/SG

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

DATE: 13/05/2008
CASE NO: A831/2005

REPORTABLE

In the matter between:

THE TRUSTEES OF THE TIME BEING OF THE BIOWATCH TRUST — Appellants (Applicants *a quo*)

And

THE REGISTRAR, GENETIC RESOURCES — 1st Respondent (1st Respondent *a quo*)

THE EXECUTIVE COUNCIL FOR GENETICALLY MODIFIED ORGANISMS — 2nd Respondent (2nd Respondent *a quo*)

THE MINISTER FOR AGRICULTURE — 3rd Respondent (3rd Respondent *a quo*)

MONSANTO SOUTH AFRICA (PTY) LTD — 4th Respondent (4th Respondent *a quo*)

STONEVILLE PEDIGREED

SEED COMPANY	5th Respondent (5th Respondent *a quo*)
D&PL SA SOUTH AFRICA INC	6th Respondent (6th Respondent *a quo*)
THE OPEN DEMOCRACY ADVICE CENTRE	*Amicus Curiae*

JUDGMENT

POSWA, J

Introduction and History of the case

[1] The introduction and the history of this case are set out in the majority judgment. Suffice it to say that it is an appeal against costs only.

[2] I am in agreement with the following statement by my brother, MYNHARDT, J, giving the majority judgment, that although it is disputed in the papers that Biowatch was acting in the public interest, he is prepared to accept, as a factual finding of the Court *a quo*, that Biowatch acted, indeed, in the public interest in instituting the proceedings in the Court *a quo*. In my view, the finding was appropriately made. There are, in my view, major considerations, on the basis whereof the judgment in the Court *a quo's* correct in this finding. I deem it necessary to give a more

detailed history of the case, somewhat more than appears in the majority judgment, to illustrate where, in my view, the Court *a quo* went wrong in its judgment.

[3] The applicant initially brought the application against the first, the second and the third respondents, respectively. In its notice of motion the appellant asked for an order whose relevant terms read as follows:

> "*1. Directing the first respondent, alternatively the second respondent, alternatively the third respondent, alternatively the first, second and third respondents, to provide the applicant with the information requested in annexures 'EPS8(1)', 'EPS8(2)', 'EPS8(5)' and 'EPS9' to the founding affidavit, save insofar as such information has already been provided in annexures 'EPS8(4)' and 'EPS8(6)' thereto;*
>
> *2. Directing such persons as may oppose this application to pay the costs thereof.*"

[4] Before bringing the application, the applicant wrote a number of letters to the Directorate: Genetic Resources, in which it sought certain information related to the applicant's mission. Some of the letters e-mailed to the directorate are attached as annexures in the papers. The applicant subsequently had communication directed to the Directorate by its attorneys, which communication is also annexed to the papers. From the papers, it appears that the first letter was e-mailed on 17 February 2000 and that the last communication was from the appellant's attorneys to the Directorate on 29 March 2001. That was before the applicant issued the application.

[5] It was not until 22 August 2002 that the applicant filed the notice of motion. The appellant explains this delay in paragraph 19 of its founding affidavit as follows:

> "*19. The applicant has not been in a position to proceed with legal action to enforce its rights until now. The reasons for this are twofold: In the first instance,* ***the***

> ***applicants needed to raise the appropriate monies to fund legal action***. *In the second instance, I was unable to allocate the time required to draft this affidavit for personal reasons beyond my control.*" (Emphasis added)

Parties

[6] A brief description of the parties is, in my view, necessary. I have already mentioned the three initial respondents. Three other respondents, from the fourth to the sixth, subsequently joined at various stages along the way, of whom only the fourth respondent is of great consequence for purposes of this judgment.

Appellant

The appellant is described adequately in annexure EPS9, the first letter written by its attorneys to the directorate on 26 February 2001, the relevant portions thereof reads:

> "*As you are aware, Biowatch is a non-governmental organisation formed in 1997 for the purpose of researching*

and monitoring the implementation of South Africa's obligations under the Convention on Biological Diversity. Biowatch is concerned that genetically modified organisms ('GMO's') may pose a threat to human health and to the environment, and is committed to ensuring that the ***constitutional right of all South Africans*** *to an environment that is not harmful to their health and well-being is respected, protected, promoted and fulfilled. Moreover, Biowatch is committed to ensuring that the environment is protected,* ***for the benefit of present and future generations****, by means of adequate legislative and other measures. In furtherance of its objectives, Biowatch requires access to certain information held by the Directorate: Genetic Resources and/or the NDA [National Department of Agriculture]. More particularly, Biowatch requires access to all the information listed in the schedule to this letter held by the NDA*." (Emphasis added)

It is not necessary, for purposes of the description of the appellant to annex the schedule. In annexure EPS1, the curriculum vitae of Ms Elfrieda Christine Pschorn-Strauss, deponent to the appellant's

founding affidavit, it is stated that the appellant was established in October 1999, with ten trustees.

In a confirmatory affidavit by one Christian Leon Jardine, a microbiologist and environmental scientist, who was a consultant to the appellant, a number of documents that reveal, in greater detail, the nature of the appellant's preoccupation are referred to. I mention the titles of two of such documents, viz:

(a) A document marked CLJ7, whose title reads: "**DEGRADATION OF TRANSGENIC DNA FROM GENETICALLY MODIFIED SOYA AND MAIZE IN HUMAN INTESTINAL SIMILATION,**" (It is in Vol. 2, pages 121-130);

(b) "**THE IMPACT OF GENETIC MODIFICATION ON AGRICULTURE, FOOD AND HEALTH,**" containing "Recommendations: Environmental precautions and public health risks". [Page 155]

From these annexures and others whose titles I have not mentioned, it is quite evident that the appellant is or was concerned with matters of health, a concern that it shares or shared with other like-minded organisations internationally. It is a non-governmental organisation (NGO).

The applicant has described itself as follows in paragraph 10 of the founding affidavit:

> "*10. … a civil society organisation that is* ***acting in the public interest*** *in bringing this application.*"

Respondents

[7] The first, second and third respondents are described, respectively, as follows in the founding affidavit:

First respondent

> "*7.1 In terms of section 8(2) of the GMO Act (the Generally Modified Organisms Act, 15 of 1998), the first respondent is charged with administration of the*

GMO Act and may also exercise powers and functions assigned to him under this Act or by the second respondent.

7.2 The first respondent is cited in his capacity as the administrator of the GMO Act. (The applicant's various requests for excess to information held by the department of agriculture ('the department'), described below, were addressed to the third respondent.)"

Second respondent

"*8.1 The function of the second respondent in terms of section 4 of the GMO Act is to advise the first respondent on all aspects concerning the development, production, use, application and the release of GMO's, and to ensure that all activities with regard to the development, production, use, application and release of GMO's are performed in accordance with the provisions of the GMO Act.*

8.2 The second respondent is cited as a co-respondent in this application because it is vested with certain powers and duties under section 18 of the GMO Act relating to the disclosure of information which may not be kept confidential, and because of the fact that the first respondent has relied on the failure (or refusal) of the second respondent to aequiesce in the disclosure of information, as the basis for his (i.e. the first respondent's) refusal to provide the information requested."

Third respondent

"*9.1 The third respondent is sited as a respondent because of her potential interest in the matter. In this regard, the information to which the applicant has requested access is in the possession of the department which falls under her control.*

9.2 Save in relation to the information specified, no specific relief is sought against her."

The first, second and third respondent are collectively referred to as "the statutory respondents".

Fourth respondent

[8] On 14 May 2003, the fourth respondent filed an answering affidavit, dated 9 May 2003, having served both documents on the appellant on 13 May 2003. That was in consequence of a successful application by the fourth respondent for leave to intervene in the application "on the grounds that it [had] a direct and substantial interest in the subject matter [thereof]", (paragraph 5 of the fourth respondent's answering affidavit.) In paragraph 3 of its answering affidavit, under the heading "introduction", the fourth respondent describes itself as follows:

> "*3. Monsanto is a diversified biotechnology company which is involved,* ***inter alia****, in the research, development* ***and sale*** *of genetically modified organisms ('GMO's') in South Africa. These activities are comprehensively regulated by the State in terms of the Genetically Modified Organisms Act*

(No 15 of 1997) (the 'GMO Act')." The deponent then proceeds: "*To the best of my knowledge, Monsanto is the (sic) one of the leading participants in the South African GMO industry. Both before and since the commencement of the GMO Act, Monsanto has been active in applying for permits, approvals and authorisations for GMO commodity imports, trial releases and general releases in South Africa. This is reflected in the list of GMO permits attached to annexures 'EPS8(6)' of Biowatch's founding affidavit. As appears therefrom, at least 23 GMO permits have been issued to Monsanto since January 2000.*" (Emphasis on the words "and sale" is added.)

Issues

[9] It must be evident from what has been stated above in this judgment that the appellant sought information related to GMO's from the statutory respondents. The following, *inter alia*, appears in paragraph 12 of the founding affidavit:

"*12. The requests that are dealt with in this application concern information relating to GMO's. I will thus briefly outline the issues and concerns arising from the use, control and the release of such GMO's in South Africa.*

12.1 Genetic engineering is a process that is used to modify life forms by introducing molecular material (i.e. deoxyribonucleic acid, or DNA) from other life forms in order to alter their genetic makeup and inheritable qualities permanently. The modified life forms are referred to as GMOs.

12.2 ***Genetic engineering is different from the traditional breathing of plant varieties****. The latter consist of mating selected individuals of the same or closely related species for generations in order to develop specific properties in the offspring. Genetic engineering, on the other hand, permits the*

insertion of DNA into one organism from a completely unrelated organism, thereby forming transgenetic organisms. For example, ***genes from a virus or bacteria, or from an animal, can be inserted into a plant****.*" (Emphasis added)

[10] In its answering affidavit, when dealing with the various paragraphs of paragraph 12 of the appellant's founding affidavit, the fourth respondent does not deal with subparagraph 12.1 and 12.2. In fact, paragraph 12 of the appellant's founding affidavit has the following further subparagraphs, 12.3, 12.4, 12.5, 12.6, 12.7, 12.8 (with subparagraphs 12.8.1 to 12.8.7), 12.9 (with subparagraphs, 12.9.1 and 12.9.2), 12.10 (from 12.10.1 to 12.10.6) and 12.11. Only subparagraphs 12.3 to 12.5 and 12.8.3 to 12.8.7 are challenged in the fourth respondent's answering affidavit. I consider it important to cite some subparagraphs, in paragraph 12 of the appellant's founding affidavit, that have not been challenged, in addition to 12.1 and 12.2. They read thus:

"*12.6 Members of civil society, scientists, farmers and*

persons all over the world are voicing their concern over the increased commercialisation of GMOs. These concerns are even felt in the insurance sector. Insurance companies in Scotland, for example, have deemed GMO contamination, like war and nuclear accidents, too risky an event to insure. Similarly, the Australian Insurance Industry is reluctant to cover the Biotechnology industry against litigation.

12.7 In South Africa the number of permits granted in relation to genetically modified corps, excluding import permits, has increased from one application in 1990 to 122 in 2001. A map showing the approximate locations of genetically modified crops in South Africa of which the applicant is aware, including field trials of which the applicant is aware, is annexed marked 'EPS4'. [I do not deem it necessary to attach that map].

12.8 ***In Europe and the rest of the industrialised world, the GMO debate has centred on public health and***

environmental safety issues.

12.8.1 The unpredictability of the technology and its impact on public health issues are outlined in more detail in annexure 'EPS5A', an affidavit deposed to by Christine Jardine, a microbiologist who consults to (sic) the trust. Her background, and her experience, are set forth in annexure 'EPS5A'.

12.8.2 The ecological and environmental safety issues are outlined in more detail in annexure 'EPS5B', an affidavit deposed to by Rachel Wynberg, a trustee of the applicant. Her background, and her experience are set forth in annexure 'EPS5B'.

12.9 The Convention on Biological Diversity ('the Convention') was agreed for signature in June 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil. It entered

into force on 29 December 1993. It currently has 182 parties to it, ***including South Africa, which signed the convention on 4 June 1993 and rectified on 2 November 1993****. (Emphasis added).*

12.9.1 The Convention obliges parties to apply the precautionary principle, which is stated in the convention to mean that the lack of … certainty should not be used as a reason for postponing measures to avoid or minimise a threat of significant reduction or loss of biodiversity. I shall ensure that the copy of the convention is made available at the hearing of this matter.

12.9.2 On 29 January 2000, Montreal, Canada, the Protocol on Biosafety ('the Protocol') to the Convention on Biological Diversity was adopted. ***South Africa participated in the negotiation of the Protocol but is not yet a party to it****. The objective of the Protocol is to*

ensure adequate regulations of the transfer, handling and use of living modified organisms (which includes GMOs) engineered using [of] modern biotechnology and which may have adverse effect on the conservation and ***sustainable use of biological diversity and on human health****. The Protocol establishes an advance informed agreement procedure, such minimum standards to the use of living modified organisms, as well as … standards relating* ***to risk assessment, risk management, and … awareness and participation****. I shall ensure that a copy of the Protocol is made available at the hearing of this matter.*

12.10 The arguments against GMOs are not advanced only by involvement and civil society organisations. The British Medical Association's Board of Science and Education, for example, have issued recommendations regarding environmental precautions and public health risk. These

recommendations, annexed marked Annexure 'EPS6', state inter alia that:

"12.10.4 comprehensive health and environmental impact assessments should be applied to all genetically modified crop site applications, and should be open to public scrutiny (paragraph 13);"

"12.10.5 ***commercial secrecy should not take precedence to openness of information in matters relating to public health****." (Paragraph 13).*

"12.10.6 regulatory the procedure in developing countries should be as vigorous as those in developed countries ***in order to prevent companies from escaping legal constraints****" (paragraph 15).*

"12.11 Because of these issues and concern, ***many countries around the world have banned commercial use and release of GMOs****. A list of worldwide initiatives in this regard has at May 2001 is attached, marked annexure 'EPS7,'"* (Emphasis on all the paragraphs in which they appear are added).

[11] From the fourth respondent's responses with regard to the challenged subparagraph of paragraph 12 of the appellant's founding affidavit, the gist of the contents of the challenge subparagraphs is encapsulated. Consequently, I quote from the relevant paragraphs in the fourth respondent's answering affidavit as follows:

"*78.* ***Ad founding affidavit, paras 12.8.3 to 12.8.7***

79.1 I deny that GMOs have had a negative socio-economic impact on the livelihood of farmers in South Africa. The benefits offered by GMOs to the farming community has been

recognised by the allowance of farming with GMOs in South Africa ***subject to the provisions of the GMO Act****. Farmers choose to use GMOs on the grounds that they have a positive socio-economic impact on such farmers' livelihood. The submissions made by Biowatch in these paragraphs represent an attempt by Biowatch to advance and promote its own views and opinions on GMOs* ***without regard to the stated position of the legislature in this regard and the choice of farmers and consumers to accept the benefits of GMOs****. In this sense,* ***inter alia****, Biowatch is clearly not acting as it alleges, '****in the public interest****'.*

*79.2 Biowatch also misrepresents the facts when it states that the duty to pay royalties for GMO products has been extended to those whose crops have been '****contaminated****' by such GMOs (****founding affidavit, para 12.8.5****).*

> *Biowatch refers in this regard to the case of one Percy Schmeiser, a Canadian farmer who was allegedly ordered by a Canadian Court to pay royalties to Monsanto "**notwithstanding that his crops had been genetically polluted**". In fact, the court in question found that Mr Schmeiser had intentionally and knowingly exploited Monsanto's patent by using its GMO products, without authorisation, in his crops, and this finding was confirmed on appeal. Copies of the relevant judgments will, if necessary, be placed before this Honourable Court at the hearing of this application.*"

[12] The purpose of referring to paragraph 12 of the appellant's founding affidavit, as well as to the fourth respondent's responses to the allegations contained in that paragraph, is not to determine who, as between the appellant and the fourth respondent is correct, but merely to indicate that, from the unchallenged portions of paragraph 12 of the appellant's affidavit, it is evident that the appellant was, in approaching the statutory respondents for

information, actuated by genuine concerns about public interest. It is also important, in my view, to highlight that the fourth respondent vehemently and relentlessly disputed that Biowatch was acting in the public interest. In the light of its attitude in this regard, there is, in my view, nothing that the appellant could have done, short of abandoning the entire application, to cause the fourth respondent to relent in its opposition. The fourth respondent's opposition was far more deep-rooted than an objection to the *manner* in which the appellant presented its application. I seek, further, to emphasise and illustrate that, unlike the Court *a quo* and the majority judgment in this Court, I do not merely accept that the applicant acted in the public interest but find that it demonstrated that with convincing evidence. In my view, *the fact that the fourth respondent denied that the appellant was acting in the public interest is not a matter of mere observation. It went into great detail to support its submission in that regard. A finding that Biowatch has standing and is acting in the public interest is, in my view, a comprehensive success by Biowatch and a comprehensive loss by the fourth respondent.*

Biowatch's submissions with regard to costs

[13] In its heads of argument, the appellant dealt with the costs order on two bases. Firstly, the decision not to grant an order of costs in its favour against the statutory respondents. Secondly, the decision to grant costs, against the appellant, in favour of the fourth respondent. These two sets of costs are referred to as "the first costs order" and "the second costs order", respectively. It is apposite, at this stage to cite paragraph 68 of the judgment of the Court *a quo*, in which the costs aspect is dealt with. It reads:

> "*[68] As far as costs are concerned, the general rule in mitigation is that the cost should follow the result regard. However, although Biowatch has been* ***partially successful*** *in obtaining* ***some*** *of the relief sought,* ***the manner in which some of the its request for information is formulated****, as well as* ***the manner in which the relief claimed in the notice of motion*** *was formulated, has convinced me that it should not be granted a costs order in its favour in these circumstances. Furthermore,* ***the approach adopted by it compelled*** *Monsanto, Stoneville and D & PL SA*

> ***to come to court*** *to protect their interest.* ***The issues were complex and arguments presented by them were of great assistance***. *Stoneville and D & PL SA did not seek any cost order against the applicant. On behalf of Monsanto its counsel sought an order for costs against the applicant. In my view the applicant should be ordered to pay Monsanto's costs. No other order as to costs is warranted in the circumstances of this case.*"

It is, in my view, important to mention that that is all that the Court *a quo* said with regard to costs. The significance thereof will be more apparent, later, when that approach is compared with that of other courts where parties that litigated in the public interest were, nevertheless, mulcted in costs, with full reasons for such decisions set out in detail.

[14] In paragraph 6.4 of the appellant's heads of argument, the following is stated:

> "*6.4 The objects of the trust are set out in the trust deed, a*

copy of which is annexed marked 'EPS3'."

In paragraph 2.3 of the Deed of Trust, a number of words and expressions are defined. I extract some of those, in respect whereof the respondents could, in my view and in the light of their attack on the appellant's claim to be acting in the public interest, have commented:

1. In 2.3.7.1, there is reference to conservation activities which include

> 2.3.7.1 monitoring biodiversity prospecting in South Africa;"
>
> "2.3.7.1.2 establishing legal and institutional mechanisms to control access to genetic resources;"
>
> "2.3.7.2 monitoring the use, control and release of genetically modified organisms in South Africa."

"2.3.7.4 assisting in building the capacity of government officials to deal with issues relating to biodiversity;"

"2.3.7.5 building awareness among civil society, and so allow for representative and informed policy to be developed;"

2.3.7.7 taking measures, including legal action, to ensure compliance with the principal object."

In paragraph 1.7 of Biowatch's heads of argument, it is submitted that the public interest nature of Biowatch's activities in general is underlined by the provisions of Biowatch's trust deed, which was annexed to the founding affidavit. Then, in subparagraphs 1.7.1 to 1.7.3, support for this submission is obtained from certain clauses in the deed of trust for Biowatch, Annexure "EPS3". Believing that it was acting in the public interest, the appellant then went about seeking information, from the first respondent, from which

it, the appellant, would be able to determine that the Government is, or was, complying with international requirements as well as those of the GMO Act. It sought to monitor "the implementation of South Africa's obligations under the Convention on Biological Diversity" (Annexure EPS9).

The Respondent's Responses to Paragraph 6.4 of the Founding Affidavit

Statutory Respondents

[15] In paragraph 22 of their answering affidavit, in response to, *inter alia*, paragraph 6.4 of the appellant's founding affidavit, the statutory respondents merely state that "this is noted". This inspite of the contents of the trust deed, "EPS3", concerning the purpose for which Biowatch was formed, its objectives and its functions. Paragraph 15 of the founding affidavit, which relates the appellant's desire to obtain the information it sought in relation to the purpose for which it was formed, including its aims and functions, which are of a public nature. It reads:

"*15. The applicant seeks the information to which this*

> *application relates, both* ***in the public interest****, as well as for the protection of the rights which the applicant enjoys.*" (Emphasis added)

However, in response to paragraph 15 of the applicant's founding affidavit, the statutory respondents reply:

> "*It is denied that the appellant has established any right to any information for itself 'in the public interest'*."

This, in my view, is a strange reply when the contents of the trust deed, in the context I have referred I have highlighted, are not contested. The Court *a quo* made no comment about this contradictory reaction on the statutory respondents' part.

Fourth respondent

[16] In his response to the applicant's assertion that it is a "civil society organisation that is acting in the public interest", the fourth respondent challenges the applicant's *locus standi*, in paragraphs 13 to 21 of its answering affidavit, the latter of which reads as follows:

"*21. For all the reasons stated above, I am advised and respectfully submit that Biowatch does not enjoy* ***locus standi*** *to bring the current proceedings and this application should be dismissed on that basis alone.*"

The applicant's *locus standi* is that challenged and denied by both the statutory respondents and the fourth respondent.

[17] In paragraph 16 of its answering affidavit, the deponent on behalf of the fourth respondent specifically and says:

"*16. I am advised that Biowatch* ***does not make out any case*** *and has not established, that it is acting as a 'member of, or in the interest of, a group of class of persons' within the meaning of section 38(c) [of the Constitution]. In addition, I as the fourth respondent's deponent deny that Biowatch is truly acting 'in the public interest' within the meaning of section 38(d) in bringing this application. Biowatch*

> *is a private organisation that* ***simply represents and advocates the personal interests and opinions of its trustees***. *Further argument would be made in this regard at the hearing of this application,*" (emphasis added).

No mention was made by the fourth respondent, in all the paragraphs I have mentioned, of paragraph 6.4 of the appellant's founding affidavit, neither was there allusion to the trust deed. How the fourth respondent reconciles its attack on the appellant's *locus standi* when it does not challenge its averments in the trust deed is, in my view, incongruous.

Similarly, when dealing with the applicant's reliance on also s 32(1)(c) of NEMA, the fourth respondent writes:

> "*In the event, I deny that Biowatch has made out a case, or established, that it is acting 'in the interest of or on behalf of a group of or a class of persons whose interest are affected' within the meaning of section 32(1)(c) of the NEMA in bringing these proceedings. I also deny that Biowatch is*

truly acting in the 'public interest' or in the 'interest of protecting the environment' within the meaning of sections 32(1)(d) and (e) respectively. As stated above, Biowatch is a private organisation that simply represents and advances the person interest and opinions of his trustees."

"*21. For all the reasons stated above, I am advised and respectfully submit that Biowatch does not enjoy a* ***locus standi*** *to bring the current proceedings and its application should be dismissed on that basis alone.*"

[18] Determination of the question as to whether the applicant acted "in the public interest" is one of the main issues that the Court *a quo* had to decide. The nature of the information sought by the applicant was such that it could have been entitled to it only if it was acting in the public interest. As I have illustrated, both the statutory respondents and the fourth respondent denied that the applicant was acting in the public interest, totally unjustifiably. They denied that up till the time of judgment and a lot of time was, unnecessarily in my view, spent in dealing with their respective objections in this regard.

[19] One of the facts of this case is that the Court *a quo*, having found that "Biowatch did achieve substantial success in the relief it sought against the first to third respondents, i.e. the Registrar, the Council and the Minister", went on, in respect of the first cost order, to refuse "to grant an order for costs against the first to third respondents" (para [8] of the judgment in the application for leave to appeal). In the case of the second cost order, it granted an order of costs against the applicant, in favour of the fourth respondent, adding that "the provisions of section 21A of the Supreme Court Act 1959, 59 of 1959, are applicable". Of crucial importance is also the fact that, as a matter of fact, the applicant did make requests for information related to its mission from the statutory respondents. The fact that the applicant directed no request to the fourth respondent, before bringing the application and , the nature of the relationship between the statutory respondents, on the one hand, and the fourth respondent, on the other hand, were, in my view, important factors for consideration by the Court *a quo*. Related to the latter aspect is the question as to how the fourth respondent reacted when it learnt that the applicant was making requests, to the statutory respondents, for information of a nature

that the fourth respondent had an interest in. It did nothing and joined the application only after it had been set down and had fortuitously been postponed before starting. That conduct does not, in my view, demonstrate the fourth respondent's lack of genuine concern about the risk of some protected information being provided, by the first respondent, to the appellant, or reckless disregard for the consequences thereof.

Discretion of the Court *a quo* in Respect of the Award of Costs

[20] It is submitted, on the applicant's behalf, that the Court *a quo* "failed to take a number of relevant considerations into account in making [its] award as to costs, including its own finding that Biowatch was litigating in the public interest". (Paragraph 4.4 of the appellant's heads of argument.) As I understand the submissions on the appellant's behalf in this regard, the court *a quo* misdirected itself with regard to "'two basic principles' developed by the courts in relation to costs. (***Ferreira v Levine NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 2 SA 61 (CC) at para [3]**" (para 5.1 of the applicant's heads of argument)).

[21] With regard to principles applicable in respect of the discretion of the Court *a quo* with regard to costs, the appellant elaborates as follows in its heads of argument:

> "*5.2 These principles are as follows*
>
> *5.2.1 The award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial official and is 'in essence* ***a matter of fairness to both sides****'.*
>
> ***Kruger Bros and Wasserman v Ruskin 1918 AD 63 at 69; Rondalia Assurance Corporation of SA Ltd v Page and Others 1975 1 SA 708 (A) at 720C; Ward v Sulzer 1973 3 SA 701 (A) at 706G.***
>
> *5.2.2 The successful party should, as a general rule, have his or her costs.*
>
> ***Fripp v Gibbon and Co 1913 AD 354 at 357; Merber***

v Merber 1948 1 SA 446 (A) at 452." (Emphasis added)

[22] The submission is qualified as follows:

> "*5.3 The Constitutional Court, however, stated that 'the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.' Although the general principles 'of a useful point of departure … [if] the need arises, the rules may have to be substantially adapted; this should however be done on a case by case basis'.*
>
> ***Ferreira (supra)*** *at paragraph [3]*", (emphasis added).

I did not understand either Mr Bester, on behalf of the statutory respondents, or Mr Snyckers, on the fourth respondent's behalf, to disagree with the submissions made, above by Mr Moultrie, on behalf of the appellant. The submissions are correctly made, in my

view. What should be borne in mind when dealing with the dictum by Atkin, LJ, in Ritter Godfrey (1920, 2 K.B. 47, at 60), regarding instances when "a wholly successful party" may be denied costs, is what Greenberg JA said in *Merber* (*supra*), at 453. He stated that, even in those instances, it does not

> "*mean that in the instances mentioned [quoted in his judgment on the same page, 453], the successful party must necessarily be deprived of his [or her or its] costs but that it is only in these instances … that the Court is entitled to deprive him [her or it] of his [her or its] costs. It seems, therefore, that when a successful party has been deprived of his [her or its] costs in the trial,* ***an appeal court will enquire*** *whether there were any* ***grounds for departure*** *from the general rule, and if there are no such grounds, then* ***ordinarily*** *it will interfere*".

It is, in my view, evident form the above excerpt, that a "wholly successful party", such as the applicant was in my view, is entitled to appeal against that decision, so as to place the court of appeal in

a position where it "will enquire whether there were any grounds for departure from the general rule".

[23] What I consider to be an important observation, especially in respect of the current appeal, is the submission made on the appellant's behalf, viz., that "there is no general presumption against interference with cost orders on appeal" (para 6.2 of the appellant's heads of argument). In particular, it should, in my view, be emphasised that the "traditional" test that the judicial discretion of the court of first instance with regard to the awarding of costs will not be readily interfered with on appeal, even where the appeal court would have come to a different conclusion as to costs, is subject to another important "general principle", which was stated in **Fripp and Gibbon** (*supra*) at 357, as being "that to the successful party should be awarded his costs". As "a general rule", a successful party should have its costs and the discretion of the court of first instance "is not unlimited" in that regard, (**Fripp and Gibbon and Co** (*supra*) at 357). As long ago as 1913, therefore, when judgment was passed in ***Fripp v Gibbon & Ceo (supra)***, there were "*numerous cases in which courts of appeal*

[had] set aside judgments as to costs where such judgments [had] contravened the general principle that to the successful party should be awarded his costs". (**Fripp and Gibbon and Co** (*supra*) at 357.

[24] In **Naylor and Another v Jansen 2007 (1) SA 16**, CLOETE JA dealt with a case in which WILLIS, J, of the Johannesburg High Court, had ordered the defendants, in an action for damages arising from defamation, to pay the plaintiff's costs. When he initially made that order, WILLIS, J was unaware of the defendants' without-prejudice tender which preceded the trial. Such tender came to be known after the defendants' appeal before the Supreme Court of Appeal had also been finalised. In the latter Court, the initial award of R30 000.00 damages, in the plaintiff's favour, was reduced to R15 000.00. The first Supreme Court of Appeal decision, involving Naylor and another, on the one hand and Jansen, on the other hand, is generally referred to as **Naylor 1**, whilst the second one is referred to as **Naylor 2**. It is, in my view, important to fully understand what happened in both **Naylor 1** and **Naylor 2**, in order to appreciate the cost principles and the

application of s 21A discussed in **Naylor 2**.

[25] As I have already stated, neither WILLIS, J nor SCOTCH, JA, in **Naylor 1**, were aware of the defendants' without-prejudice tender made before the commencement of the trial. Rule 34(12) provides:

> "*If the Court has given judgment on the question of costs in ignorance of or tender and it is brought to the notice of the Registrar, in writing, within 5 days of the date of the judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this sub-rule contained shall affect the court's discretion as to an award of costs.*"

Mr Naylor was the CEO of Atomaer (RSA) (Pty) Ltd, the second defendant in the Court *a quo*, before WILLIS, J. Atomaer, a foreign company, had appointed Mr Jansen as its local manager and it had a work relationship with Iscor, relating to negotiations in connection with the joint development of technology by both the second defendant and Iscor. Mr Jansen enjoyed a good relationship with Iscor Management. When, on his return to South

Africa, Mr Naylor had discovered that Mr Jansen had breached his service contract in various respects, he confronted Mr Jansen who, according to CLOETE, JA, "was less than frank about what he had done" (19E). The second defendant suspended Mr Jansen and, consequently, the latter was unable to attend a scheduled meeting between the second defendant and Iscor. Mr Jansen's absence at the meeting was explained by Mr Naylor and such explanation is recorded in the minutes as follows:

> "*Mr Naylor informed the meeting that Mr Jansen of the South African Local Office has been suspended from his position because* ***he had misappropriated Atamoaer Funds*** *to a company of which he holds a directorship*" (emphasis added).

That announcement was believed by those present, including a Mr Bezuidenhout, Iscor's engineering manager at Vanderbijlpark, who subsequently telephoned Mr Jansen asking him why he stole and also informing him "that he was a *persona non cata* at Iscor" (19G). WILLIS J had found that the words used at the meeting were defamatory of the plaintiff, Mr Jansen, in that he was

described as a thief, a finding that was upheld by SCOTT JA in the SCA.

[26] Because both Courts were unaware of the defendants' without prejudice tender, the defendant duly give notice of the order to the Registrar's of the Johannesburg High Court and the SCA the defendant sought a reconsideration of the order of cost made by WILLIS J and the SCA, respectively. SCOTT JA:

> "*initially directed that, if the parties did not reach agreement on the question of costs, each party was to submit a draft of the order it contended should be made, together with submissions in support thereof; and that the draft and submissions were to be served on the other party, who, if he wished, might file a reply.*"

When the matter was argued before WILLIS, J, he did not alter the cost order that he had made in favour of Mr Jansen. He, however, granted defendants leave to appeal against his refusal to alter the costs order. Consequently SCOTT, JA altered his previous direction and substituted it with one to the effect that the issue of

the cost of the earlier appeal would be considered at the same time as the appeal from WILLIS, J's judgment.

[27] In **Naylor 2**, when these two appeals were considered, CLOETE, JA also considered the implications of Rule 34(12) on the discretion of the judge *a quo*, with regard to the question of cost. In paragraph [14] of his judgment, CLOETE, JA says the following:

> "*[14] Ordinarily the purpose behind Rule 34 would cause the Judge to order the defendant to pay the plaintiff's costs incurred up to the date of the offer, and that the plaintiff to pay the defendant's costs thereafter. That does not mean, however, that there is a 'rule' 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 [1969 (4) SA 260 (E) at 336 in fine – 367B] and Mdlalose v Road Accident Fund [2000 4 SA 876 (N) at 885B-C]****. 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 14(12) makes clear, that the Rule does not dictate this result, even provisionally. When the law has given a Judge an unfitted 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' discretion). In such a case, the power to interfere on appeal is limited to cases in which it is found that a Court vested with the discretion* ***did not exercise the discretion judicially****, which 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 mind 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 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"***" (a quotation from ***National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** 2000 2 SA 1 (CC) [2000] (1) BCLR 39, at para [11]).

[28] CLOETE, JA then emphasised in para [15], that the trial judge, WILLIS, J, "was acutely aware of the fact that he was exercising a discretion. He was also aware of the parameters of that discretion." He then cited some passages to confirm that WILLIS, J's awareness of the fact that he was exercising a discretion and of all the parameters thereof. WILLIS, J emphasised that "in defamation actions, the **quantum** is largely irrelevant" and that "it is well-settled law that, in defamation actions, the **quantum** most often, essentially takes the form of a

solatium". CLOETE, JA further demonstrated how the Court *a quo* stressed that, more than the amount of damages awarded to him or her, a party that comes to court in an action for damages does so "in order to clear his or her name and reputation" and that it is "relatively unimportant, in the greater scheme of things", what "the actual *quantum* that is ultimately awarded" to him or her is. CLOETE, JA also cited WILLIS, J's following remark:

> "*it seems clear from the particulars of claim, never mind the ordinary principle that is applicable in matters such as this, that the plaintiff came to the High Court,* ***inter alia****, but perhaps most importantly for him, to vindicate his reputation.*" 25C-D.

WILLIS, J had also emphasised in his judgment that no acknowledgement of debt accompanied the defendants' tender, neither was there acknowledgment that a defamatory statement had been made and, more particularly, that the statement had been made wrongfully. Moreover, so WILLIS, J had emphasised, the tender contained no apology, which, in his view, is relevant to the exercise of the discretion with regard to costs because the

defendants had tendered R15 500.00 and the award of damages in the amount of R30 000.00 had been reduced by the SCA to R15 000.00 WILLIS, J specifically dealt with that situation as follows:

> "*It seems to me that, although the plaintiff ultimately succeeded in proving damages in an amount of R15 000.00, whereas the defendants had tendered R15 500.00, the plaintiff nevertheless needed to persist with the action in order to vindicate his reputation, more especially his reputation 'generally and within the industry within which he operates'. Accordingly, I am satisfied that, in this particular case, a judicial exercise of a discretion requires me not to vary the cost order which I made on 31 October 2003 in this matter.*"' (Quoted by CLOETE, JA at para [15], at 25F.)

Reacting to criticism, by counsel before the SCA, of some of the remarks by WILLIS, J, which it appeared to be common cause were "open to some criticism", CLOETE, JA remarked as follows in para [16]:

"*But what is important is not so much whether these remarks state the law completely accurately in the unqualified form in which they were made, but the purpose for which they were made. The golden tread running through the trial Judge's entire reasoning process, which ultimately led to his decision to exercise his discretion as he did, was that Jansen was obliged to come to court to clear his name. I am unable to fault this approach.*"

[29] Apart from restating the general principle with regard to the discretion of the court of first instance on the question of the award of cost to a successful party, **Naylor 1** (*supra*) is a good example of how a successful party was denied costs, contrary to the general principle in that regard. What is more important, in my view, is the fact that it illustrates the need to indicate reasons why that has been done. The fact of the matter is that Naylor and the second defendant succeeded in reducing the damages by half, on appeal, and yet were not awarded cost of the appeal. SCOTT, JA, in **Naylor 1**, para [18], 557 sums up his reasons for not awarding costs to Naylor and his co-appellant, as follows:

"*[18] To sum up, none of the defences raised by the defendants can be sustained and, to this extent, the appeal must fail. The limited success achieved on appeal, namely, by the reduction of the amount of R30 000.00 to R15 000.00, does not, in my view, justify an order cost in favour of the defendants. Jansen, it will be recalled, abided the judgment of this court.*"

Although I have already given reasons for the decision of the SCA, in **Naylor 2**, not to reverse the Court *a quo's* decision to refuse the plaintiffs their costs, I do think it is appropriate to sum them up as follows:

1. Cloete JA states that;

"Several of the defences raised at the trial by Naylor and Atamaer were abandoned on appeal. In particular, it was no longer in issue that the words reflected in the Iscor minutes of the meeting had been

uttered by Naylor; and the defence of justification was not persisted in (20E-21A).”

2. Defences which were persisted in were rejected by the SCA in **Naylor 1**.

3. Although the amount of damages ordered by the Court *a quo* was reduced from R30 000.00 to R15 000.00, the reasoning of the SCA, in making the reduction in **Naylor 1**, was that, as Cloete JA puts it in **Naylor 2;**

“… although Jansen had not been guilty of stealing money from Atomaer and diverting it to a company in which he had an interest (the sense in which this Court held the Iscor employees would have understood the words uttered by Naylor), Jansen had breached the duty of good faith he owed to Atomaer; that conduct, like theft, involved dishonesty; there was a direct link between the making of the defamatory statement and Jansen’s conduct; and the trial Court should have taken this conduct into account in

accessing the damages awarded. (Para [7], 21B-C)."

4. Jansen did not resist the appeal by the defendants with regard to the damages award, had not as much as been represented at the SCA but had elected to abide the judgment of the Court (para [1], 549A-550A, **Naylor 1**).

These are substantive reasons as to why there was departure from the one of the two general principles with regard to the question of cost, viz., the second one, that the successful party should, as a general rule, have his or her costs.

5. Willis, J was fully conscious of the fact that he was exercising his discretion with regard to the question of cost and gave reasons for his departure from that general rule. On the contrary, Dunn, AJ did not, in his judgment when dealing with costs, mention the question of public interest action, and give reasons, therein, why he was disregarding that factor.

[30] In ex parte **Gauteng Legislature: Gauteng School Education Bill**

1996 (3) SA 165 (CC), which is a Constitutional Court decision, of course, MAHOMMED, DP, as he then was, referred with approval, at 185F-G, to

> "*the well-known rule in the Supreme Court [now the High Court] that ordinarily, and subject to the discretion of the Supreme Court, costs should follow the result and the losing party should be directed to pay the cost of the successful party*".

For that proposition he relied on **Fripp and Gibbon and Co** (*supra*) and **Merber v Merber** (*supra*) **at 452**. He went on to say "there are obviously attractive grounds of policy which supports such an approach in ordinary litigation between litigants in the Supreme Court and in the Magistrate's Courts". KRIEGLER, J concurred in that judgment, at 185J, and order, as couched by MAHOMMED, DP.

[31] What emerges from the authorities is that, whilst the first principle, if one can so describe it, on the question of costs is that the judicial officer has a discretion whether to award or not to award cost, such

discretion is subject to a second principle, if one can describe that as such as well, viz., that, in exercising his or her discretion, the judicial officer must be aware that, ordinarily, the party that is wholly successful in an action or application is awarded costs. In other words, the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for a reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case. Both the first and the second principles are contained in what was said in **Merber v Merber** (*supra*) and cases that have followed and applied that decision, many of which have been discussed in this judgment.

[32] There is no doubt that the present appeal is one in respect whereof the successful party, especially with regard to the appellant against the statutory respondents, was deprived of what would ordinarily be its costs. I shall later deal with the question whether or not the Court *a quo* was justified in holding, in respect of Monsanto, the fourth respondent, that it was the successful party. To the extent that, therefore, the Court *a quo*, in the present case, deprived

Biowatch of its costs against the statutory respondents, the appellant was, in my view, entitled to approach this Court and to request it to "enquire whether there were any grounds for this departure from the general rule". I would, therefore, allow the appeal.

SECTION 21A PROVISIONS

[33] The conclusion I have reached above does not, however, dispose of the issues in this appeal. A word has to said about the provisions of s 21A of the Supreme Court of Appeal Act, with regard to the entertainment of an appeal whose results would have no practical effect except in respect of costs. This is more so, in the event of my conclusion, with regard to the exercise by the Court *a quo*, in general and on the facts of this case, being incorrect. According to the section, except in "exceptional circumstances", costs should not be used as one of the measures of determining whether or not an appeal will have a practical effect. The section is set out in full in paragraph 18 of the majority judgment and will, except for subsection 3, not be repeated in this judgment. Subsection 3 reads:

"*(3) Save **under exceptional circumstances**, the question*

whether the judgment or order would have no practical effect or result is to be determined with reference to consideration of costs." (Emphasis added)

[34] The phrase "exceptional circumstances" is not defined in the Act. SCOTT, JA dealt with that phrase in **Naylor 1**, **at 558C-D/F** in paragraph **[22]**, where he said the following:

"*[22] Ms Robinson, who argued the costs appeal on behalf of Naylor, contended* ***in limine*** *that this Court, in the exercise of its discretion in terms of s 21A of the Supreme Court Act 59 of 1959, should decline to entertain the appeal, as the result will have no practical effect save in respect of costs which, in terms of the section, are to be left out of account save under 'exceptional circumstances'. I cannot agree. As will appear from what follows, the circumstances in the present case are exceptional, as the order granted by the Court* ***a quo*** *involves not only* ***a***

> ***departure from a practice that is well established****, but also an inroad in what has hitherto always been regarded as a substantive right enjoyed by an incola. I should add that the point taken is somewhat surprising, as it appears from the judgment of the Court* ***a quo*** *granting leave to appeal that both counsel were in agreement not only that leave should be granted but that it should be granted to this Court*" (emphasis added).

In *Premier, Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA), the Court gave the purpose of s 21A as being, primarily, to alleviate the heavy workload of Courts of appeal (1143A-C). Because the judgment is in Afrikaans, I quote from the head note, which appears to the a correct rendition of what is said in the text. It is stated that the section;

> "*sets a direct and positive test; will the judgment or order have a practical effect or result? Given the object and clear meaning of this formulation, the question is whether the judgment in the case before the Court will have a practical*

effect or result and not whether it might be of importance in a hypothetical future case. Appeals should be submitted for adjudication only if there will be a real, practical effect or result of a judgment of the Court of Appeal."

The Court warned practitioners to always bear in mind the existence of s 21A and its aim.

[35] There are three aspects all of which are present in this appeal, that, in my view, amount to the "exceptional circumstances" contemplated in s 21A. Firstly, I am of the view that where the trial court has departed from one or both of the "two general principles" mentioned in **Fripp and Gibbon and Co** (*supra*) and endorsed in, *inter alia*, **Merber and Merber** (*supra*), justification for the court of appeal to "enquire whether there were any grounds for this departure from the general rule[s]" constitutes an exceptional circumstance for purposes of also s 21A. That, in my view, is akin to what SCOTT, JA held in respect of the Court *a quo's* departure, in **Naylor 1**, from what had hitherto always been regarded as a substantive right enjoyed by an *incola*.

What amounts to an exceptional circumstance in this case, in my view, is that of the Court *a quo* denying the appellant costs against the statutory respondents, in the one instance, and awarding costs against the appellant and in favour of the fourth respondent, in the other instance. In the Court *a quo*'s own judgment, the appellant was wholly successful against the statutory respondents. Concerning the fourth respondent, I am of the view that the appellant was wholly successful there as well. Even if it was not, its success against the statutory respondents and yet being denied costs justifies an enquiry by the court of appeal.

Secondly, it is where a party is acting in the public interest. Even on the assumption that the factual basis on which the Court *a quo* made those adverse orders is correct, the very idea of mulcting the appellant in costs in circumstances where it is, admittedly and in the Court *a quo*'s own judgment, acting in the public interest and in pursuit of rights and obligations contained in s 32 of the Constitution of the Republic of South Africa, 1996 (the Constitution), constitutes exceptional circumstances.

Thirdly, it is where litigation concerns matters of importance that frequently arise with regard to questions of law, or in interpretation of statutes and in interpretation of clauses in constitutions of private bodies; provided the judgment of the SCA will have practical effect or result.

A brief discussion of each of the three instances that, in my view, constitute exceptional circumstances for purposes of s 21A follows.

Departure from One or the Other or Both of the General Principles

[36] **Naylor 1** is a typical example of when, although the only issue for consideration is one of costs, the provisions of s 21(a) will, nevertheless, not be deterrent to such an appeal. There was departure, by the Court *a quo*, from a well established practice, as explained by SCOTT, JA.

[37] Before dealing with public interest as a basis for bringing an appeal against costs, inspite of the provisions of s 21A, it is, in my view, important to consider the attitude of the first to the fourth

respondents with regard to the appellant's claim that it was, in making the request it made to the first to third respondents and making its application in court, acting in the public interest. I have already referred to the point *in limine*, on behalf of the first to the third respondents, in which the appellant's *locus standi* was challenged. The fourth respondent, on its part, contended that the appellant's right of action, if any, was governed by PAIA. Alternatively, if PAIA was not applicable, the right of access to information was governed by item 23(2)(a) of Schedule 6 to the Constitution. Only during argument did counsel for the fourth respondent concede, during the course of his own address, that item 23(2)(a) of Schedule 6 of the Constitution lapsed with the enactment of PAIA. That, therefore, meant that the appellant was entitled to bring the application in terms of s 32 of the Constitution. In its judgment, the court *a quo* dismissed the statutory respondents' point *in limine* with regard to the appellant's *locus standi* (judgment para [15]), for reasons fully set out in paragraph [14] of the judgment. Objections to the appellant's *locus standi*, on behalf of the fifth respondent, based on the provisions of s 18 of the GMO Act and s 31(1)(c) of NEMA – details of which objections are discussed fully in paragraphs [36]

and [37] of the judgment – as well as an objection based on the appellant's failure to take the Registrar's refusal to provide the appellant with information it required – also dealt with in para [37] of the judgment – were dismissed by the Court *a quo*. All three counsel who made submissions, i.e. on behalf of the statutory respondent, the fourth respondent and the fifth respondent, respectively, advanced substantive submissions, backed with ample authority, in a manner that was clearly designed to kill the application from the outset. The Court *a quo*'s judgment with regard to these various objections, itself, covers quite a number of pages in a very well-reasoned discussion of each and everyone of the points raised.

[38] In the course of its judgment, in dealing with the submission made on behalf of the fifth respondent to the effect that the Registrar was protected by the provisions of the GMO Act from furnishing the information sought by the appellant (judgment, pages 648/9, para [37]), the court *a quo* made it clear that it considered the appellant's request for information to be in the exercise of a constitutional right. In this regard the court *a quo* said the following:

"*In other words the Registrar is not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMO Act, if such disclosure is aimed at giving effect to the right to access of information enshrined in section 32(1)(a) of the Constitution. Our constitutional dispensation after all enjoins the State – acting through its appointed officials – to positively respect, protect, promote and fulfil the rights in the Bill of Rights Chapter of the Constitution. To interpret section 18(1)(a) of the GMO Act in the aforementioned fashion, which in my view it should be, would also be in keeping with the constitutional imperative of interpreting legislation in a manner that promotes the spirit, purpose and objects of the Bill of Rights*." (Footnote references are omitted)

[39] In its notice of appeal, dealing with the court *a quo*'s failure to order payment of costs by any of the statutory respondents, the appellant submits, *inter alia*, that:

"*3. The learned judge misdirected himself:*

3.1 in not giving due weight to the facts that the appellants were acting in the public interest (as found at paragraph 14 of the judgment) in the interest of protecting the environment, and to uphold constitutional rights."

[40] During the application for leave to appeal Mr Butler, on behalf of the appellant, sought to draw the Court's attention to further affidavits that had been submitted on behalf of the appellant to focus on the consequences of a costs order on the appellant, an NGO (non-governmental organisation). Mr Rip, on behalf of the fourth respondent, objected to the late introduction of such affidavit, submitting that the appellant should have done so during the hearing of the application. The following important and interesting discussion then took lace between the Court *a quo* and Mr Rip:

"<u>*COURT*</u>*: 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?

<u>MR RIP</u>: *Your Lordship* ***probably you could have taken that into account*** *in any event that, that it is a body that deals with public funds or … (intervene)*

<u>COURT</u>: ***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 such for funding … (intervene).*

<u>MR RIP</u>: *Well, M'Lord it was never raised in 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 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, but to try and take it now further, as they wish to do in these affidavits and come down to very specific contractual relationships which they have outside (sic). That was not before the Court and with the greatest of respect, there is absolutely no reason why it was not before the Court. The simple answer, to come now and simply say, oh, we are flabbergasted, we never expected in our wildest dreams that we would not have a cost order made against us or something like that, is without any justification.*" (Page 705-706)

[One gets the impression, up to now, that Mr Rip submits that the public interest nature of the application was not considered when costs were argued. The discussion goes further, from page 707, thus:]

"<u>*COURT*</u>*:* *But, I could just ask you this.* ***What concerns me is, did I not, where a party comes to Court to protect its constitutional rights did I not, you know, treat that too lightly****? They were obliged to come to court. Your clients obliged them to persist with the application … Am I not wrong in not awarding them costs against the State?*

[One gets die impression, up to now, that Mr Rip agreed with the Court, that the public interest nature of the application was not considered when costs were argued.]

<u>MR RIP</u>: *Well, M'Lord, we would submit that your Lordship was not wrong in doing that because, M'Lord, … But, M'Lord, the point I am trying to make is whether your Lordship was wrong or not at this stage, is irrelevant.* ***The question is did your lordship judicially apply your mind to that discretion*** *and if you have, if you did that,* ***whether you did it wrongly or not then they do not have any grounds for leave to appeal****. As my learned friend has himself quoted, that the, at page 3 from Cloete's judgment and in determining this question an approach laid down by the Appellate Division such matters remains (sic) relevant in that* ***the failure to exercise a judicial discretion would at least usually constitute an exceptional circumstance****. A failure to exercise a judicial (sic). But conversely the mere fact that an appeal court might or even probably would give a different order would not (sic). The test*

is, did your Lordship consider the relevant facts and did your Lordship exercise your discretion and did your lordship in the light of your discretion, rightly wrongly, come to the conclusion that your Lordship did. The test is not whether the conclusion is the correct conclusion, as seen from other sources, but whether or not all the factors were on the table at the time that your Lordship made that decision ***and we would submit ample facts your Lordship considered all the relevant facts****. … So that all those facts which my learned friend now says that you misdirected yourself at (sic), wherein your Lordship's mind when at the conclusion you come along and you say, and by saying, with respect, M'Lord the way we would read it, is that your Lordship is saying yes, normally all of this would lead to a cost order but there are certain other factors that I am now taking into account which persuades me not to do that and your Lordship*

mentions what those factors are.

[Mr Rip now sings a different tune, viz. that the Court *a quo* took into account the public nature of the application. As can be gleaned from what follows, this now becomes the new approach which, in my view, differs from the initial approach. The discussion proceeds:]

<u>COURT</u>: ***But I only mentioned one***. *Doesn't that, if I understand Mr Butler's argument,* ***I only mentioned one****, so, what really proceeded that one must ignore if I understand his argument.*

<u>MR RIP</u>: *Well, M'Lord that might be what he wishes to state. M'Lord, that is why we say it has been taken out of context … I do not think your Lordship says it is only, only one. Your lordship says the manner in which some of the requested information were formulated as well as the manner in which the relief is claimed in*

the notes [notice] of motion was formulated. … The fact is that ***your Lordship did exercise the discretion against the background of a detailed and reasoned judgment*** *where your Lordship* ***set out the relevant facts*** *and on such a basis that there is no basis for another court to come and say, well you did not your exercise your. … The only way a court of appeal can interfere is that they can find that* ***your Lordship did not exercise a discretion judicially****.*

<u>COURT</u>: *But are there not reasonable prospects of a court of appeal coming to such a conclusion?*

<u>MR RIP</u>: *Well, we would submit not, M'Lord. Not, not on the basis that your Lordship, there may be an argument to be made out that this, the way your Lordship exercised your discretion might have led to a result which some other court*

might not support, M'Lord, but not that your Lordship did not exercise your discretion judicially, taken (sic) into account all the relevant … (intervene)." (Page 705-712, emphasis added, with a lot of discussion, which is either repetition or of no significance particularly from Mr Rib's comments, deliberately omitted.)

[41] I have deliberately quoted at length from the discussion between DUNN, AJ and Mr Rip, who was making submissions on behalf of the statutory respondents, because of the importance of –

(a) the initial concession by both the learned acting judge and counsel that the court *a quo* should have taken into account the fact that the appellant was acting in public interest; and

(b) the need to determine, from the contents of the discussion, whether or not the Court *a quo* did, as a fact, take that aspect into consideration when making the costs award. During argument before us, Mr Snyckers submitted, on the fourth

respondent's behalf, that DUNN, AJ's observations during argument around the question of public interest did not amount to a concession, on his part, that he had not, as a matter of fact, considered the appellant's role as an NGO making an application in the public interest. In making this submission, Mr Snyckers was fortified by the following passage in DUNN, AJ's judgment, in paragraph [15] of his judgment on the application for leave to appeal; Vol 8, page 738:

> "*[15] As far as the cost order that I made against Biowatch in favour of Monsanto is concerned, I also considered that such an order was appropriate in all the circumstances. A failure to expressly articulate all the grounds in favour of not making such an order certainly do (sic) not mean that they were not considered. I am acquainted with the case law referred to by Mr Butler in his heads of argument, particularly since I was also involved in at least one of those cases, namely the* ***Democratic Alliance***

and Another v Masondo N. O. and Another 2003 (2) SA 413 (CC) para 35. *What does not appear in the case report is that the Constitutional Court also refused to reverse the costs order made against the appellant ie the appellant before the Constitutional Court in the High Court. Although I do not think that another court will necessarily arrive at a different conclusion about the costs order in Monsanto's favour, I consider that this is also a … case that might result in a different conclusion by another court.*"

[42] MYNHARDT, J, in the majority judgment, explains DUNN, AJ's above remarks on the basis that they were uttered during what he, DUNN, AJ, referred to as "the poverty defence" which the appellant's counsel sought to place before him after he had given judgment, for him to consider with regard to costs. After, correctly in my view, pointing out that DUNN, AJ did not deal with the question of the admissibility or otherwise of the supplementary affidavit, the majority judgment proceeds as follows at para [36]

pages 67-68:

> "*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 court order against a NGO might have 'a chilling effect' that is* ***something that is fairly common knowledge****. In the* ***Wessa case [Wild Life and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others 2005 (6) SA 123 (ECD)]*** *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 'the poverty debate' and the fact that Biowatch's impecuniosity was not taken into account in his favour certainly does not mean that Biowatch has succeeded in showing that the court* ***a quo*** *had committed a demonstrable blunder.*"

It appears, on my understanding of the above passage in the majority judgment, that it accepts that DUNN, AJ did not take into account the appellant's impecuniosity. I do not understand the import of the phrase "if that is a fact" and I do not think it should alter my understanding of the passage. I am, therefore, in agreement with the majority judgment that, as DUNN, AJ, himself kept saying, the Court *a quo* did not take into account the fact that the appellant was an NGO when considering his judgment on costs. That, in my view, could only be in the context of the appellant acting, as an NGO, in the public interest. I do not, therefore, agree with the majority judgment that, that omission on DUNN, AJ's part does not show "that [he] had committed a demonstrable blunder". In my view, it demonstrates just that. It is in this context that I proceed in this judgment, to discuss how the question of costs in public interest actions has been considered in various courts, ie internationally and South Africa.

PUBLIC INTEREST

Public Interest Litigation and Costs in Foreign Jurisdictions

Canada

[43] In **Hlatshwayo v Hein 1999 (2) SA 834 (LCC) para 24**, it is stated that Canada "shares our general rule that costs follow the result". That, indeed, appears to be the case, as will appear from the authorities that follow. However, there is a growing trend to depart from the general rule, in some foreign jurisdictions in litigation involving matters of general interest. In **Mahar v Rodgers Cable Systems Ltd (1995) 25 OR (3d) 690 (GD)** the following is stated at 703b:

> "*There will always be debate about what is the public interest, but it is fair to characterise this proceeding as a public interest suit. While the ordinary costs rules apply in public interest litigation,* ***those rules do include a discretion to relief the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in favour of public interest litigants***." (Emphasis added)

[44] The Court then went on to say the following:

> "*The matter was considered in depth by the* ***Ontario***

Law perform in its report on class actions *(1982), where the following summary was given of the court's discretion in this area (vol. III, p. 649):*

> *'While the general rule is well established in our legal system, there are well accepted exceptions that justify a denial of costs to a victorious party, even where there has been no misconduct by him or his lawyer. In some cases, a successful party may not be awarded costs where the issue determined is novel, where the court has been asked to interpret a new or ambiguous statute, or where the action is a "test case". The existence of certain exceptions indicates that* ***the general rule is not immutable****, but a rule that, however deeply entrenched, occasionally defers to special considerations dictating that its application is inappropriate."'*

Finally I refer to the following passage by the Court:

"*In my view, it is appropriate in this case to exercise my discretion in favour of the applicant and to make no orders as to costs. The issue raised was novel and certainly* ***involved a matter of public interest***. *While I decided the jurisdiction point against the applicant, I am satisfied that the* ***application was brought in good faith for the genuine purpose of having a point of law of general public interest*** *resolved. It is true that many of the cases in which an unsuccessful public interest litigant has been relieved of the cost order have involved suites against the government, and the respondent here is a private entity. However, the respondent does enjoy the substantial benefit and protection of a statutory monopoly in the provision of its services to the public, and this application was brought in relation to an important aspect of the terms on which that monopoly is enjoyed. While the targets of public interest litigation are certainly entitled to the protection of the rules of court it should not be forgotten that those rules include a discretion to relieve the loser of the burden of paying the winner's party and party cost. As observed by Fox,* ***supra*** *and by the*

Ontario Law Reform commission report, **supra**, ***public interest litigants are in a different position than parties involved in ordinary civil proceedings***. *The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interest.*" (Emphasis added)

[45] It would seem that public interest litigants in Canada, do, indeed, enjoy universal protection in respect of costs, where they have lost their claims. In the journal **McGill Law Journal / Review De Troit De McGill**, the following appears:

"**A more recent Nova Scotia case directly considered the impact of security for costs on public interest litigation. In *Coalition of Citizens for a Charter Challenge v Metropolitan Authority Kennett, supra* not 24 at 749, the plaintiffs challenged the constitutionality of a waste incinerator on the grounds that the resulting damage to public health and to the environment would contravene section 7 and 15 of the *Charter*. The defendant requested**

> **security on the basis that the citizens' group was a 'nominal plaintiff'. Glube, J, stated that there is 'apparently no case law supporting the position that a public interest group is a "nominal plaintiff" and therefore should provide security for costs.**
>
> > **'To order security for costs where a public interest action arises would, as was argued on behalf of the Coalition, have "serious and chilling results". It would affectively [*sic*] end any such actions. It would be anomalous to grant standing and then effectively bar the action by ordering security for costs at this time.'**" (Emphasis added)

[46] Writing about costs in Canada, L Friedlander, in "L Friedlander – Costs", says "public interest litigation will not frequently produce significant financial gain for the plaintiffs and the risks of litigation are therefore increased". There can be no doubt, therefore, that the question of impecuniosity is a matter of curial importance in public interest litigation. The author further states, at page 62 of the same

journal that, "public interest litigation is also discouraged by the potential obligation to provide security for costs". He then goes on to say:

> "*The obligation to provide security for costs may bring impending litigation to a halt if the plaintiff does not have adequate financial resources. Defendants may thus ask for security as a stalling tactic.*" (Page 63)

[47] What is stated by REID, J in **John Wink Ltd v Sico Inc (1987), 57 O.R. (2d) 705, 15 C.P.C (2d) 187 (H.C.J.),** quoted on page 64 of Friedland's article, is, in my view, apt. It reads:

> "*[U]nless a claim is* ***plainly devoid of merit****, it should be allowed to proceed … While the adoption of this standard might allow some cases to go to trial and that the trial will prove should not have proceeded, nevertheless, the danger of injustice resulting from wrongly destroyed claims that should have been permitted to go to trial is to my mind a greater injustice.*"

[48] In his book, "Costs and the Pubic Interest Litigant" (1995, 40 McGill Law Journal 55), Friedlander, with reference to "public interest litigation", observes that:

> "*… public interest litigation will not frequently produce significant financial gain for the plaintiffs and the risks of litigation are therefore increased. The use of the English Rule (costs-in-the-cause) to discharge cases in which the possibility of pecuniary gain is insufficient to counterbalance the costs of litigation means not only that all types of litigation will be reduced, but also that* ***public interest cases will be discouraged in a manner disproportionate to other types of litigation****. This will be due to the minimal likelihood that potential success will offset financial risk*." (Vol. 40, page 62-63, emphasis added.)

The author refers to the judgment in **Coalition of Citizens for a Charter Challenge v Metropolitan Authority, (1993), 122 N.S.R. (2d) 1, 103 D.L.R. (4th) 409 (S.C.T.D)**, in which

GLUBE, J is reported to have said the following:

> "*To order security for costs* ***where a public interest action arises*** *would, as was argued on behalf of the Coalition, have* ***'serious and chilling results'***. *It would affectively [sic]* ***end any such actions***. *It would be anomalous to grant standing and then effectively bar the action by ordering security for costs at this time.*"

[49] In **British Columbia (Minister of Forests) v Okanjan Indian Band [2003] 3 S.C.R. (SCC)** the following is stated, at paragraphs 27 and 28:

> "*27. Another consideration relevant to the application of costs rules is* ***access to justice***. *This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the* ***Charter***. *In special cases where the individual litigants of limited means seek to enforce* ***their constitutional rights***, *courts often*

exercise their discretion on costs so as to avoid the ***harshness that might result from adherence to traditional principles****. This helps to ensure that* ***ordinary citizens have access to the justice system*** *when they seek to resolve* ***matters of consequence to the community as a whole****.*

28. Courts have referred to the importance of this objective on numerous occasions. In ***Canadian Newspapers Co v Attorney-General of Canada (1986), 32 D.L.R (4th) 292 (Ont H.C.J.)****, Osler J, opined that 'it is desirable that* ***bona fide*** *challenge is not to be discouraged by the necessity for the applicant to bare the entire burden' (pp. 305-6), while at the same time cautioning that 'the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged' (p.306).*" (Emphasis added)

United Kingdom

[50] In **R (Corner House Research) v Secretary of State (UK) for Trade and Industry [2005] 1 WLR 2006** per BROOKE, LJ, at para 41, the Court of Appeal stated the following, in paragraph 41:

> "*41. Some of the authorities … demonstrate a trend towards protecting litigants, who reasonably bring public law proceedings* ***in the public interest****, from the liability to (sic) cost that falls, as a general rule, on an unsuccessful party.*"

Privy Council

[51] In **Belize Alliance of Conservation Non-governmental Organisations v The Department of the Environment (First Judgment of the Privy Council Appeal No 47 of 2003)**, the applicant, generally referred to as Bacongo, sought certain information with regard to environmental matters from the Department of the Environment, which the department refused to furnish. In that regard the Court commented as follows:

> "*The respondents' reluctance to disclose information to Bacongo (even when it is highly material and not obviously confidential) has been a regrettable feature of this case. No doubt the respondents regard Bacongo as a most troublesome thorn in their flesh, but* ***their unhelpful attitude can only have tended to create the Bacongo's suspicion, and perhaps also its determination to press on with the litigation.***" (Paragraph 15, emphasis added.)

The Chief Justice gave judgment against Bacongo but, in doing so, "**recognised the Bacongo as having acted with the commendable public spirit** (paragraph 17). Consequently, he made **no order as to costs.**" Bacongo proceeded to the Court of appeal, where the appeal was dismissed. Once more, there was no order as to costs.

The respondents' reluctance in that case, to disclose information is, in my view, not unlike that of the first and fourth respondents' reluctance in the present case. More important, in my view,

however, is the two Courts' approach of not awarding costs to the successful respondents, recognising that the applicant had "acted with commendable **public spirit**".

Australia

[52] In an article attributed to the Law Reform Commission, entitled "Costs Shifting – who pays for Litigation?" ALRC TS (1995), the following appears under a heading "COSTS ALLOCATION RULES AND PUBLIC INTEREST LITIGATION":

> "*13.8 Costs allocation rules can significantly influence the bringing and conduct of* ***public interest litigation and test cases***. *In particular, the* ***costs indemnity rule generally has a deterrent effect on this type of litigation***.
>
> *13.9 In an address to an International Conference on Environmental Law in 1998, Justice Toohey stated:*

*'**There is little point in opening the doors to the Courts if litigants cannot afford to come** in. The general rule in litigation that "costs follow the event" is in point. **The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.**'*

13.10 *Some jurisdictions have introduced systems of one-way fee shifting where **a party found to be acting in the public interest**, usually the plaintiff, is able to recover costs if successful **but pay nothing if unsuccessful**.*

13.11 *The Commission considers that **the significant***

benefits of public interest litigation mean it should not be impeded by the costs allocation rules." (Emphasis added)

[53] From the above, it can confidently be said that the question of public interest litigation and the need to have it encouraged by not awarding costs against litigants, even if they should lose the action, is a matter of concern in other jurisdictions, internationally.

What is the Position in South Africa Concerning Public Interest Actions?

[54] In the appellant's heads of argument for application for leave to appeal this aspect, as indeed other aspects, is elaborately and, in my view, eloquently dealt with. It is discussed in respect of the approach of the Constitutional Court, other South African courts and environmental litigation and costs with regard to s 32 of NEMA, which approach I find quite practical and useful.

Constitutional Court

[55] It is submitted, correctly in my view, on behalf of the appellant,

that the Constitutional Court has approved of the two basic principles with regard to the award of costs. For that submission the appellant relies on **Ferreira v Levin NO and Others**; **Vryenhoek and Others** (*supra*) at para [3]. It is stated therein that:

> "*the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet* ***new needs*** *which may arise in regard to* ***constitutional litigation***,

and that, whilst the general principles are:

> "*a useful point of departure … **[i]f the need arises the rules may have to be substantially adapted**; this should however be done on a case by case basis.*" (Emphasis added)

I find myself in agreement with the further submission, on the appellant's behalf, that:

"*the Constitutional Court has proceeded to develop a growing* ***jurisprudence*** *relating to costs orders in constitutional and public interest matters.*" (Emphasis added)

[56] Reference is made in the applicant's heads, to a number of judgments by the Constitutional Court, in which the losing party was not mulcted in costs (**Ex parte Gauteng Provincial Legislature**: In re **Dispute Concurring Constitutionality of Certain Provisions of the Gauteng School Education Bill of** 1995, 1996 (3) SA 16 (CC) at para [36]; **Motsepe v Commissioner for Inland Revenue** 1997 (2) SA 898 (CC) at paras [31]-[32], at paras [36]-[32]; **Sanderson** (*supra*), at para [44]; **Democratic Alliance and Another v Masondo N.O and Another** 2003 (2) SA 413 (CC), at para [35] **City of Cape Town and Another v Robertson and Another 2005 (2) SA 323 (CC)**, at para [79]).

[57] Reference will be made here, at random, to two of these Constitutional Court decisions.

In **Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC)**, the Constitutional Court was dealing with an application by an accused person whose prosecution had been excessively delayed, for which delay he sought to have the prosecution stayed, on the basis that it had been excessively delayed. The Constitutional Court stated that the focus of the Court's enquiry was not on the general disadvantages suffered by the appellant in consequence of the serious charges preferred against him and the consequences flowing from them, but rather on the delay and the prejudice it caused to him. The Court, nevertheless, held that, on the facts of the case, it was not an appropriate case for a stay of prosecution. The Court considered, *inter alia*, the following aspects; that the appellant was not in custody in all that time, that he continued working, that postponements were to dates which suited him and that that did not require him to frequently attend court and that he was legally represented and could have opposed the postponements much more energetically than had been done when the request therefor were made. The appellant's appeal against an earlier dismissal of this application by the High Court was, therefore, dismissed by the Constitutional Court. In

dismissing the application, the High Court had made an adverse costs' order against the appellant.

[58] Concerning "public interest", KRIEGLER, J, giving the judgment of the Court, stated the following in para [37], 57H-58B:

> "*[37] … Since time immemorial it has been an established principle that the* ***public interest*** *is served by bringing litigation to finality and, of course, quite apart from the general public, there are individuals with a very special interest in seeing the end of a criminal case. … Ordinarily the interest of all concerned are best served by getting on and getting done with the case as quickly as reasonably possible …*" (Emphasis added).

Alluding to the question of costs, KRIEGLER, J said the following, in para [43], at 70A:

> "*[43] This judgment cannot conclude without something being said about costs. The dismissal of the appellant's application in the High Court carried*

with it an adverse order for costs. That was in conformity with [a] long-established practice in that Court, even in cases such as this, where leave sought is tied up with a criminal case. On appeal to this Court the respondent supported that approach as far as the costs in both Courts is concerned. The appellant, however, advanced the contention that, as the proceedings in the High Court had been an extension of the criminal case, which violated ***the appellant's fundamental right****, no order as costs should have been made against him even though the resort to the Constitution had failed and cited the judgment of this Court in* ***Motsepe v Commissioner for Inland Revenue*** *[1997 (2) SA 898 (CC)] 1997 (6) BCLR 692] in support. In my view the citation is apt and the proposition well founded. The observations of Ackermann J, on behalf of the Court, in the passage cited are directly in point:*

> *'… one should be cautious in awarding costs against litigants who seek to enforce their*

> ***constitutional right*** *against this 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****.'*

Ackermann J immediately proceeded to point out, however, that such an approach should not be allowed to develop into an ***inflexible rul****e which might induce litigants*

> *'... into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the cause for doing so may be or how remote the possibility that this Court will grant them access.'*

In fact, in that case, ***an adverse costs order was granted*** *against the unsuccessful individual in*

order to

> *'... disabus(e) the minds of potential litigants of the notion that they can approach this Court without any risk of having an adverse costs order being made against them,* ***no matter how groundless the merits of such approach****.'*

At the time the costs order in this case was made that judgment had not yet been reported. We had, however, already alluded to the ***possibly dangerous 'chilling' effect of an adverse costs order in constitutional cases****. [****Ferreira v Levine NO and Others****;* ***Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC) 1996 (4) BCLR 441]****.*

[44] The observations in ***Motsepe and Ferreira*** *were based on* ***policy considerations*** *that apply with equal force to other courts.* ***Ordinarily the dismissal of a claim such as this in the High Court should not***

carry an adverse costs order. *It is not a suit between private individuals; it relates directly to the criminal proceedings, which are instituted by the State and in which costs orders are not competent; and a cause of action is that the State allegedly* ***breached an accused's constitutional rights to a fair trial***. *Although the appellant failed to establish the constitutional claim he advanced,* ***it was a genuine complaint on a point of substance and should therefore not have been visited with the sanction of a costs order***. *However slow, a Court of appeal should be to interfere with a costs order in a court of first instance, this is clearly a case where* ***intervention is necessary***. *Although the appeal must fail on the merits, the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay the costs and should not have to bear the costs in this Court.*

[45] In the result, the appeal is dismissed, save that the

order in the High Court directing the appellant to pay the costs of those proceedings is set aside." (Emphasis added)

There was no reference to s 21A in *Sanderson* (*supra*), probably because the provisions thereof were not alluded to during argument by counsel. Whatever the reason is, I am of the view that this judgment is relevant to the provisions of that section.

[59] Although, in dealing with the question of costs, in para [44], the learned judge of the Constitutional Court alludes to the suit "[not being] between private individuals: [but, instead, relating] directly to criminal proceedings, which are instituted by the state", it is, in my view, quite evident that the ratio of the decision in this regard is the fact that the appellant's complaint was based on an alleged breach of his "constitutional right to a fair trial" and that his "was a genuine complaint on a point of substance". KRIEGLER, J also referred to "public interest", in paragraph [37] of the judgment.

[60] In **Democratic Alliance and Another v Masondo NO and Another 2003 (2) SA 413 (CC)**, the appellants had brought an

application before the High Court in Johannesburg, challenging the constitutionality of the appointment of the current mayoral committee by the first respondent. The application had been dismissed, with costs, and the appellants had then appealed against that decision in the Supreme Court of Appeal. That appeal was also unsuccessful. It does not appear that, when the question of costs was being argued before the SCA, the question of the provisions of s 21A was discussed nor, for that matter, was there reference to the first of the two principles on matters of costs, viz., the supremacy of the judicial discretion of the court of first instance in the awarding of costs. I cite this authority, however, as another illustration of the relevance of public interest concerning the awarding of costs. In para [35], LANGA, DCJ, as he then was, says the following:

> "*In the High Court, the appellants were ordered to pay costs. The respondents have asked for costs in this Court in the event of their being successful. The issues at stake are* ***important matters of public interest*** *affecting local government structures throughout the Republic. I consider that an appropriate order in this Court is for each party to*

pay its own costs."

That is the majority judgment in that case. Although, in his minority judgment, SACHS, J gave different reasons for concurring in the judgment to LANGA, DCJ (as he then was), he said nothing that suggested that he had a different view with regard to the view expressed concerning costs. In her dissenting minority judgment, O'REGAN, J did not, in suggesting that the appeal be upheld, allude to the question of costs.

[61] From the above, there is no doubt in my view, that the Constitutional Court adopts the trend that is in vague in some foreign jurisdiction of the ordinary, not awarding costs against applicants in public interest litigation. Consequently, I find the following statement by the Land Claims Court, in **Hlatshwayo** (*supra*), at para [18], summarises the attitude of the Constitutional Court as follows:

"*Our law recognises that in* ***the exercise of its discretion*** *relating to costs a court may deprive a successful party of*

his or her costs and ***the trend, in the Constitutional Court*** *at least, appears to be in the direction of* ***recognising public interest cases as one of those circumstances where it may be appropriate to do so***," (emphasis added).

In my view, there is more than a "tend" but a flexible rule by the Constitutional Court in this regard.

Supreme Court of Appeal on Section 21A Public Interest

[62] In **Western Cape Education Department and Another v George 1998 (3) SA 77 (SCA)**, the Supreme Court of Appeal (the SCA) requested counsel for the appellants to prepare argument on the question, *in limine*, whether the appeal was not liable for dismissal in terms of s 21 of the Supreme Court Act 59 of 1959, on the basis that, as the section lays out, "the issues are of such a nature that the judgment or order sought will have no practical effect or result". After hearing argument, the Court came to the conclusion that no practical effect or result would be served in hearing the appeal, which was only with regard to costs. HOWIE, JA (as he then

was), in giving the judgment on behalf of the Court, reiterated at 84G, a "warning expressed in the matter of **Premier, Provinsie Mpumalanga en Ander v Globlersdalse Stadsraad [1998 (2) SA 1136 (SCA),** that practitioners keep the provisions of s 21A in mind not only at the stage of an application for leave to appeal but also thereafter (84G)". Whilst this is a case in which the provisions of s 21A were applied, it is important to examine the basis on which the Supreme Court of Appeal dismissed the appeal.

[63] The respondent, George, had referred a decision by the appellant – refusing to accord her benefits of the house-owner allowance scheme – to the Industrial Court, in terms of s 18 of the Education Labour Relations Act 146 of 1993, for it to be declared an unfair labour practice. The industrial court found in the respondents' favour, holding that the respondents' refusal constituted an unfair labour practice. The appellant appealed to the Labour Appeal Court, which also dismissed the appeal but granted the appellant leave to appeal to the Supreme Court of Appeal, which is the decision in respect of which HOWIE, JA (as he then was) gave his

judgment. Before the appeal was heard in the Supreme Court of Appeal, the parties concluded a settlement agreement, which resulted in the respondent withdrawing her opposition to the appellant's appeal before the SCA. By that time that the appeal was heard in the SCA, the agreement of the Council had already been published and the discrimination of which the respondent had complained had already been removed. The only issue remaining for decision was the question whether or not the appellant's conduct constituted an unfair labour practice. It was on that basis that the Court called upon the appellant's counsel to make submissions in respect of the provisions of s 21A.

[64] The gravamen of the appellant's submissions, with regard to its continued pursuit of the appeal, in *George* (*supra*) was that it was essential to free the appellant of a stigma of having perpetrated an unfair labour practice. It was submitted that it was important for the Court to lay down a principle that, where, as was the case in that matter, negotiations were still in progress, it was legally inappropriate of an employee to take the issue before the Industrial Court for that Court to decide on it. Because the Education Labour Relations Act had already been repealed by the Labour Relations

Act 66 of 1995, the SCA was of the view that the stigma feared by the appellants was no longer justified. If anything, any would-be applicants for employment with the appellant would be encouraged by the change. They would, instead, be of the view that: "*The position is quite different now – equality has been achieved*." Although the SCA held that: "*nothing demonstrates in this case that a finding that there was no unfair labour practice, whilst it might constitute subjective* ***solatium*** *for appellants, would bring about any objectively discernible practical advantages for them or anyone else whether in the labour relations sphere or at all*", it significantly, for purposes of the present case, accepted that: "*To litigate with the motive to clear one's name is understandable (83H-I/J),* ***even where the outcome of the judgment will have no practical effect on the relationship between the parties, except to reverse a costs decision by a lower court***." (Emphasis added)

[65] With regard to costs, the following is said in paras [59], [60], [61], and [62], in *George* (***supra***):

"*[59] In their notice of motion, the applicants claimed an*

order for costs against the respondents jointly and severally. In the event of dismissal of the application, however, they submitted that no order as to costs should be made, on the basis that they acted herein ***bona fide*** *and in the public interest. The respondents resisted this request, arguing that the dispute was between private bodies and that costs should follow the result.*

[60] ***The guiding*** *principle in this regard appears to be that the question of costs in* ***constitutional and public interest litigation*** *remains a discretionary matter. However, parties who litigate to test the constitutionality of law or conduct* ***usually seek*** *to* ***ventilate important issues relating to constitutional principle****. Such person should not be discouraged from doing so by running 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.*" [In the footnote, reliance is had on

Joubert [ed] **The Law of South Africa** (1st re-issue) vol 3 para 301 and **Democratic Alliance v Masondo NO and Another** (supra) and cases cited therein.]

[61] These principles have been applied uniformly where litigation is against an organ of State. The same principles apply in cases involving private litigants where a party litigates ***for public purposes and in the public interest****. The Court's discretion could be exercised against a private litigant, however,* ***inter alia****, where the litigation was spurious or frivolous or where such litigant has not acted in good faith or where it was apparently pursuing private commercial interest (reliance is had on a number of cases cited in the footnote, including* ***South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson (Seefoods Division Fish Processing) 2000 (3) SA 705 (CC) (2000 (8) BCLR 886) at para [51].***

[62] In my view, the applicants in the present case ***raised matters of great public interest and concern*** *– not for any benefit or advantage to themselves, but* ***bona fide*** *and for the* ***common good****, as perceived by them. Moreover, the points they raised, though* ***ultimately unsuccessful, were not without merit****. In line with the general approach outlined above, I am of the view that it will be* ***fair*** *if no order as to costs were made, thus leaving each party to pay its own costs.*

Order

[63] For the reasons set out above, the application is dismissed. ***No order is made as to costs****.*" (All emphases added)

[66] The SCA did not, in my view, disagree, in *George* (***supra***), that "a judgment could be given **providing a practical guideline for the solution of similar legal questions in future**" 83J, but found, on the facts of the case, that "considerations point the other way" (83J). In other words, it would be pointless for the SCA to define

what is or is not an unfair labour practice where the legislature has removed the possibility of any future actions based on an alleged unfair labour practice. Had the position been otherwise, the SCA would, in my view, have entertained the appeal, although it would have had no practical effect on the relationship between the parties, in view of the settlement agreement, except the possible reversal of the costs order. The appellants would, therefore, not have been hit by the provisions of s 21A if the Education Labour Relations Act was still in place as that would, in my view, have been in keeping with **Globlersdalse Stadsraad (supra)**.

[67] The majority judgment makes a further comment with which I, once more, respectfully find myself in disagreement. It says, still in para [33], at pages 56-57:

> "*What is more, as counsel for Monsanto rightly submitted, is that section 21A of the Supreme Court Act 1969 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.*"

I do not understand the significance of mentioning that the Constitutional Court does not hear appeals on costs orders as a way of explaining the Sanderson decision. In the first place, the appeal heard by the Constitutional Court in the Sanderson case was against the decision of the South-Eastern Cape local division, which had dismissed the appellant's application in that Court, which had an adverse order for costs against the appellant. As KRIEGLER, J puts it, the adverse costs order:

> "*was in conformity with long a established practice in that Court,* ***even in cases such as this, where the relief sought is tied up with a criminal case***."

In the Constitutional Court, KRIEGLER, J said the following:

> "*The appellant, however, advanced the contention in that, as the proceedings in the High Court had been an extension of the criminal case, which violated the appellant's fundamental right, no order as to costs should have been made against him even though the resort to the Constitution*

had failed and cited the judgment in this Court in ***Motsepe v Commissioner for England Revenue*** *[**supra**] in support.*"

KRIEGLER, J then approved of the appellant's reliance on **Motsepe** (*supra*), (para [43], at 60B-D). What was said, thereafter, by KRIEGLER, J, in respect of costs, did not, in my view, negate the principle earlier stated about costs in cases of the nature of **Sanderson**.

[68] Quite clearly, from decisions I have cited and discussed above the High Court also recognises and follows, in my view, the Constitutional Court's approach and that of the SCA concerning public interest litigants, with regard to costs related to such litigation. It is also in line with international trends in that regard.

[69] In my view, even if Monsanto, the fourth respondent, was the successful party, it ought, in the circumstances of this case to have been, denied its costs.

[70] In any event, considerations of the provisions of s 21A part where

a court of first instance has breached one or the other or both of the two basic principles in relation to the award of costs, the party against whom costs have been awarded is, on my interpretation of the authorities, entitled to appeal against such order, notwithstanding that such appeal is only in respect of costs. To use KRIEGLER, J's words, at para [44], 61B: "*However slow a Court of Appeal should be to interfere with a costs order in a court of first instance, this is clearly a case where intervention is necessary.*" The intervention of the Court of Appeal, in the present case, is justified by, *inter alia*, the fact that the court *a quo* denied the appellant, the successful party, what would ordinarily be its costs against the statutory respondents, the unsuccessful parties.

[71] It can, in my view, be said without hesitation that there is a trend in the Constitutional Court's decisions that, like the instances I have mentioned in some international jurisdictions, ordinarily, protects public interest litigants from the risk of paying costs in the event of their actions being unsuccessful. Evidently, both the Constitutional Court, the SCA and the international jurisdictions I have referred to do not give parties an open ticket to litigate recklessly simply because they do so in what is ostensibly public

interest. In this regard, I am of the view that what was said in **Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (T) at 371E-F** is of general application, in all Courts. What RANCHOD, AJ said in that case is the following:

> "*In the exercise of its (sic) discretion the courts have on occasion departed from the rule that the successful party should at all times be favoured with the costs order. Such a departure only occurs in exceptional circumstances. The major exception to the rule is one that deprives the successful party its costs. There is also a possibility that a successful party should pay the costs of the unsuccessful party. The latter is, however, extremely rare in practice whereas the former is not. …* ***In very special circumstances the successful party may be ordered to pay the costs of the unsuccessful party. An order to this effect is 'very unusual (and) is very seldom given'***. (See *Cilliers Law of Court* 3rd ed at 3.20.)"

DUNN, AJ has, in my view, done exactly what is "very unusual".

He has denied the successful party its costs, which is a possibility that, in exceptional circumstances, may, of course, happen. In such a situation, the court of appeal, such as we are, is entitled to enquire as to the justification of such an order.

[72] In saying that there is no such "rule", the majority judgment is, in my view, incorrect. Certainly, there is no inflexible rule. As already pointed out, ACKERMANN, J, in **Motsepe** (*supra*), at para [30], cautioned against

> "*awarding costs against litigants who seek to enforce their constitutional rights 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*".

In **Sanderson**, (*supra*), the remarks by ACKERMANN, J were endorsed, at para [44]. To the extent that KRIEGLER, J, in **Sanderson** (*supra*), at para [43], 60E, referring to ACKERMANN, J's, caution in **Motsepe** (*supra*), said:

> "*Ackermann J immediately proceeded to point out, however, that such an approach should not be allowed to develop into an* ***inflexible rule*****",**

he was not, in my view, warning against the acceptance of the existence of a "rule" which makes it free for litigants to challenge the unconstitutionality of statutory provisions where the merits of the approach to court are not "groundless". He was, instead, warning against a belief that such a rule is inflexible.

[73] The question as to why the Court *a quo*, in the present case, ordered costs against a successful party, the appellant, is, in my view, one of the issues for consideration. That relates to costs awarded against the appellant, in favour of the fourth respondent. The Court *a quo* found that the fourth respondent was successful in its opposition to the appellant's application. If, however, as is, in my view, the Court *a quo* in the present case was incorrect in finding that the appellant was the unsuccessful party, as against the fourth applicant, then the Court *a quo* has, in the words of the

Treatment Action Campaign judgment, embarked on what is an "extremely rare practice", which calls for "very special circumstances" for an order of that nature to be given. It is simply "very unusual (and) is very seldom given".

THE HIGH COURT

[74] It is, in my view, evident from various decisions of the High Court of South Africa that that Court does not ordinarily mulct an applicant in a public interest matter with costs.

[75] It is quite evident that, in determining whether the provisions of s 21A were applicable or not, the Court took with … the public interest nature of the application as well as constitutional issues raised. Whilst, in accordance with the provisions of s 21A, the appeal failed, the application escaped costs on account of the stated nature of the application. The attitude of the SCA, with regard to the provisions of s 21A, is also discussed, later in my judgment, under topic on matters of great importance and the need to give guidance in respect of living ongoing relationships.

[76] Further, concerning High Court decisions with regard to matters of public interest or of constitutional importance entitling a party to appeal against an award of costs, notwithstanding the provisions of s 21A notwithstanding, I refer to the case of **Institute for Democracy in South Africa v African National Congress and Others 2005 (5) SA 39 (C)**, the judgment by GRIESEL, J. This was an application for the applicant to gain access to records of donations, … than R500 000.00 made to various political parties over a specified period. During his judgment, the learned Judge says the following in para [3], at 45E/F:

> "*The three applicants bring the present proceedings in terms of s 38 of the Constitution on their own behalf; in the interest of all South African citizens; and in the public interest.*"

With regard to the professed aim of the application, the following is stated in para [1], at 45B-C/D:

"*[1] The professed aim of this application, as articulated by the applicants in their founding affidavit, is 'to establish the principle that political parties, or at least those who hold seats in the national, provincial government legislatures, are obliged in terms of s 32(1) of the Constitution of the Republic of South Africa and s 11 of s 50 of the Promotion of Access to Information Act 2 of 2000 (PAIA), to disclose particulars of all the substantial donations they receive, on due and proper request for those particulars made by any other South African citizen'*."

The learned judge came to the conclusion that "on [his] interpretation of existing legislation, the respondents are not obliged to disclose such records" (para [57], at 60E).

With regard to costs, GRIESEL, J writes as follows, at paras [60] and [61], 61E-G:

"[60] The guiding principle in this regard appears to be that the question of costs in constitutional and public

interest litigation remains a discretionary matter. However, parties who litigate to test the constitutionality of law or conduct usually seek to ventilate important issues relating to constitutional principle. Such persons should not be discouraged from doing so by running 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.

[61] These principles have been applied uniformly where litigation is against an organ of State. The same principle apply in cases involving private litigants where a party litigates for public purposes and in the public interest."

[77] In **Nzimande v Nzimande and Another 2005 (1) SA 83 (W)**, at para 75, the JAJBHAY, J recognises that where litigants seek to test the

"*implementation and application of a statute which has*

> *important socio-economic consequences … **[they] 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 applicant, provided that 'the grounds of attack on the impugned statute are [not] frivolous or vexatious' or a consequence of the litigant having 'acted from improper motives or [because] there are other circumstances which make it in the interest of justice to direct such costs to be paid by the losing party*", (emphasis added).

Environmental Litigation and Costs (and section 32 of NEMA)

[78] The appellant's heads of argument also list a number of cases relating to environmental issues, in which the same trend, with regard to public interest actions, has been followed.

[79] The appellant's reliance on this special category of cases is, no doubts, prompted, primarily, by the fact that the appellant, like the applicants in those cases, was preoccupied with environmental issues, in its application, where NEMA was the dominant Act. The principles enunciated in the cases cited by the appellant, in this

regard, though they happen to refer to environmental litigation, are, in my view, no different from the general principles with regard to public interest litigation. Section 32(2) of the National Environmental Management Act, 107 of 1998 ("NEMA"), reads:

> "*A court may decide not to award costs against a person who, … persons which, face 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.*"

Cases involving environmental litigaiton include **Petro Props (Pty) Ltd v Barlow and Another 2006 (5) SA 160 (W) at para [61]; Silvermine Valley Coalition v Sybrand Van der Stey**

Boerdery and Others 2002 (1) SA 478 (C); Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others 2005 (6) SA 123 (E) – often referred to as the **WESSA** case – **Highchange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products, and Others 2004 (2) SA 393 (E)**.

[80] I propose to discuss two of those cases. **Silvermine Valley Coalition** (*supra*) and **WESSA** (*supra*) are examples of where the exercise of the discretion, on the part of the Court, produced different results. In both cases, the Court was unhappy about the manner in which the application was brought before the Court. DAVIES, J said the following in that regard, in **Silvermine** (*supra*), at 493C-D/E:

> "*The manner in which this case has come before this Court is unfortunate.* ***Had the fourth respondent performed its environmental stewardship, it would not have been necessary for an NGO to have so acted***. *Unfortunately* ***the manner in which the dispute was 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 the court*** *of this particular conclusion it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in the manner designed to hold the State and indeed the private community accountable for the constitutional commitments of our new society, which includes the protection of the environments.*"

The learned Judge concluded, at 493D, 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***," (emphasis added).

Although the application was dismissed, no order was made as to costs, save as to costs for an abortive urgent application brought earlier by the applicant. Referring to costs of the two applications, the court said the following at 493E-F:

> "*For this reason it will 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. The same unfortunately cannot be said of the premature and ill-advised application launched on 22 February where there was no reasonable justification for the urgency which was sought in that application before Josman, J.*"

[81] In **WESSA**, the applicant brought the application out of concern that the toxic levels of chemicals from a proposed construction of an incinerator being dangerously high. When the applicant eventually withdrew its application, the Court was called upon to decide the question of costs. It was submitted, on the respondent's behalf, that the ordinary common law principles concerning the awarding of costs should apply. PICKERING, J stated, at 131C,

that that submission "loses sight of the **public interest and constitutional nature of the litigation** … with the enactment of the Constitution, **the common law principles set out above are to be regarded only as the starting point of the enquiry in matters of this nature**".

The learned Judge referred to a large number of authorities, some of which have been discussed in this judgment, as well as in the majority judgment, with regard to costs in public interest litigation. He, nevertheless, in exercising his discretion in terms of s 32(2) of NEMA, awarded costs against the applicant, expressing himself as follows, at 144B, in that regard:

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

failure from inception."

[82] Another aspect that has not been being mentioned by counsel when making submissions, at all the stages of this case, by the Court *a quo* in respect of both judgments and in the majority judgment is what appears to me to be an anomaly, viz., that the first and fourth respondents failed to communicate about the appellant's request. There is no doubt in my mind that if they had so communicated the fourth respondent would have conveyed to the first respondent the perceived threat by the appellant's request to all or some of the fourth respondent's confidential information in the custody of the first respondent. It would then have been the easiest of things to do, for the first respondent to convey to the appellant such information, without it being necessary for the fourth respondent to join as a party in the application. In that event, what is stated by the Court *a quo*, in para [43] of the judgment, at 657 line 16 – 658 line 8 would have applied equally to such information. What the Court *a quo* says in that regard is the following:

"*But what is important about the Registrar's viewpoint is this, namely, that if he had any doubt about the nature*

and/or validity of Biowatch's request he was, in my view, enjoined to establish precisely what it was seeking and to assist it in its endeavours to achieve that. The Registrar was not entitled to adopt a passive role in that regard. If, after having engaged Biowatch, he had any doubt about the bona fides of its request and that he genuinely opined that it was vexatious and oppressive or unintelligible he could and he should have refused it on that ground. The fact that he did not do so is rather significant" (emphasis added)]

[83] During argument before us counsel for the statutory respondents and counsel for the fourth respondent relied heavily on **WESSA**. They submitted that the Court *a quo* was correct in its decision on costs, because, in the words of the Court *a quo*, in para [68] of the judgment, "the manner in which some of the requests for information were formulated, as well as the manner in which the relief claimed in the notice of motion was formulated". The circumstances under which PICKERING, J, in **WESSA**, ordered the applicant to pay the costs of the respondents in that case are, in my view, different from those pertaining in the present case.

Firstly, the applicant in **WESSA** withdrew the entire application. Secondly, for reasons discussed fully and in detail by PICKERING, J, at 132J-143H/I, the Court came to the conclusion that the applicant, in launching the application, had acted unreasonably. In a detailed discussion and analyses of the facts, in more than ten pages, the learned Judge gave clear reasons for his conclusion.

[84] In a very detailed analysis of the evidence, PICKERING, J painstakingly explains the flaws in the conduct of the applicant's various functionaries in the investigation of the levels of a toxic chemical (hexavalent chromium) in waste that was to be incinerated by the third respondent. I cannot possibly do justice to PICKERING, J's reasons by trying to sum them up in this judgment. It is, nevertheless, worthwhile to cite a portion in the judgment that demonstrates one of the applicant's glaring flaws:

> "*The concerns of raised by Dr Chernaik were dealt with by Albertyn at the public participation meeting held on 31 January 2003, the second of which is annexed to the founding papers as annexure WJ and which is annexed to*

the final scope and report as part E. The following appears therein:

> *'Mr Albertyn drew a concept diagram on the flip chart of the Pelt's process showing how tannery waste for incineration was removed from the process, prior to the treatment of hides with chrome. In view of this method, the tannery waste for incineration would only contain innate chromium in the hides, as they were received, and would not contain excess chromium as the waste would be removed prior to the introduction of chromium chemicals for the treatment process. In view of this, Dr Chernaik's comments that the reported chromium content of the waste is implausibly low, is not relevant as in the new process the chromium content, as reported in the scope and report would be very low.'"* (137G-H/I)

The learned Judge emphasised that:

"*It is common cause that both Reeves and a member of the*

applicant's attorneys were present at the meeting. Neither of them, however, addressed any query to Albertyn as to the process whereby the waste would be removed prior to the introduction of chromium chemicals" (emphasis added, 137I).

[85] Moreover, the applicant in the **WESSA** case, by virtue of having withdrawn its application, was the unsuccessful party. The award of costs against it was in keeping with the first of the two basic principles with regard to the question of costs. PICKERING, J adequately explained why he was not allowing the applicant the benefit of having brought a public interest action, the implications whereof PICKERING J was acutely aware. Biowatch, the appellant, on the other hand and according to the Court *a quo*, was the successful party in respect of the statutory respondents. That leads me to the question that I said I would return to, viz. whether, the appellant, indeed, was the unsuccessful party *vis-à-vis* the fourth applicant.

The provisions of s 21A may be overlooked where the judgment deals with a matter of great importance or where there is need to set a

pattern for future guidance in a given on-going relationship

[86] It seems to me that there is a fourth exception, wherein an appeal may be brought notwithstanding the provisions of s 21A. That is, in rare instances, where the judgment deals with a matter of great importance or where there is need to set up a precedent for future guidance in an ongoing relationship.

In dealing with this aspect, the warning given in **Groblersdalse Stadsraad** (**supra**) should be heeded. The issue dealt with must be such that it can be said to be "living" and not merely of academic interest. As an illustration of this proposition, I refer to two cases.

[87] In **Natal Rugby Union v Gould 1999 (1) SA 432 (SCA)**, the respondent had challenged the results of an election at which the retiring president (P) had been elected, in preference to the respondent. The name is Parkinsen. I have adopted the approach in the head note where only the first letter of the name(s) is used). Although P attended and chaired the meeting at which the elections were being conducted, he ensured that one V, who as the

appellant's general manager, conducted the elections. At such meeting, on 3 March 1995, P was elected by 45 votes. On 29 March 1995 the respondent brought a review application in the Natal Provincial Division, alleging that the election was invalidated by procedural irregularities, *inter alia*, in that P had either appointed V as chairperson during the meeting or had himself remained chairperson. He, accordingly, sought to have P's election as president set aside and that there be a re-election. His application was successful and an application for leave was noted by the appellant and postponed to a later hearing. The appellant decided to convene a special general meeting in order to have a fresh presidential election, which meeting was duly held on 15 May 1995. At such meeting he recused himself from the meeting and was duly elected by seventeen votes to eleven. On 27 March 1996, the appellant's application for leave to appeal was granted. The appeal was proceeded with, notwithstanding that, by that time, he had already been elected as president, at a meeting in respect whereof the respondent had had no complaints. The issues at stake were:

"*The parties' competing contentions on appeal gave rise to*

the following questions:

(a) Whether the 3 March 1995 election of P was invalidated by

(i) his appointment of V, or himself being, chairman of the meeting throughout the election process and/or

(ii) the voting being by secret ballot instead of by way of a show of hands

(b) Whether the right to appeal was not in any event perempted by the appellant having, in effect, complied with the order appealed against.

(c) Whether the appeal could be entertained at all if, in a sense, the only issue concerned to costs in the court ***a quo***'" (437G-H/I).

[88] The decision of the Court *a quo* was set aside. It is not necessary,

for purposes of this judgment, to go into the details on the reasons given for the SCA's decision, especially in respect of (a). It is (b) and (c) that are relevant to this judgment. The Court *a quo*, in setting aside P's election, had held that, by remaining at the meeting, even though the election was conducted by V, P had chaired the proceedings. By remaining as chairperson of the meeting, so the Court *a quo* held, P violated the principle that one should not act as a judge in one's own cause. He was, therefore, disqualified by his interest in the outcome of the election and, in that sense, he was "legally disqualified" in terms of clause 15 of the appellant's constitution having failed to absent himself. The SCA held that the appellant's constitution did not, in the expression "legally disqualified", mean or imply that what was expected of P was his physical "absence" from the meeting where the election was conducted. In that regard, the SCA said:

> "*The type of legal incapacity which the Court below held to have existed is not dealt with by the constitution at all. This has distinct significance. It is commonplace in associations and clubs that the retiring office bearers are eligible, and offer themselves for re-election. That the framers of the*

constitution knew that is scarcely open to doubt. Yet the strong possibility of a retiring president's being chairman of the general meeting at which his re-election was on the agenda did not cause them to attach any proviso or condition to the requirement that the president be chair or to his freedom to vote. There is therefore nothing in the express terms of the constitution which supports the Judge's conclusion that 'absence' includes legal disqualification." (441C-E)

The SCA concluded that, on the facts of the case, notwithstanding authorities upon which the Court *a quo* relied, which the SCA discussed, P's conduct, as chairperson, during the presidential election did not involve any decision-making of a judicial or quasi-judicial nature (442B).

[89] Because, in setting aside P's election, the Court *a quo* had ordered that the election, thereafter, be "in terms of (the) constitution", that meant in terms of the constitution as interpreted by the Court *a quo*, P recused himself at the subsequent meeting, on 15 May 1995. He was re-elected, in his absence. The SCA held

that such precautions as were adopted at the meeting of 15 May 1994, in accordance with the order of the Court *a quo*, "were unwarranted" and that, according to the appellant's constitution, P was entitled, as chairperson, to act as such and also to cast his deliberative vote at the meeting. With regard to the vital question as to whether the appeal could be entertained at all if, in essence, the only issue concerned costs in the Court *a quo*, the SCA uttered the following, at 445I-446B:

> "*Had there been no appeal the judgment of the Court below would in all probability* ***have continued to influence the procedure adopted in respect of office bearers elections at future union meetings***. *There was, of course, nothing irregular or unfair in the procedures adopted at the re-election meeting, viewed purely in isolation, without regard to the constitution. But the union does have this constitution. It is the chosen instrument by which the union's affairs are to be regulated and the union, its office bearers and council members* ***are entitled to have it interpreted in order to guide them for the future.*** *In the*

> *circumstances I consider that the determination of the appeal will, quite apart from the issue of costs in the Court below,* ***have a 'practical effect of or results' within the meaning of s 21A of the Supreme Court Act.***" (Emphasis added)

On the question with regard to whether or not the right of appeal had been perempted by the holding of elections in a manner that complied with the order of the Court *a quo*, HOWIE, JA (as he then was) said the following at 444F:

> "*… I find that the decision to hold the re-election was consistent with administrative considerations and certainly not inconsistent with the intention to appeal.*"

PLEWMAN, JA, in **Coin Security Group v SA National Union for Security Forces** 2001 (2) SA 872 (SCA), at 875H-I, explained the decision in **Natal Rugby Union** (**supra**) thus:

> "*The members of the* ***[Natal Rugby Union]*** *had, as a result*

> *of the litigation, been* ***left 'disturbingly*** *but understandably* ***divided*** *[using Howie, JA's words]'* ***with regard to the meaning and effect of their constitution. This was felt to be a 'living issue'*** *– sufficiently so for the exercise of the Court's discretion in the manner in which it was exercised.*" (Emphasis added)

Dismissing the appeal in **Coin Security Group** (**supra**), PLEWMAN, JA said, at para [11], 877A-B:

> "*The Court would be asked to confirm a rule which interdicted, for the future, acts committed in the course of an industrial dispute which was finally resolved between the parties by the dismissals in 1997 and in which all the perpetrators have long since gone their separate ways*."

HOWIE, JA, in **Natal Rugby Union** (**supra**), added the following:

> "*(The section was amended subsequent to the grant of leave in this case but in the result it is unnecessary to decide if the*

section in its pre-amended or post-amended form would have applied.)"

In my view, the amendment does not affect the Court's interpretation with regard to circumstances where, as on the facts of that case, a "*practical effect or result*" could mean the need to give an interpretation "*in order to guide*" proceedings of an organisation "for the future", where that problem was a living issue. My view in this regard is fortified by the decision of the SCA in the **Merak S**: **Sea SCA Melody Enterprises SA v Bulktrans 2002 4 SA 273 (SCA)**, which was after the amendment of s 21A.

[90] In **Merak S**: **Sea Melody Enterprises SA** (*supra*), the appellant had applied for a reduction in the amount of a bank guarantee given by it to secure the release of its ship, the **Merak S**, from arrest and for an order calling upon the respondent, at whose instance the **Merak S** had been arrested, to furnish the appellant with counter-security for the claims it intended bringing against the respondent. The Court *a quo*, in the Durban and Coast Local

Division granted the appellant leave to appeal to the Supreme Court of Appeal. Before the appeal was heard, however, it appeared that the respondent was no longer proceeding with its claim in the London Arbitration, which was the basis on which the vessel had been attached, whereafter the appellant obtained an order for the return of the bank guarantee. The appellant did not withdraw its appeal to the SCA, which resulted in the application of the provisions of s 21A being in issue. In that regard, the Court stated the following, at 276G/H, para [4]:

"*[4] In view of the importance of* ***the questions of law which arise in this matter, the frequency with which they arise and the fact that at*** *the time of the decision in the Court* ***a quo*** *and of the granting of leave to appeal* ***those questions*** *were, as Mr Shaw for the appellant put it, '****live issues****', I am satisfied that this is an appropriate matter for the exercise of this Court's discretion to allow the appeal to proceed: cf* ***Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others 2001 (2) SA 872 (SCA)***

*at **875 (para [8])** and **Natal Rugby Union v Gould [supra]***," (emphasis added).

[91] In **Land en Landbou Ontwikkelingsbank van Suid-Afrika v Conradie 2005 (4) SA 506 (SCA)**, the provisions of s 21 A(1) of the Supreme Court Act as amended, were discussed by the SCA. Mpati DP, deals extensively with the section in paragraphs [6]-[14], at 510H-514B. It is, in my view, not necessary for the facts of that case to be set out as the principle emerges without difficulty from the following excerpts. After restating the well-known principle, in para [6], at 510I-511B/C, that: "*this Court will not make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between the, a practical result could be achieved in other respects*", party, MPATI, DP stated the following:

"*[7] As was said in **Coin Security** (at 875 in para [8]), however, the section confers a discretion on this Court. See also **President, Ordinary Court Marshal,***

and Others v Freedom of Expression Institute and Others 1994 (4) SA 682 (CC) (1999) (11) BCLR 1219 at 687 (SA) in para [13]. *… for example,* ***questions of law, which are likely to arise frequently,*** *a court of appeal may hear the merits of the appeal and pronounce upon it. The* ***Merak S: Sea Melody Enterprises SA*** *(****supra****) at 276 in para [4].*

[8] In the present matter counsel argued, in addition to the submission mentioned in para [5] above, that in dealing with the merits of the appeal this Court may consider, and give guidance on, the requirements to be met by an owner or person in charge of the property in order to persuade a court, in eviction proceedings, have with regard to the provisions of s 8(1)(a)-(e) of the [Security of Tanya Act 62 of 1977, the] Act, that the termination of the occupier's right of residence was just and equitable. A further submission by counsel was that this Court, if it hears the appeal, would have occasion to consider the

extent of the duty of the owner or person in charge 'to adduce the necessary averments and evidence to make out a case in relation to every provision to wish a court must apply its mind in deciding whether an eviction order is justified'.

The learned Deputy President then quoted s 8(1) of the Act and then proceeded as follows:

"It is clear from these provisions that the result of their consideration will depend upon the facts of which was the case no guidance can thus be given as to what requirements are to be met by an owner or person in charge to prove that determination of an occupier's rights of residence was just and equitable nor is it possible for this court to consider, in the …, the extent of the averments to be made and the evidence to be adduced by an owner or a person in charge to make out a case for an eviction order each case … on its own facts.

[10] There is, however, a further submission by counsel viz

that ***the questions of law at issue here are of considerable importance and are likely to arise frequently****. Reliance for its submission was sought in the* ***Merak S*** *case (****supra****) in para [4], where Farlem JA said [the learned deputy president then cites what is stated in that paragraph]:*

> *'The purpose of s 19(3) of the Act (which subjects eviction orders granted by a magistrate to automatic review by the Land Claims Court), so counsel argued, is to create a … of precedents to be followed by magistrates' courts when they deal with eviction proceedings. That being so, an erroneous decision of the Land Claims Court* ***on questions of law that are like to arise with frequency*** *should not be allowed to stand.'*

[11] The present matter concerns the application of the concept of 'just and equitable' as those words appear

in s 8(1) of the Act. (The subsection is quoted in full in para [a] above.) It appears that an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable. In considering whether the termination of an occupier's right of residence is just and equitable a court must have regard to 'all relevant factors' and in particular those listed under items (a) to (e) of the subsection."

After discussing the consequence of all that, the learned Deputy President proceeded, at paras [13] and [14], at 513E/F-514B, to discuss, in detail, why he was of the view that "the approach of the court **a quo** was clearly erroneous". He then concluded as follows:

"***The issue … concerns the interpretation and application of the Act and is thus a question of law.*** *I have no doubt that counsel is correct in his submission that* ***it is likely to arise frequently****. There is already a previous reported judgment (****Mayor NO v Tambani*** *(****supra****) [****2002 (5) SA 811***

> ***(LCC)]*** *where a similar approach as that followed the instant case was adopted. In my view,* ***the present is an appropriate matter for this court to exercise its discretion in favour of the appellant and to consider the merits of the appeal. Had the appellant not proceeded with the appeal, the judgment of the court below would in all probability have been followed by itself****, as it did in the* ***Mayor NO v Tambani*** *decision,* ***and by magistrates' courts****. Cf* ***Natal Rugby Union v Gould*** *(****supra****) at 444I-445B*" (emphasis added.)

[92] In the light of the above three decisions, and, arguably, also **Naylor 1**, it is my view that the appellant was entitled, on this ground alone, to proceed to the Court of Appeal for a decision on the question of costs, as it would not, in essence, be only about costs. The appeal entails the question as to whether there is a rule, in this country, with regard to the question of costs in public interest and the constitutional matters. The majority judgment is of the view that there is no such rule and I disagree. In my view, the question whether there is such a rule is, in itself, is a living issue

which requires determination by the SCA.

Was Biowatch the successful party?

[93] In my view, unlike DUNN, AJ, PICKERING, J made it very clear in his judgment that he was aware of the public interest litigation approach, with regard to costs, and gave his reasons, fully, as to why he was not going to adopt that route. He then concluded his judgment thus:

> "*In all the circumstances I am of the view that, objectively viewed, applicant's conduct in launching the application was, regrettably, not reasonable. I use the word regrettably advisedly, because it is quite clear that in bringing the application the applicant acted out of the best of motives arising out of its very real concern for the environment. It wished, in the public interest, to prevent the installation of a waste disposal system which it considered would be gravely harmful to the environment and to human life. However, in the light of all the circumstances pertaining at the time the proceedings were instituted and of which circumstances applicant, had it exercised due care, should have been*

aware, ***its concerns had already been met and the application was therefore unnecessary****.* ***I am acutely aware of the above-mentioned authorities as to the chilling effect of the 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 interest of justice for first and second respondents to be deprived of the costs incurred by them in opposing* ***an application which is doomed to failure from its inception.***" (143H/I-144B)

In Biowatch's case, its application was not "*doomed to failure*", right from its inception and did not fail. The "SUMMARY" of the judgment, contained in para [66] of DUNN, AJ's judgment in this regard, is instructive. It reads:

"*[66] To summarise then: Biowatch has, in my view, established that it has a clear right to some of the information to which access was and is now requested; that the Registrar's failure to grant it*

> *access to such information as it was legally entitled to constituted a continued infringement of Biowatch's rights under section 32(1)(a) of the Constitution; that Biowatch had no alternative remedy to enforce its rights; that Biowatch should not be non-suited for the inept manner in which the information sought in its fourth request, as well as in its notice of motion, is formulated; and that the Registrar would be entitled to refuse access to certain records, or part thereof, in terms of the grounds for refusal contained in Chapter 4 of Part 2 of PAIA. (Page 57)*"

[94] It should be mentioned, in passing, that PICKERING J evidently did not agree with the sentiments expressed by DAVIS J in **Silvermine** and, what is more, with his decision, inspite of the Court in **Silvermine** holding that "*the manner in which [that] dispute [had] been placed before [the] Court [left] it with no other alternative but to find against the applicant*".

[95] Although the decisions in both **Silvermine** and **WESSA** related to applications based on the provisions of s 32 of NEMA, with regard

to environmental matters, in respect of which that Act specifically provided guidance to the courts when it comes to the question of costs, the principles applied are, in my view, identical to those applied in all other public interest matters. On the facts in **WESSA**, it is understandable, in my view, why the Court mulcted the applicant with costs in a public interest application. The application was to be "doomed to failure from its inception" and that was adequately illustrated in the Court's analysis of the facts.

COMMENT ON SOME ASPECTS OF THE MAJORITY JUDGMENT

[96] The following criticism of the appellant's submissions is made in the majority judgment, in paragraph 36:

> "*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 [**this sentence is obviously incomplete**], 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" (emphasis added).

I have difficulty with this excerpt from the majority judgment, in that, in the very next sentence, the following is said:

"*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 refer[ed] to because he himself was involved as counsel in* ***Democratic Alliance and Another v Masondo NO and Another [supra]***."

If, as is stated above, DUNN, AJ was aware of the "rule" or "principle" or "trend", I do not understand why the majority judgment says "there is no such 'rule'".

[97] It appears to me that what is being criticised is the following submission in the appellant's heads of argument:

"*11.1 In the notice of appeal, Biowatch takes issue with the decision on costs on the ground that 'the learned judge misdirected himself … in not giving new weight to the fact that the appellants were acting in the pubic interest (as found at paragraph 14 of the judgment) in the interest of protecting the environment, and to uphold constitutional rights'.*

11.2 It is submitted that the court ***a quo's*** *failure to take into account the public interest aspects of this litigation when considering the question of costs, meant that that it exercised its power 'upon a wrong principle … or did not act for substantial reasons' and that the decision on costs is therefore liable to be overturned on appeal.*

11.3 To the extent that such aspects are not regarded as being relevant to the question of costs within common law, it is submitted that the common law must be developed in line with the constitution to ensure adequate access to court in public interest matters.

11.4 It is clear, however, that the courts have consistently recognised that the ordinary principles in relation to costs should not be applied in public interest litigation" (reference to authorities has been omitted).

The submission in 11.4, to the extent that it says "the ordinary principles should not be applied", is, in my view, overstated. The appellant's heads, themselves, repeatedly referred to authorities to that effect. For instance, they emphasise what is said in **Institute for Democracy in South Africa** (*supra*), at para [60], that: "*The guiding principle in this regard appears to be that the question of costs* ***in constitutional and public interest litigation remains a discretionary matter***" (emphasis added).

[98] I also find myself in respectful disagreement with the following, interpretation by the majority judgment, in paragraph [33], at pages 55-56, of the decision in **Sanderson** (*supra*):

"*The Constitutional Court also set aside the High Court's*

> *order as to costs. The reason for that was that litigation was 'not a suit between private individuals' but that it related directly to criminal proceedings where costs orders are not competent.*"

In saying that that was not a suit between "private" individuals, KRIEGLER, J was, in my view, emphasising that it was not an action with regard to public interest. That it related to "criminal proceedings", was not, in my view, intended to confine the kind of relief that was ordered by the Constitutional Court, with regard to costs, to applications related to "criminal proceedings". It was a statement of the facts of that case. As a matter of fact, the state had instituted criminal proceedings against the accused person, where "costs orders are not competent". What is important, in my view, in the context of public interest litigation, is the fact that the applicant's action against the state related to his "constitutional right", which, because he was an accused person in that instance, was in respect of "a fair trial". Had Mr Sanderson, for an example, unsuccessfully sued the state for damages arising out of what he genuinely believed was wrongful conduct, an assault on him by an employee of the state, during the course of employment of such

employee, the mere fact that the defendant was the state would not have rendered Mr Sanderson's action a public interest claim.

[99] I also have difficulty with the following further statement in the majority judgment, in respect of the **Sanderson** decision:

> "*Kriegler J, who gave the judgment of the court, was also of the view, at 61A-B of the Board, 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'(para [33], page 56, emphasis added.)*

Whilst this is a correct statement of what Kriegler, J said, I understand the majority judgment to be using that statement as a basis for distinguishing the facts of the Sanderson decision from those of the Biowatch case. That, in my view, cannot be a correct basis for distinguishing the two cases. From my understanding of the judgment of the Court **a quo**, there has not been the slightest suggestion by Dunn, AJ that Biowatch's complaint was not

genuine. There would not, otherwise, have been a judgment in Biowatch's favour, on the merits, against the statutory respondents. It follows, from what I have said, that I disagree with the following passage in the majority judgment, also in para [33], page 56:

> *"Counsel for Biowatch relied heavily on this [**Sanderson**] 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 which seeks to enforce or establish an important constitutional point or principle.* ***I think that counsel reads more into the decision than is justified****. What is 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."*" (Emphasis added)

My reasons for disagreeing are contained in what I have already stated earlier on, with regard to the **Sanderson** decision. The appellant's reliance on the Sanderson decision is, in my view,

justified.

CONCLUSION

[100] As a general conclusion on the question of an appeal in respect of costs only, I ally myself with the following submission by the appellant's counsel, in the heads of argument, in paragraph 10.10:

> "*It is submitted that the Constitutional Court's approach to costs in public interest litigation* ***must now be regarded as a key factor*** *to be considered by a court in the exercise of its discretion as to costs. This is particularly so in light of the recognition in* ***Ferreira*** *that the common law rules may have to be 'substantially adapted' and the statement in* ***Sanderson*** *[that]* ***the same policy considerations 'apply with equal force to other courts***." (Emphasis added)

Although I have arrived at the conclusion that the appellant is wholly successful against the statutory respondents and the fourth respondent, I take into account that the appellant does not seek a costs order against the fourth respondent. In the circumstances, I

am of the view that the correct order should be as follows:

1. The appeal succeeds;
2. The order of costs against the appellant is set aside;
3. The first, second and third respondents are ordered to pay the appellant's costs, including costs of the application for leave to appeal and costs of this appeal;

4. The costs order in favour of the fourth respondent is reversed.
5. No other costs order is made.

J N M POSWA
JUDGE OF THE HIGH COURT

When I expressed my dissent from MYNHARDT, J's (majority judgment, that was based on an unsigned draft thereof. It has transpired that the page numbering in the edition that Mynhardt, J and MOLOPA, J ultimately signed is not always identical with that of the draft. By the time I discovered this change, I had gone too far with my judgment, to effect the necessary changes. I am

satisfied, however, that the excerpts I have relied on or referred to in the draft of the majority judgment are retained in the signed draft.

Heard on:	23 April 2007
For the Appellants:	Adv R. J. A. Moultrie
Instructed by:	Legal Resources Centre, Pretoria
For the First, Second and Third Respondents:	Adv T.W.G. Bester
Instructed by:	The State Attorney, Pretoria
For the Fourth Respondent:	Adv F. Snykers
Instructed by:	Messrs Bowman Gilfillan, Johannesburg
Date of Judgment:	13 May 2008