

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

CASE NO: 23005/2002

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF THE
BIOWATCH TRUST**

Applicants

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) LIMITED

Fourth Respondent

STONEVILLE PEDIGREED SEED COMPANY

Fifth Respondent

D&PL SA SOUTH AFRICA INC

Sixth Respondent

THE OPEN DEMOCRACY ADVICE CENTRE

Amicus Curiae

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicants hereby apply for leave to appeal to the full bench of the above Honourable Court, alternatively to the Supreme Court of Appeal, against a portion of the Judgment handed down on 24 February 2005 by His Lordship Mr Acting Justice Dunn in the above matter, being the portion in which His Lordship ordered the applicants to pay the fourth respondent's costs and made no other order as to costs, with the effect that the first, second and third respondents were not required to pay the applicants' costs.

The grounds upon which leave to appeal is sought are as follows:

FAILURE TO ORDER PAYMENT OF BIOWATCH'S COSTS

1. The learned Acting Judge misdirected himself in not applying the general principle in litigation that costs should follow the result, and ought to have ordered that one or more of the first, second and third respondents, should pay the applicants' costs. If the learned Acting Judge had given appropriate weight to the following factors, he ought to have concluded that there were no grounds that justified departure from this general principle.
 - 1.1. The applicants had no option but to approach this Honourable Court for relief because the first respondent unlawfully failed to provide access to the information to which the applicants were legally entitled. The learned Acting Judge found (at paragraph 66 of the judgement), that the first respondent's failure to grant access to such information as Biowatch was legally entitled to, "constituted a continued infringement of Biowatch's rights under section 32(1)(a) of the Constitution; [and] that Biowatch had no alternative remedy to enforce its rights".
 - 1.2. The applicants were substantially successful. Indeed, as appears from the learned Acting Judge's order, the applicants were successful in almost every respect in obtaining the relief sought against the first and second respondents, as well as against the third respondent to the extent that she and the National Department of Agriculture are in possession of any of the relevant records.
 - 1.3. The first, second and third respondents opposed the relief sought by the applicants in its entirety, and did not merely resist the granting of access to those portions of the records in question in respect of which confidentiality was claimed. They were almost wholly unsuccessful in opposing the relief sought by the applicants.
 - 1.4. The fact that the learned Acting Judge concluded that the applicants had formulated a minority of the categories of information to which access was

sought in an overly broad manner, does not constitute a ground for departing from the general principle in relation to the first respondent. In any event:

- 1.4.1. the first respondent did not state in his answering affidavit that he had any difficulty in ascertaining precisely what information the applicants were seeking access to from time to time (see paragraph 43 of the judgement);
- 1.4.2. the applicants had no means of knowing precisely what records were held by the first respondent (beyond those specifically identified in its requests) and could not, without the co-operation of the first respondent, identify the relevant records and those parts of the records in respect of which confidentiality was claimed;
- 1.4.3. the applicants were prevented from identifying the information sought with more particularity, in large part by the first respondent's passive role in relation to the applicants' requests, a role that the learned Acting Judge found (at paragraph 43 of the judgement) to be contrary to section 7(2) of the Bill of Rights which requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights". The passive role adopted by the first respondent is also at odds with the granting of access to information, which the learned Acting Judge found to be necessary for the proper application of the provisions of the Genetically Modified Organisms Act (at paragraph 37 of the judgement);

2. The learned Acting Judge misdirected himself:

- 2.1. in not giving due weight to the facts that the applicants were acting in the public interest (as found at paragraph 14 of the judgement) in the interests of protecting the environment, and to uphold Constitutional rights; and
- 2.2. in failing to take judicial notice of the legislature's intention to promote and facilitate litigation in the public interest to protect the environment, as evidenced by, *inter alia*, sections 31 and 32 of the National Environmental Management Act 108 of 1998 ("NEMA").

COSTS ORDER IN FAVOUR OF THE FOURTH RESPONDENT

3. The learned Acting Judge misdirected himself in reversing the general principle in litigation that costs should follow the result in relation to the fourth respondent, and ought not to have ordered the applicants to pay the fourth respondent's costs.
4. The learned Acting Judge misdirected himself in concluding (in paragraph 68 of the judgement) that the broad manner in which the applicants had formulated a few of the categories of information to which they sought access, constituted valid or sufficient grounds for reversing the general principle in litigation that costs should follow the result. In particular, the learned Acting Judge did not give appropriate consideration or weight to:
 - 4.1. the fact that the fourth respondent opposed the relief sought by the applicants in its entirety (including all of the relief granted by the learned Acting Judge), and did not merely resist the granting of access to those portions of the records in question in respect of which confidentiality was claimed, and accordingly the applicants were substantially successful in relation to the fourth respondent (except in relation to the costs order);
 - 4.2. the principles generally applied in relation to the awarding of costs in cases in which one of the parties is litigating in the public interest to assert a Constitutional right;
 - 4.3. the principles generally applied in relation to the awarding of costs in cases in which one of the parties is litigating to protect the environment;
 - 4.4. the legislature's intention to protect parties that litigate in the public interest to protect the environment, from adverse costs orders as evidenced by, *inter alia*, sections 31 and 32 of the National Environmental Management Act 108 of 1998 ("NEMA"), and in this regard erred in finding (in paragraph 36 of the judgement) that the provisions of section 31(1) of NEMA ceased to apply the moment the Promotion of Access to Information Act No 2 of 2000 ("PAIA") was promulgated. (This provision is specifically saved in the Schedule to PAIA.)

5. The learned Acting Judge misdirected himself in concluding that the fourth respondent was compelled to come to court to protect its interests because of the broad manner in which the applicants had formulated a few of the categories of information to which they sought access, and that this constituted a valid or sufficient reason to reverse the general principle in relation to the awarding of costs. In particular, the learned Acting Judge failed to take account of, or to give appropriate weight to:

- 5.1. the fact that the fourth respondent had refused to assist the applicants in identifying the information in dispute more specifically, and in particular, refused to provide the applicants' attorneys with a list of the documents submitted by fourth respondent to the first respondent with an indication of which portions it regarded as confidential (this is dealt with in paragraph 6 of the Replying Affidavit of Elfrieda Pschorn Strauss to the fourth respondent's answering affidavit and the annexes referred to in that paragraph);
- 5.2. the fact that, in the absence of the first respondent properly fulfilling his role in determining which information held by him ought properly to be kept confidential and which should be made accessible to the applicants, the applicants were not able to clarify what information was held by the first respondent relating to the fourth, fifth and sixth respondents, without the cooperation of those respondents;
- 5.3. the fact that the fourth respondent could have avoided the necessity of coming to court by adopting a co-operative attitude as was done Pannar (Pty) Ltd ("Pannar"), another company in a similar position to that of the fourth respondent which made certain records available to the applicants while maintaining the confidentiality of limited portions of those records, in return for the applicants agreeing not to seek certain information relating to Pannar from the first, second or third respondents (as recorded in the last paragraph of the order granted in paragraph 69 of the judgement); and
- 5.4. the fact that the fourth respondent could have protected its rights without coming to court by advising the first respondent which portions of the documents which it had previously submitted to the first respondent should

be kept confidential (giving reasons), and which portions could be made available to the applicants, but instead chose to resist the applicants being granted access to any records on the basis that some records allegedly contained commercially confidential information.

6. The learned Acting Judge misdirected himself in that he failed to consider the deterrent effect which the costs order in favour of the fourth respondent is likely to have on future public interest litigation of this nature, and the consequential negative impacts on the enforcement of the Constitutional right of access to information itself. This aspect of the order creates the perception that if any part of a request for information is found to be insufficiently specific, even a successful litigant may be heavily penalised by being required to pay the costs of intervening parties, including the costs of intervening parties such as the fourth respondent, which unsuccessfully attempted to prevent the lawful exercise of the applicant's rights of access to information.
7. The learned Acting Judge misdirected himself in that he failed to consider or give adequate weight to the impact that the costs order in favour of the fourth respondent will have on the Biowatch Trust and its activities, including in particular, the extent to which the costs order will:
 - 7.1. impair the capacity of the Biowatch Trust to gain access to, analyse and disseminate to the public information in respect of which access was granted;
 - 7.2. impair the ability of the Biowatch Trust to raise funding and potentially cause it to cease operating; and
 - 7.3. discourage the applicants from engaging in future public interest litigation on important environmental and Constitutional issues.
8. For the above reasons, the learned Acting Judge ought to have ordered:
 - 8.1. that the first respondent or, alternatively, two or more of the first to third respondents pay the applicants' costs; and

8.2. that no order is made in relation to the costs of the fourth respondent.

DATED at **CAPE TOWN** on this 16th day of **MARCH 2005**.

WINSTANLEY & CULLINAN INC.

Per
MS J.A EASTWOOD
Applicant's attorneys
c/o Savage, Jooste & Adams Inc.
Corner Melk & Boshoff Streets
Muckleneuk
PRETORIA
(Ref: T S Lefteris-Kartoudes)

To: **THE REGISTRAR**
The High Court
Pretoria

And to: **THE REGISTRAR: GENETIC RESOURCES**
First respondent

And to: **THE EXECUTIVE COUNCIL FOR GENETICALLY MODIFIED ORGANISMS**
Second respondent

And to: **THE MINISTER FOR AGRICULTURE**
Third respondent

And to: **MONSANTO SOUTH AFRICA (PTY) LTD**
Fourth respondent

And to: **STONEVILLE PEDIGREED SEED COMPANY**
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