was required to, and did, afford Monsanto.

3.29 Reliance on positions adopted in the course of argument as defining the claim and defence for the purposes of success is entirely misplaced, particularly in motion proceedings, when almost all the costs, including counsel's fees, are already incurred before argument commences, and the issues in dispute are defined in the notice of motion and affidavits. Such reliance is a stark illustration of the contortions that are necessary for Biowatch to seek to make out a case that it was in fact the substantially successful party in respect of the relevant *Us* between itself and Monsanto. Such contortions can hardly amount to a tenable case that there was a demonstrable blunder entailed by not accepting Biowatch as the substantially successful party, and, irrespective of the question of success, by employing the healing balm of a costs award in respect of the manner in which Biowatch had framed its relief and brought the matter to court.

<sup>48</sup>Par.51,R331.

<sup>49</sup>AApar. 62.R291.

- 3.30 Indeed, the cumbersome process of Grafting an order in successive and contending drafts, culminating ultimately in the court order, is itself the clearest indication of the waste occasioned by Biowatch's essential failure to frame its relief properly. It was left up to the parties and the court to put together a coherent and manageable formulation of the information to which Biowatch was entitled, an exercise that would not have been necessary at all had Biowatch done so when claiming such an entitlement by way of application proceedings seeking unintelligible relief.
- 3.31 It follows from the above that there were more than adequate grounds upon which the court a quo exercised its discretion to award costs in favour of Monsanto and no case has been made out to justify interference with that award.
- 3.32 As a result, the appeal on the "second costs order" falls to be dismissed with costs. When it comes to an appeal against costs only, such as the instant, money only is at issue. The constitutional and public interest issues have been determined in the application and do not arise again for determination. This is precisely why such appeals are severely discouraged. In fact, in the days before s21A, Botha J in *Bowley v Tuckers Land & Development Corporation (Pty) Ltd* 1978 (2) SA 488 (T) found it

"disturbing" that an appeal before him was brought against a costs award alone. That was an appeal from a magistrate's court, brought as of right. Botha J remarked that courts were to discourage such appeals and should do so by making special costs awards in the appeal itself.

3.33 Monsanto is not requesting a special costs award in this appeal. It merely submits that there is no reason why it should not be awarded the costs of the appeal, an appeal about costs only, in the event of successfully resisting it.

**Frank Snyckers**

**Counsel for Monsanto**

**SANDTON**

**3 March 2007**