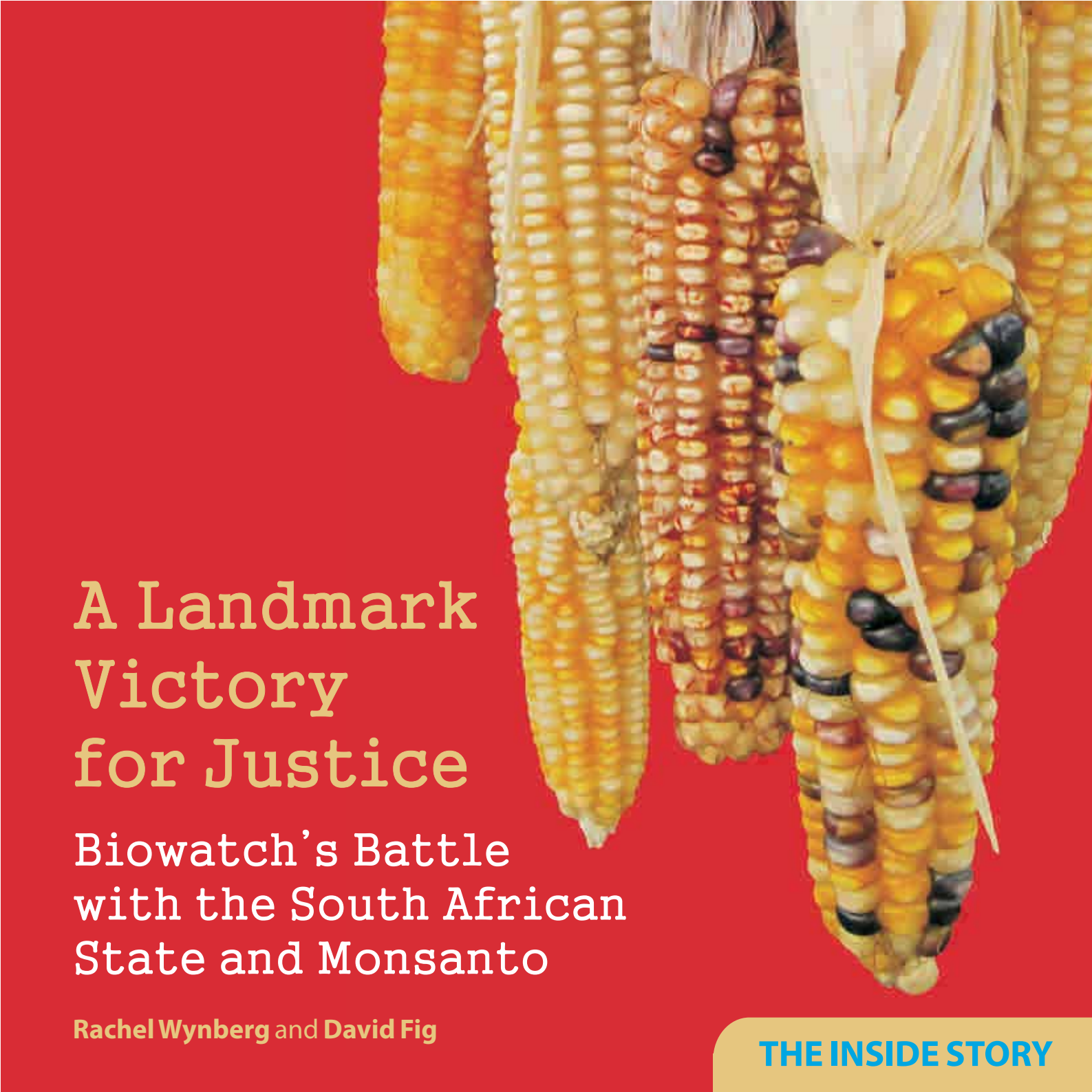




A Landmark Victory for Justice

Biowatch's Battle
with the South African
State and Monsanto

Rachel Wynberg and David Fig

THE INSIDE STORY

A LANDMARK VICTORY FOR JUSTICE

Biowatch's Battle with the
South African State and Monsanto

Rachel Wynberg and David Fig

A LANDMARK VICTORY FOR JUSTICE

Biowatch's Battle with the South African State and Monsanto

March 2013

ISBN: 978-0-620-55828-0

Published by:

Biowatch South Africa

23 Acacia Road, Glenwood, Durban 4001

PO Box 2243, Hillcrest 3650

Tel: +27 31 206 2954

Fax: +27 86 546 9196

E-mail: biowatch@mweb.co.za

Website: www.biowatch.org.za

Copyright © March 2013 Biowatch South Africa

Written by:

Rachel Wynberg and David Fig

Design & layout:

Earth & Oceans Developments (info@earthandoceans.co.za)

Citation:

Wynberg, R., and Fig, D., 2013. *A Landmark Victory for Justice. Biowatch's Battle with the South African State and Monsanto*. Biowatch South Africa: Durban.

Funder:

This publication was funded by the Ford Foundation. We are most appreciative of this support.

Contents

Preface.....	5
Foreword.....	7
1. Introduction	13
2. The establishment of Biowatch	16
3. The proliferation of GM crops	20
4. Biowatch, Monsanto and the state: Securing access to information about GM crops	24
4.1 Evolution of the decision to litigate	24
4.2 Monsanto and other seed companies intervene	31
4.3 Preparing for litigation: Campaigning, awareness-raising and advocacy	32
4.4 The access to information court case	34
4.5 Delays in the verdict – and Syngenta	41
4.6 The verdict	42
4.7 Obtaining access to information	45
5. Challenging the costs order	48
5.1 After the High Court verdict	48
5.2 The appeal	56
5.3 Steps after the appeal hearing	60
5.4 In the Constitutional Court	62
6. Lessons and conclusions	69
The inside story – snapshots.....	74
Captions and credits.....	75
Chronology of events and decisions.....	77

Acronyms

ANC	African National Congress
Bt	<i>Bacillus thuringiensis</i>
CALS	Centre for Applied Legal Studies
CBD	Convention on Biological Diversity
CCL	Centre for Child Law
CONNEPP	Consultative National Environmental Policy Process
COSATU	Congress of South African Trade Unions
DST/NRF	Department of Science and Technology/National Research Foundation
EEU	Environmental Evaluation Unit, University of Cape Town
EIA	Environmental Impact Assessment
GM	Genetically modified
GMO	Genetically modified organism
KZN	KwaZulu-Natal
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
NDA	National Department of Agriculture
NEMA	National Environmental Management Act
NGO	non-governmental organisation
ODAC	Open Democracy Advice Centre
PAIA	Promotion of Access to Information Act
PELUM	Participatory Ecological Land Use Movement
SAFeAGE	South African Freeze Alliance on Genetic Engineering
SAGENE	South African Genetic Experimentation Committee
SANGOCO	South African Non-Governmental Coalition
TAC	Treatment Action Campaign
UKZN	University of KwaZulu-Natal
WSSD	World Summit on Sustainable Development

Preface

Rachel Wynberg and David Fig, Biowatch founder trustees, have written a detailed and absorbing account of Biowatch's nine-year legal battle against the South African state and biotechnology multinational Monsanto. It gives us the inside story of the challenges and complications that a non-profit organisation has to overcome in a struggle of this kind.

The case came dangerously close to crippling and bankrupting Biowatch, but fortunately the organisation can now carry on its important work.

We will continue supporting small-holder and family farmers, farmers' rights and biodiversity. We will continue to challenge the industrial agriculture model, including the use of genetically modified organisms. It is a model that disempowers, that robs people of their land and livelihoods, that has an unconscionably high carbon footprint, and that corrupts the ecological balance of the land. The productivity and resilience of the small-holder farmers, and the inequity of the system, inspire us to carry on.

It was a victory that Biowatch could not have achieved on its own. We were supported by the communities that we work with, by our partner organisations, and by a host of individuals and institutions locally, nationally and internationally. This, coupled with the determination of the legal teams to secure justice notwithstanding the financial constraints, inspired us, and we prevailed.

There was also support from the Biowatch funders, who enabled the organisation to continue and who also assisted in its renewal after the Constitutional Court judgment.

The history of these nine years needs to be recorded and analysed – starting with our initial insistence on access to information, when Biowatch was forced to take legal action to exercise its constitutional right to information about the planting of genetically modified crops in South Africa. We argued then and continue to argue now that there are health and environmental risks associated with this technology, and that it diminishes food security and food sovereignty.

The Biowatch case at the Constitutional Court needs to be widely publicised for its wider implications too: that organisations acting in the public interest can now litigate for their rights without fear of the chilling effect of costs orders against them, and, for the legal profession, that constitutional rights need to be taken into account when costs orders are made.



Celebrating the Constitutional Court judgment.
From left to right: Lawrence Mkhalihi (Biowatch),
Achmed Mayet (Legal Aid South Africa), Adeline
Malema (Legal Resources Centre), Rose Williams
(Biowatch), David Fig (Biowatch), Richard Moultrie
(Biowatch advocate), Carole Cooper (Centre for
Applied Legal Studies).
The Star, 4 June 2009 – Picture: Antoine de Ras.

The issues – access to information, the right to know and action in the public interest – are not going away. They are all of great importance in our country, and Monsanto is not the only one threatening them. The fight to secure these rights must continue.

We hope that this inside story inspires you in your work for environmental and social justice.

Rose Williams
Biowatch Director, 2013

Foreword

What has become known as “the Biowatch case” originated in a genuine attempt to access information from government about the planting of genetically modified crops in South Africa. Biowatch only used the law as a last resort, after numerous earlier requests for the information, to which we felt entitled under the Constitution, were stalled or refused.

The story you are about to read is the organisation’s official version of what it experienced in the prosecution of this case. Biowatch was confronted by outdated approaches to the law, the immense power of transnational corporations and government collusion with corporate interests. It is a tale of risk and heroism, inasmuch as Biowatch’s existence was threatened and yet it persisted in its quest for justice. It also underlines the importance in our democratic justice system of the Constitutional Court, the only forum in which we felt that true justice was served.

As Biowatch trustees, we have accompanied the case from its origins to its aftermath. However, we have relied extensively on others, and have to thank Elfrieda Pschorn-Strauss, in particular, for searching through her formidable archive and helping us to develop a collective memory of the process. Jaci van Niekerk trawled through other dusty archives to put all the pieces of the jigsaw together. Rose Williams catalysed the publication, ensured that the write-up kept its momentum and provided on-going support. We extend profound thanks to all those who agreed to be interviewed by the authors and by Josie Eastwood. Their responses enriched its quality immeasurably.

This story makes it clear that Biowatch could not have undertaken its successful challenges without the full backing of superb legal teams. We started off in the Pretoria High Court in the hands of Winstanley, Smith & Cullinan, an environmental law firm based in Cape Town. As our attorney, Cormac Cullinan played a really important role in helping frame our request for information and was always mindful of the constitutional provisions that allowed us to take up the case so vigorously. Josie Eastwood, employed at the time at Winstanley, Smith & Cullinan, also played an invaluable role at this earlier phase and continued to provide Biowatch with legal support and advice. After the initial High Court judgment, we were obliged to seek a *pro bono* solution to further litigation because of the nature of Biowatch’s finances. We were fortunate in being able to turn to the Legal Resources Centre (LRC), perhaps the country’s most important public interest law firm, to lodge our appeal to the full bench of the High Court. The LRC provided us with the services of attorney Ellen Nicol and of its in-house advocate, Richard Moultrie, and took on our case on a contingency basis. This team’s personal contributions to the case were enormous and despite both of them subsequently leaving the LRC, it continued with the case all the way through to the Constitutional Court. We therefore have an enormous debt to both Cormac Cullinan and the LRC for believing in our case and helping us to follow it through with their sage counsel and support.

During the case we received endorsements from all over the world. The Biowatch website lists over 200 messages of support from 27 countries.¹ We wish to thank all these supporters for believing in our case and helping us with our fight. Their solidarity was an important morale booster at times of despondency as much as it was at the final victory.

In a sense, because we substantially won the right to the requested information in the High Court, the rest of the legal story involved a contest to reverse the decision to award costs to Monsanto, which had entered the case on the side of the state. An understanding was reached prior to the case in which certain information was provided to Biowatch by Pannar, which had previously indicated that it was interested in joining the case against Biowatch. Not so with Monsanto.

Monsanto is based in St Louis, Missouri and since the late 1990s it has become the world's second largest manufacturer of agricultural chemicals, one of the largest producers of seeds and the largest seller of prescription drugs in the US. Its origins were in the production of chemicals like polychlorinated biphenyls (PCBs, extremely toxic persistent organic pollutants), dioxins (another group of toxic chemical contaminants) and other carcinogens, as well as plastics like polystyrene, which has a huge hazardous waste footprint. One of Monsanto's dioxin-producing compounds was Agent Orange, used as a herbicide by the US military in Vietnam and which caused severe illnesses for both users and victims. In the 1990s, Monsanto turned to the production of genetically modified crops, whose use involved the purchase of other Monsanto products such as Roundup, a herbicide.² Their introduction to the market has led to contamination of endemic and native crop species,³ gradual monopolisation of control over seed (such as in South Africa)⁴ and increasing debt for small farmers.⁵

According to New Zealand anti-GMO campaigner Christine Dann, "Monsanto goes to court a lot". The company has been implicated in corruption in Indonesia and involved in false advertising in the US and France and toxic pollution in the US. It also has a history of losing cases. When there is the possibility of winning, Monsanto is litigious, for example in setting up cases against farmers, other seed companies or citizens seeking information or redress. It spends US\$10 million a year on a staff of 70 and a team of contract workers dedicated to catching farmers in breach of Monsanto rules. In North America alone it has sued hundreds of farmers for infringement of its patent rights or violation of technology

1. <http://www.biowatch.org.za/main.asp?include=docs/pr/2007/pr0420list.html>.

2. Brian Tockar, 1998. Monsanto: A checkered history. *The Ecologist*, September/October: 254–261.

3. ETC Group, 2002. Genetic pollution in Mexico's center of maize diversity. *Food First Backgrounder*, 8(2), Spring, available at www.foodfirst.org/en/node/53, accessed 5 September 2012.

4. Amanda Visser, 2012. Pannar turns to Competition Appeal Court. *Business Day*, 3 April.

5. Harald Witt, Rajeev Patel and Matthew Schnurr, 2006. Can the poor help GM crops? Technology, representation and cotton in the Makhathini Flats, South Africa. *Review of African Political Economy*, 33(109): 497–513; Masifunde Education and Development Project Trust and Zingisa Educational Project, 2011. *Impacts of the Massive Food Production Programme, GMOs and cash crops in the Amathole District Municipality*. Cape Town: Trust for Community Outreach and Education.

agreements. It has won over US\$20 million in court judgments against farmers and over US\$100 million in out-of-court settlements.⁶

Monsanto knew that insisting on costs from Biowatch would have a devastating effect on the organisation and it therefore had little interest in settling. And, as the Constitutional Court judgment was to stress, Monsanto's beef should have been with the state, not with Biowatch.⁷

Biowatch's position received great sympathy from its donor organisations, who sustained it from the outset. Readers will note that donors were prepared to collaborate with Biowatch's strategy to place donations in a newly created entity, the Biowatch Association, to protect the assets of the Trust and the jobs of the staff. In particular, we owe an important debt to the regional office of the Ford Foundation, which actively supported Biowatch in its legal battle and recognised the need for this publication.

Since the case has become a legal landmark it will be subject to all kinds of legal and other academic analyses. While we appreciate this attention, we also need a space to provide our own subjective account of the case, for the record. We hope it will be of interest to all those concerned with environmental justice, with the right to information, and a new emphasis on the constitutional dimensions of costs orders made in relation to whistle-blowers acting in the public interest. We also hope it will be a resource to those trying to make sense of the case in the future.

Writing a publication like this is not easy. The authors had to rely significantly on the organisation's institutional memory, which proved challenging in relation to dynamic organisational changes. Biowatch has moved three times since its inception, has operated from several different regional offices, and has had a number of staff come and go, including five directors. The Board, however, has included a core group of trustees from its inception, providing overall stability, although it too has changed over the organisation's 15-year life. By gathering together minutes, e-mails, workshop material and media releases, convening editorial conferences and speaking to people involved at different stages of the legal battle, we have attempted to reflect, as accurately as possible, the sequence of events, the rationale behind certain decisions and the insights we gained along the way.

We salute and thank all those who make this publication possible.

David Fig and Rachel Wynberg

6. Christine Dann, 2009. Monsanto comes a constitutional cropper. *Organic New Zealand*, September/October; Center for Food Safety, 2007. *Monsanto vs US Farmers Update*, November. Washington DC: Center for Food Safety.

7. *Trustees, Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), at paragraphs 53, 54, 59.

About the authors

Rachel Wynberg and David Fig are co-founders of Biowatch and have been trustees since its inception. Both participated actively in the organisation's legal battle to secure access to justice and information.

Rachel Wynberg is associate professor at the Environmental Evaluation Unit (EEU), University of Cape Town, where she holds a DST/NRF Research Chair on Social and Environmental Dimensions of the Bio-Economy. Rachel's research is focused on biopolitics, community rights, social justice and environmental governance and she is active in the NGO community in southern Africa.

David Fig is an honorary research associate of the EEU and a Fellow of the Transnational Institute in Amsterdam. His research focuses on environmental problems related to energy, extractive industries and corporate behaviour. His training is in international political economy and he works closely with the environmental justice movement.





1. Introduction

Biowatch South Africa is a small, public interest non-governmental organisation (NGO) working in the field of biodiversity, food sovereignty and security, and social justice. It was established in 1997 to publicise, monitor and research issues of genetic modification and promote biological diversity and sustainable livelihoods. Biowatch is an advocacy and research organisation that also forges relationships with small-scale farmers to demonstrate the viability of sustainable agriculture and the importance of seed security and farmers' rights.

The period from 2000 to 2009 saw Biowatch fighting for its survival in a lengthy legal battle that threatened to overshadow the organisation's work. A seemingly simple request for information from the National Department of Agriculture (NDA) about the environmental releases of genetically modified (GM) crops in South Africa, led to a legal victory in which most of this information was granted. But there was an unexpected twist through a devastating costs order. This led, in 2009, to the case being heard – and the costs order overturned – by the highest court in the land, the Constitutional Court.

The Biowatch case is now one of the most widely cited Constitutional Court cases.⁸ Its outcome was vitally important for Biowatch, but also holds significance for public interest litigation in South Africa as a whole. Not only did it help to assert the constitutional right to a clean and healthy environment, but it also affirmed the right to information needed to secure environmental rights, and the rights of small, whistle-blowing public interest organisations to make interventions without punitive legal measures being taken against them – which, in this case, involved the awarding of costs to a highly controversial foreign corporation.

The “Biowatch case”, as it is referred to, has attracted considerable attention over the past decade in the media, in academic literature, among the legal fraternity and in civil society.⁹ Commentators have remarked that it is a “landmark case”,¹⁰ that it

-
8. Stephen Budlender, 2009. The significance of the Biowatch judgment for South African jurisprudence, Biowatch Think Tank, Constitution Hill, 25 November.
 9. See, for example Melanie Gosling, 2002. NGO goes to court after 3-year battle for info on crops. *Cape Times*, September 19; Melanie Gosling, 2002. We've been eating GM food for past five years. *Cape Times*, September 19; Melanie Gosling, 2002. Biowatch “has no right” to info on modified crops. *Cape Times*, November 27; Zelda Venter and staff writer, 2005. Court orders government to reveal GM crop details. *Cape Times*, 25 February; Cormac Cullinan, 2009. Biowatch: The costs of constitutional litigation. *Without Prejudice*, July: 8-9; Louis Kotzé and Loretta Feris, 2009. *Trustees for the Time Being of the Biowatch Trust v. Registrar, Genetic Resources and Others*: Access to information, costs awards and the future of public interest environmental litigation in South Africa. *Review of European Community & International Environmental Law*, 18(3): 338–346; Tracy Humby, 2010. The Biowatch case: Major advance in South African law of costs and access to environmental justice. *Journal of Environmental Law*, 22(1): 125–134.
 10. Interview with senior advocate involved in the case, 25 April 2011.

“Biowatch was so brave. It is heroic; it is absolutely fantastic that they kept going. I cannot speak highly enough of their tenacity in taking the case all the way to the Constitutional Court.”

Alison Tilley, Open Democracy Advice Centre, May 2011.

is “path-breaking” in nature and that it “revolutionised the law of costs”.¹¹ Comments on the “heroic” nature of Biowatch¹² and of the importance of “organisations like Biowatch [which] make important things happen”¹³ have underscored the vital need for an active and stable civil society presence to enable the realisation of environmental rights.

The purpose of this publication is to tell the story from the perspective of Biowatch, to explain why and how certain decisions were taken, to describe the impacts of the legal actions on both Biowatch itself and on civil society, and to analyse the wider environmental and public interest outcomes. The paper draws on a variety of sources, including interviews with key organisations and individuals, minutes of Board and staff meetings, e-mail correspondence, as well as the formal papers associated with the various legal actions.

We begin the story by explaining the context for the establishment of Biowatch and the reasons why it became concerned about securing access to information about the proliferation of GM crops in South Africa. We then introduce some key organisations involved in the series of law suits that were to follow and follow the case chronologically, tracing the evolution of the initial decision to litigate, describing the intervention of Monsanto, the advocacy campaign that was developed, the Pretoria High Court hearing to secure access to information and the High Court decision. After that we provide an account of how Biowatch set about challenging the negative costs order, initially appealing the High Court decision and persisting all the way to the Constitutional Court. We provide an insight into the organisational dynamics of Biowatch over this nine-year period, a story yet to be publicly revealed. Finally, we conclude the paper with a review of the lessons that have emerged from the case, and an analysis of the overall outcomes of the legal challenge.

11. Stephen Budlender, 2009. The significance of the Biowatch judgment for South African jurisprudence. Biowatch Think Tank, Constitution Hill, 25 November 2009.

12. Alison Tilley, director, Open Democracy Advice Centre, interview, 6 May 2011.

13. Cormac Cullinan, 2009. Developing legal strategies and framing the relief. Biowatch Think Tank, Constitution Hill, 25 November 2009.



2. The establishment of Biowatch

The establishment of Biowatch in the late 1990s coincided with both a fundamental transformation in environmental governance and the proliferation of GM crops in South Africa. The country's strong commercial seed market made it easy to introduce new seed varieties and years of apartheid subsidies and protectionism built a good agricultural infrastructure. This, in conjunction with an extremely permissive policy and regulatory environment, supportive intellectual property policies, the privatisation of public research institutions and a highly vocal and active scientific lobby, led to the rapid expansion of genetic engineering. South Africa was seen as the gateway to Africa and the government clearly decided that genetic engineering was part of its future agricultural path.

At the same time there were dramatic changes in the ways in which civil society engaged with the law and its development. Significantly, the 1996 Constitution included an environmental right¹⁴ entitling everyone to the right to an environment that is not harmful to health or well-being and to have the environment protected for the benefit of present and future generations. The Constitution also provided various entitlements and rights of a procedural nature, including the right of access to information,¹⁵ to administrative justice¹⁶ and to intervene in litigation as part of the public interest. The liberalisation of this so-called *locus standi* principle¹⁷ was especially significant, enabling individuals and environmental groups to bring environmental actions. The absence of this right historically stymied the efforts of environmental organisations to secure justice through the courts.¹⁸ Most of these substantive and procedural rights were translated into statutes such as the National Environmental Management Act 107 of 1998 (NEMA), a bold and progressive approach to environmental governance written by means of an extensive multi-stakeholder participation process.

The post-apartheid era witnessed a transformation, not only in the new laws and policies that emerged, but also in the space created for civil society engagement. Redefinition of "environment" to include both the "green" issues of conservation

14. Section 24 of the Constitution stipulates that everyone has a right:

(a) *To an environment that is not harmful to their health or well-being; and*

(b) *To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
Prevent pollution and ecological degradation;*

Promote conservation; and

Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

15. s.32

16. s.33

17. s.38

18. Jan Glazewski, 2005. *Environmental law in South Africa*. Durban: LexisNexis Butterworths.

and the “brown” issues of human settlements and well-being led to a vibrant and inclusive environmental movement in South Africa.¹⁹ This new wave of civil society organisations represented a move away from earlier bodies that were white-dominated and middle class and indicated a broader public interest in ways that acknowledged links between socio-economic rights and environmental justice. Through the active intervention of these groups a highly participatory and inclusive policy process (CONNEPP, or the Consultative National Environmental Policy Process) was initiated to formulate new environmental laws and policies.

In parallel to CONNEPP, a process was launched in 1995 to develop new biodiversity policies and laws, stimulated in large part by the impending ratification of the Convention on Biological Diversity (CBD).²⁰ In contrast to CONNEPP, the biodiversity policy process focused more on technical issues relevant to the conservation and sustainable use of biological resources. This included traditional themes such as protected area management, threatened ecosystems and endangered species, but also embraced a new suite of issues focused on bioprospecting, biosafety and the use of genetically modified organisms (GMOs) in agriculture and healthcare.

Biowatch was concerned about increasing reports regarding the wide-ranging health impacts of GM crops, such as allergenicity, toxicity and antibiotic resistance, and in particular the impacts of these crops on small-scale farmers, including increased debt and dependency, contamination of traditional varieties and threats to seed saving. Moreover, a number of studies were published revealing the environmental impacts of these crops, including a loss of local biodiversity through toxic effects from *Bacillus thuringiensis* (Bt), engineered into plants as an insecticide, increased pesticide use due to the build-up of insect resistance, contamination of farmers’ varieties or landraces, harm to wildlife and soil organisms, the creation of invasive species and the development of new or more harmful viruses.²¹ Despite these concerns, there was a lack of public awareness about the implications of this new technology in South Africa, particularly among rural farmers

-
19. IDRC, 1995. *Building a new South Africa*, Volume 4: Environment, reconstruction and development, A report from the International Mission on Environmental Policy. Ottawa: The International Development Research Centre; David McDonald (ed.), 2002. *Environmental justice in South Africa*. Athens: Ohio University Press and Cape Town: University of Cape Town Press.
 20. Rachel Wynberg and Krystyna Swiderska, 2001. *South Africa's experience in developing a policy on biodiversity, access to genetic resources and benefit sharing*. Prepared as a case study for the IIED Project on Participation in Policies on Access to Genetic Resources and Traditional Knowledge. London: International Institute for Environment and Development.
 21. For example, Rosie Hails, 2000. Genetically modified plants – the debate continues. *Trends in Ecology and Evolution*, 15(1): 14–18; Robert Tripp, 2000. GMOs and NGOs: Biotechnology, the policy process, and the presentation of evidence. *ODI Natural Resources Perspectives*, 60: 1–6.; Stephen Brush, 2001. Genetically modified organisms in peasant farming: Social impact and equity. *Indiana Journal of Global Legal Studies*, 9(1): 135–162; Philip Dale, Belinda Clarke and Eliana Fontes, 2002. Potential for the environmental impact of transgenic crops. *Nature Biotechnology*, 20: 567–574; Maria Alice Garcia and Miguel Altieri, 2005. Transgenic crops: Implications for biodiversity and sustainable agriculture. *Bulletin of Science, Technology and Society*, 25(4): 335–353.

who were about to receive an onslaught of interventions aimed at persuading them to take up GM crops. Biowatch was concerned that the negative implications had not been adequately considered in the authorisation process and that environmental rights to a healthy and safe environment were being jeopardised.

Two of the activists (Rachel Wynberg and David Fig) involved in CONNEPP and the biodiversity policy process discussed this situation on a summer's day in 1997 and on the same day Biowatch was born. Ironically, this was also the year in which the first commercial GM crops were planted in South Africa. It was astounding just how much was going on without the public's knowledge. South Africa's lax regulatory framework, strong commercial seed sector and active scientific lobby had, without public consent, positioned the country as the biotechnology hub of the African continent.

Biowatch, at the time comprising a handful of volunteers, began to do research and advocacy work around these issues, investigating the adequacy of existing legal and permitting frameworks for GMOs and the potential environmental and social impacts that could arise from their commercialisation. It became increasingly alarmed at the permissive approach of the state towards the granting of permits for field trials and commercial releases of GM crops.



"Farmer Pig."

© Zapiro (www.zapiro.com)



3. The proliferation of GM crops

Biowatch had substantial grounds for these concerns. Genetically modified crops first became prominent on the South African agricultural landscape in 1992, when Monsanto field trials for transgenic cotton were approved by the apartheid government. At the time there were no regulatory frameworks in place for these novel crops, which remained untested. Oversight was through a voluntary group of scientists, the South African Genetic Experimentation Committee (SAGENE), which had close ties to industries promoting the development and marketing of GM crops and seeds. These so-called industrial “gene giants”, including multinational companies Aventis, DuPont, Monsanto and Syngenta, were experiencing rapid growth through trade liberalisation, advances in biotechnology and the granting of patents on GMOs. Together just ten companies controlled virtually the entire market for GM seeds.

There was immense pressure to commercialise new products and, in particular, to open new markets in Africa given European reservations about the technology.²² South Africa, with its relatively sophisticated infrastructure and research capacity, provided an ideal launchpad to do so. A model evolved whereby multinational gene companies typically financed research and partnered with local research facilities to develop and promote GM crops. This laid a crucial foundation for the rapid adoption of GM crops in South Africa.

Faced with a plethora of new policy imperatives, the newly elected government played a largely passive role in determining policy on genetic engineering. More pressing issues dominated the policy arena, providing the space for civil servants and those with vested interests to submit more peripheral laws and policies without following due process.

One such law was the Genetically Modified Organisms Act 15 of 1997 (the GMO Act), tabled by the NDA only *after* the first commercial planting of a GM crop in South Africa.

In contrast to other laws and policies at the time, which adhered to a process of first determining stakeholder opinions, enabling comprehensive research and debate on the matter and then crafting policy to reflect these priorities, and additionally favouring the precautionary principle, the GMO Act was promulgated without a policy in place, and, aside from allowing a limited period of written comment – which effectively precluded input from the majority of rural, largely illiterate farmers, who were most affected – without a comprehensive programme of public participation. Two structures

22. Florence Wambugu, 1999. Why Africa needs agricultural biotech. *Nature*, (400): 15–16; Rachel Wynberg, 2003. Biotechnology and the commercialisation of biodiversity in Africa, in Beatrice Chaytor and Kevin R. Gray (eds.), *International environmental law and policy in Africa, Environment & Policy* 36: 83-102, Dordrecht: Kluwer Academic Publishers.

were set up to implement the Act: an Advisory Council, which effectively replaced SAGENE but included many of the same individuals, almost all of them scientists involved in GM research, and an Executive Council, which comprised representatives from different government departments and acted as the primary decision-making structure for the Act.²³

Although structures set up to implement the Act excluded public interest groups, access to the state by major seed companies continued through scientists actively promoting genetic modification.

Also noteworthy at this time was the establishment of AfricaBio, an organisation set up by the GM industry in 1999 to counteract growing civil society resistance to GM crops and to promote their uptake. Among its initial 47 members were some of the major “gene giants” such as Monsanto, Pioneer, AgrEvo and Novartis; national research institutions engaged in genetic engineering, such as the Agricultural Research Council, the Council for Scientific and Industrial Research and several universities; and producer organisations. Its primary objective was “to alleviate the fear and uncertainty surrounding biotechnology and promote its use in South Africa and throughout Africa”.²⁴

Through significant industry funding, AfricaBio aggressively challenged any positions or organisations questioning biotechnology and, notably, formed itself into a “counter movement”, employing tactics typically employed by civil society organisations. As an example, by touting itself as a non-profit support group it joined SANGOCO, the South African NGO Coalition. By claiming that it, too, was an NGO and therefore entitled to a platform, this membership was used at the World Summit on Sustainable Development (WSSD) to intervene and, in some cases, disrupt civil society meetings convened to debate GMOs.²⁵ In another example at the WSSD, AfricaBio gathered together a contingent of small farmer spokespeople from South Africa, India and Brazil to promote the virtues of the technology and, bearing placards, to march “on behalf of excluded NGOs and the interests of small farmers”. Almost entirely and very deliberately, it took on the language and strategies of the anti-GMO movement, although its effectiveness was ambiguous.

With increased lobbying from seed companies, a flood of permit applications for GM crop plantings and the need to engage in international negotiations for a Biosafety Protocol under the United Nations CBD, the role of government in

23. s.5

24. Jocelyn Webster, 1999. AfricaBio spokesperson, statement at launch of AfricaBio.

25. AfricaBio, 2002a. Biotechnology as the basis for sustainable development in South Africa: Summary for the multi-stakeholder dialogue segment of the WSSD Prep Com IV meeting; AfricaBio, 2002b. Update on Week 1 of the WSSD. AfricaBio Newsletter 6, available at <http://www.africabio.addr.com/oldsite/wssd/6.htm>, accessed 17 November 2011; Susanne Freidberg and Leah Horowitz, 2004. Converging networks and clashing stories: South Africa's agricultural biotechnology debate. *Africa Today*, 51(1): 3–25.

regulating GM crops changed from one of “convenient neglect” towards representing all the characteristics of a country strongly promotional of their uptake.²⁶ This reflected the strongly pro-business stance of the African National Congress (ANC) government, which came to power not only with immense popular support, but also with substantial backing from large capital.²⁷ Although this capital was not necessarily linked to companies promoting GM crops, it indicated government’s accommodating position with regard to business engagement in policy formulation and decision-making.



© Tony Grogan
Cape Times, 3 June 2005

26. See, for example, Robert Paarlberg, 2000. *Governing the GM food revolution, policy choices for developing countries*. Food, Agriculture, and the Environment. Discussion Paper 33. Washington DC: International Food Policy Research Institute, available at <http://www.ifpri.org/sites/default/files/publications/2020dp33.pdf>, accessed 17 November 2011.

27. Hein Marais, 2011. *South Africa pushed to the limit: The political economy of change*. Cape Town: University of Cape Town Press and London: Zed Press; Ari Sitas, 2011. *The Mandela decade 1990–2000: Labour, culture and society in post-apartheid South Africa*. Pretoria: University of South Africa Press.



4. Biowatch, Monsanto and the state: Securing access to information about GM crops

4.1 Evolution of the decision to litigate

By 2000, GM crops covered 100,000 ha²⁸ of South African land, a 50 percent increase from the previous year. Five commercial releases had been approved and 175 field trials were under way.²⁹ By this time Biowatch had established itself as a legally constituted Trust, secured funding from international donors and employed staff to conduct research, undertake advocacy work and develop materials. It was also participating in international biosafety meetings and had emerged as an outspoken critic of South Africa's flawed regulatory system for GMOs.

The first staff members included:

- Elfrieda Pschorn-Strauss, an environmental activist and planner, who was involved in establishing the Cape Town-based NGO Eco-Programme, helped set up the Trust and played a central role in research and advocacy;
- Haidee Swanby, whose portfolio focused on networking and awareness raising; and
- Nicci van Noordwyk, who took care of administrative and office matters.

The first trustees were:

- David Fig, then working as an environmental sociologist based at Wits University, with a long history of involvement in the environmental and labour movements;
- Rachel Wynberg, an environmental policy researcher who was involved in drafting South Africa's Biodiversity White Paper and Biodiversity Act;
- Rose Williams, then curator of the Natal Herbarium;
- Dot Keet, a senior researcher working on international trade and economics and active in regional trade networks critical of the new global trade regime;
- Rosieda Shabodien, an organisational development consultant involved in the environmental and gender movements;
- George Davis, an ecologist heading up the urban conservation programme at the National Botanical Institute;

28. By 2011 this had grown to 2,3 million ha. Clive James, 2011. Global status of commercialised biotech/GM crops. Ithaca: ISAAA.

29. Elfrieda Pschorn-Strauss and Rachel Wynberg, 2002. *Genetic engineering in food and farming*. Booklet 4 of 5, South African People and Environments in the Global Market. Pietermaritzburg: groundWork and Biowatch South Africa.

P
60 MIN

MAIL GUARDIAN

August 10 to 26, 1999
**CALL TO
BAN SA'S
ILLEGAL
GENETIC
CROPS**

FAMILY
McDonald's

LAND
LANCE
Addictive Resident
TERRI - T
Paul Oakenfold
RASH
Carl Cox
FRANK
Pete Wardman
(Trollz)
COAST
Trollz Trax

ALL CLOTHING
New Store
SPORTS FROM HEAVEN
Golf & Tennis
RTD & DOWN
RED & OUTLET'S

4 SEPTEMBER 1999

DOORS OPEN @ 8:45 PM FOR 1ST 1000 TICKETS

- Thembela Kepe, a land rights researcher at the University of the Western Cape working with rural communities in the Eastern Cape;
- Zulaiga Worth, then a biologist at South African National Parks and later at the Robben Island Museum; and
- Aadiela Moerat, who worked for the Department of Water Affairs and Forestry.

Nombulelo Siqwana-Ndulo, a sociologist, gender and development practitioner, and at the time Commissioner of the Commission for Gender Equality, joined the Trust in 2003 and was strongly involved in supporting and guiding the litigation from the outset.³⁰ Thabang Ngcozela, Western Cape coordinator at the Environmental Justice Networking Forum also joined the Trust in 2003.

Several other people also played a critical role at this early stage, including Mariam Mayet, an environmental lawyer who represented Biowatch at international meetings to develop a legally binding biosafety protocol under the CBD and helped craft legal analyses of the fatally flawed GMO Act, later going on to found the African Centre for Biosafety; and Christine Jardine, a microbiologist who advised Biowatch about the technical and environmental aspects of GMO releases.

One of the first problems Biowatch identified was a lack of transparency about the way that decisions about GM crops were being made. The public had no access to information about these crops or to the risk assessments that were being used as the basis for approvals. Biowatch was increasingly concerned that the authorities were permitting GM crops to be grown and sold without properly considering the environmental and socio-economic risks and without imposing appropriate permit conditions. In part this was due to capacity constraints but there were also concerns that lobbying from industry-funded AfricaBio and the inclusion of scientists with vested interests on decision-making committees were undermining precautionary approaches to this new technology.

Biowatch's research also revealed serious flaws in the GMO Act and its regulations,³¹ including a lack of clarity on the procedures to be followed for environmental impact assessments (EIAs) for GMOs; a misinterpretation of the "precautionary principle", which requires precaution in the face of scientific uncertainty; and, worryingly, making users of GM crops (e.g. farmers or consumers) liable for any damages caused through their introduction, rather than the

30. David, Rachel, Rose, Dot, Nombulelo and Thabang remained as trustees throughout the nine-year period of litigation and represented the Biowatch Trust throughout the legal proceedings. Zulaiga Worth, Aadiela Moerat and George Davis resigned in 2004. Both Thembela Kepe and Rosieda Shabodien resigned in 2007 after serving the Trust for eight years. Thoko Makhanya, a healthcare practitioner from KwaZulu-Natal, joined the Trust in 2011, bringing her significant experience of working with youth, women and communities. Stembeni Williams, founder of the Ingwavuma Women's Centre and an active health and community worker and advisor and Loretta Feris, a law professor at UCT specialising in environmental and human rights, became Biowatch trustees in 2012.

31. Mariam Mayet, 2000. Analysis of South Africa's GMO Act of 1997. Prepared for Biowatch South Africa.

proponents of the technology. Concern was also expressed about the lack of public participation in developing the GMO Act.

A think-tank of environmental and human rights lawyers and NGOs was convened at the stone cottages adjacent to Kirstenbosch Botanical Gardens in February 2000 to discuss these concerns and develop strategies for civil society. The group strongly recommended that legal action should be taken in the public interest to challenge the GMO Act and its regulations. The GMO Act, the group noted, was “conceptually flawed, with a cynical disregard for international and national regulations”.³² But to launch a challenge, access was needed to the information that the NDA held on risk assessments. This would enable the procedures used to grant permits to companies to be better understood. As far as could be ascertained, no EIAs had been done on GM crops in SA and risk assessments were all desktop based. It was hoped that a legal case could be built up by gathering documentation and information, forcing the government to debate the merits of GMOs and impeding the further granting of permits until a more rigorous regulatory framework was in place that safeguarded environmental and human rights.

The context of these events was significant. With the end of the Mandela presidency in 1999, limits had increasingly been placed by the state on the influence of civil society, expressed in the belief that a democratically elected state acted on behalf of citizens and that “government should be left to govern”. Until 1999, the state enjoyed co-operation from civil society but as it professionalised there was less appreciation for this kind of support. Civil society organisations were marginalised, distanced or even regarded with suspicion in some cases, and the state’s regressive positions spilled over into the environmental arena. For example, despite widespread public participation in the initial development of the NEMA, significant amendments were tabled with little opportunity for public input. A similar pattern prevailed for the development of the Biodiversity Act 10 of 2004.

Civic opportunities for policy influence increasingly closed down and in this restricted policy space, other strategies to secure environmental rights became more important. Litigation, which had not been possible prior to the promulgation of the Constitution and relevant new environmental laws and administrative proceedings, opened opportunities and started to form part of the tactics used by civil society organisations to defend environmental rights.

32. Biowatch legal strategy workshop, 23 February 2000. Workshop proceedings. Participants included Cormac Cullinan, Francois Dubois, David Fig, Jan Glazewski, Liz Hosken, Glenda Lindsay, Mariam Mayet, Wally Menne, Elfrieda Pschorn-Strauss, Henk Smith, Rose Williams, Carl Wiggeshof, and Rachel Wynberg.

In 1999, using its constitutional rights of access to information,³³ Biowatch thus began a process of requesting official information from the NDA about the planting of GM crops in South Africa, the risk assessments that had been undertaken and the decision-making process to approve such crops. A series of e-mails and telephone calls were directed to Shadrack Moephuli, then Registrar of Genetic Resources in the NDA and currently Chief Executive of the Agricultural Research Council. The requests were made not only by Biowatch staff, but also by legal and specialist consultants contracted by Biowatch to undertake research. Elfrieda Pschorn-Strauss, writing in July 2000, asked for a list of crops for which licenses had been granted for field trials and the location of those field trials, yet received a barely substantive response. Christine Jardine, a microbiologist and environmental scientist appointed by Biowatch to evaluate the risk assessments upon which field trials were granted, requested access to a selection of risk assessments, but the NDA failed to respond. Only after repeated phone calls and e-mails was she told that due to confidentiality concerns her request had to be tabled before the Executive Council to the GMO Act, an appeal which was ultimately unsuccessful. Mariam Mayet, Biowatch's legal consultant at the time, asked the NDA, among other things, for permission to inspect licenses that had been granted under the GMO Act, for the department's records regarding public participation compliance and for the exact co-ordinates of field trials and commercial releases but simply received a bald spreadsheet listing applications but containing little substantive information.

As the lack of cooperation from the NDA became clear, Biowatch sought legal advice about how to proceed. A follow-up legal strategy workshop³⁴ on 9 November 2000 led to consensus that litigation should be pursued. The Legal Resources Centre (LRC) was asked to take on the case but was unable to do so because of the difficulties of proving direct impacts on indigent communities.³⁵ Although Biowatch had no funds earmarked for litigation, it had supportive donors and Winstanley, Smith & Cullinan, a private legal firm, agreed to take up the matter with the NDA for a reduced fee.

In February 2001 a letter of demand to the Registrar of the GMO Act at the NDA, Shadrack Moephuli, described the string of prior requests, affirmed Biowatch's constitutional right to the information held by the state and requested access to

33. Section 32 states that:

(1) Everyone has the right of access to –

(a) any information held by the state; and

(b) any information that is held by another person and is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

34. This was attended by Cormac Cullinan, Jan Glazewski, Christine Jardine, Mariam Mayet, Elfrieda Pschorn-Strauss, Henk Smith, David Waddilove, Gwendolyn Wellmann, and Rachel Wynberg.

35. Following the High Court judgment and a depletion of Biowatch's funds for litigation, the LRC agreed to take on the case because of its wider implications for public interest litigation. The LRC had donor support for litigation and could appoint its own in-house advocate for the appeal process.

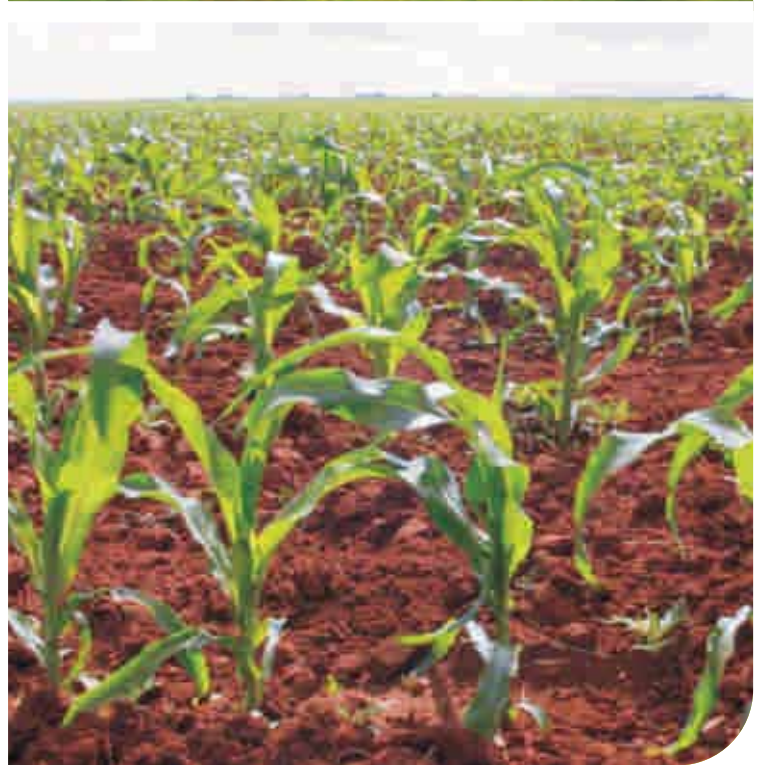
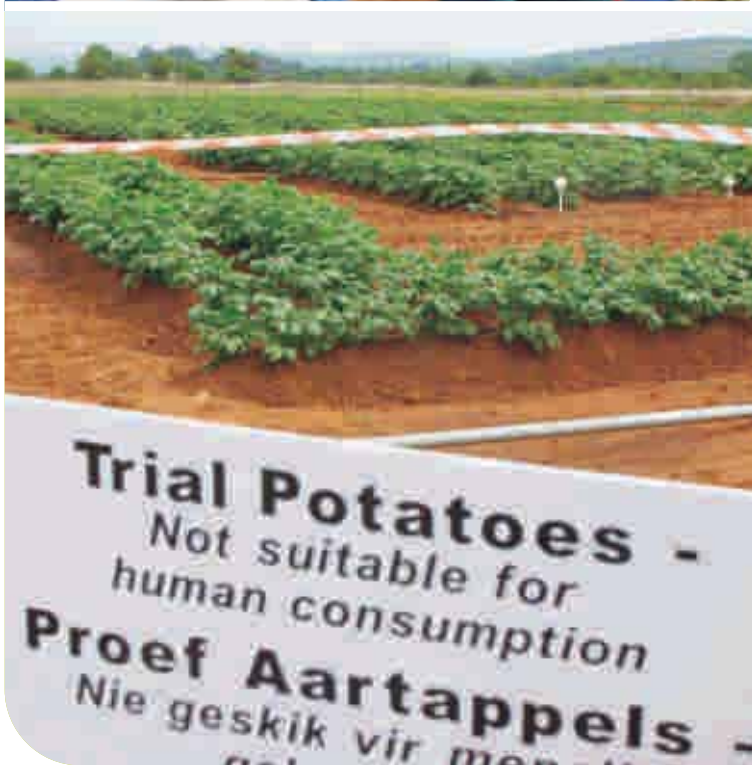
11 categories of information, including the location of field trials and commercial crops, risk assessments and information about approved licenses. The schedule specifically identified certain records and categories of information to which access was sought but, significantly, also included general “catch-all” requests because Biowatch did not know exactly what records the authorities held. (This seeming “lack of precision” about the information sought formed the basis for the later costs order against Biowatch.) It was anticipated that the Registrar would respond by indicating what records he held and which parts of them were considered confidential, so that the parties could seek to reach agreement on precisely which information Biowatch was entitled to see. In fact, the Registrar merely indicated that he would take legal advice on the requests but did not respond further.

On 29 March 2001, the NDA was advised that Biowatch would litigate if no response was received. None was forthcoming.

Critical advice was secured at this time from John Butler, a well-known Cape advocate, who also eventually argued the case for Biowatch in the Pretoria High Court. He advised not only about the extent of Biowatch’s rights under the Constitution but also about the timing of the information requests, a particularly crucial issue given legislative changes at the time. The Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted in February 2000, prior to the requests being made. However, most of PAIA’s provisions only commenced in March 2001, *after* the requests had been made. The initial requests for information thus fell within the ambit of the Constitution. This was in part strategic. Because PAIA introduces a variety of grounds to refuse access, the Biowatch team considered it advantageous to lodge detailed requests for information when reliance could be placed on the wide access to information provision contained in section 32(1)(a) of the Constitution. The legal basis for the request was thus framed in terms of the Constitution. John Butler also advised that a co-applicant directly affected by GMO plantings would strengthen the case, due both to the ability of such a person to obtain information more quickly from the NDA and the court’s greater receptivity to such a situation. The challenges of identifying a co-applicant, however, were significant, largely due to the lack of awareness about GM crops among farmers and the long-term nature of GMO impacts. Several rights-based organisations were approached to support the case, with the result that the Open Democracy Centre (ODAC) joined as *amicus curiae* (friend of the Court), focusing on the important role of access to information in a democratic society.

The following months centred on the drafting of affidavits in preparation for the case. This was also a period of great upheaval for Biowatch. Personal tragedy struck key Biowatch staff and the appointment of a director, Natalie McAskill, had led to a reconfiguration of the Biowatch team and some discontent. A founding affidavit was thus only finalised in January 2002, in the name of Elfrieda Pschorn-Strauss, with supporting affidavits from Rachel Wynberg, Christine Jardine and Mariam Mayet. The papers were further developed by the legal team over the next few months and were served on the NDA on 23 August 2002 with the full support of the Biowatch Trust.

The NDA notified Biowatch that it would oppose and a court date was set for 18 March 2003 in the Pretoria High Court.



4.2 Monsanto and other seed companies intervene

A series of delays then ensued, resulting in the case being postponed several times before finally being heard on 24 and 25 May 2004. The most significant delay was due to the unexpected application by the multinational agricultural biotechnology company Monsanto to intervene in the proceedings on the side of the state, on the basis that it had a direct and substantial interest in the proceedings. Two other seed companies, Stoneville Pedigreed Seed Company and Delta & Pine Land South Africa (D&PL SA) – both distributors of Monsanto products – also joined the state against Biowatch to protect information they considered confidential. The inclusion of Monsanto was especially noteworthy, causing alarm throughout civil society. The \$10 billion company is the leading producer of GM seed and is infamous for its aggressive litigation, political lobbying and bullying tactics. Formerly a chemical company, its main products included DDT and Agent Orange, a toxic defoliant used in Vietnam. Many of Monsanto's seed products are genetically modified to make them resistant to Monsanto-produced herbicide and it pursued a string of lawsuits against many farmers in North America for saving seed containing these patented genes, even when those farmers' crops were contaminated by neighbours' GM crops.³⁶ It was now actively seeking permits for the field trials and commercial release of GM crops in South Africa.

In a vitriolic attack on Biowatch, Monsanto accused the organisation of not acting in the public interest but rather "representing and advancing the personal interests and opinions of its trustees".³⁷ It challenged the expertise of Biowatch staff, trustees and scientists and argued that its own risk assessments contained confidential information that could harm the company's commercial and financial interests if made public.³⁸ Monsanto also introduced a series of procedural obstacles to prevent Biowatch from taking the case to court. Biowatch spent substantial time and money replying to these allegations and providing alternative scientific opinion.

A significant development took place during the course of these deliberations. Pannar Seed (Pty) Ltd, a South African company (recently in the spotlight due to its merger with Pioneer Hi-Bred),³⁹ indicated that it had an interest in joining the state against Biowatch. Following a meeting between Biowatch and Pannar, a settlement was reached whereby Pannar granted Biowatch all relevant information in its possession save for the precise location of field trials that had already been completed. Monsanto and the other intervening companies were not prepared to enter into similar negotiations.

36. Monsanto, nd, available at <http://www.monsanto.com/newsviews/Pages/saved-seed-farmer-lawsuits.aspx> accessed 8 October 2012.

37. Monsanto answering affidavit, submitted 13 May 2003. Case No. 23005/2002.

38. *Ibid.*

39. *Pioneer Hi-Bred International Inc and Pannar Seed (Pty) Ltd v The Competition Commission of South Africa* Case No. 81/AM/Dec 10.

4.3 Preparing for litigation: Campaigning, awareness raising and advocacy

As 2004 progressed, further meetings were held with lawyers and allied organisations and Biowatch began the process of developing a multi-faceted strategy to lobby for legal reform. Biowatch forged a stronger relationship with the Parliamentary Portfolio Committee on the Environment, consulted and briefed wider NGO networks and developed a broader strategy around public awareness raising, media and education. Significantly, this process was also broadened to include a range of civil society networks and the development of a wider public mandate for Biowatch to take the matter to court.

This was achieved in a variety of ways but primarily by developing an informed and sympathetic climate across various constituencies in existing networks and alliances, building a support network and support base for the court case and generating campaign materials for a range of audiences to explain the facts and implications of the case. Importantly, Oryx Media, a company skilled in press strategy and liaison, was employed and provided invaluable assistance in preparing regular press statements, securing a high media profile for the case and ensuring that the position of Biowatch and its allies received media prominence.



© Tony Grogan

Cape Times, 11 November 2002

Although Biowatch is not a membership-based organisation, it was instrumental in setting up the South African Freeze Alliance on Genetic Engineering (SAFeAGE), which represents a wide network of concerned individuals and organisations across South Africa, and is also actively involved in the Environmental Justice Networking Forum (EJNF). Biowatch developed strategic alliances with the Congress of South African Trade Unions (especially its affiliated Food and Allied Workers' Union), farmer groups (such as the regional Participatory Ecological Land Use Movement, PELUM, and the Organic Agriculture Association of South Africa), faith groups, consumer groups, conservation organisations and other civil society formations such as the Treatment Action Campaign (TAC), which faced similar recalcitrance from government. Biowatch sought to raise awareness about the difficulties it faced in obtaining access to information, to argue for upholding the constitutional right to information and to secure support in the event of having to litigate. It also drew on its global connections to NGOs across the developing and industrialised world that had a similar focus on food sovereignty, GMOs, farmers' rights and biodiversity. These international connections were invaluable in ensuring that the case received high international profile and support.

Also significant were the strengthened relationships between Biowatch and the Parliamentary Portfolio Committee on the Environment, stemming from the involvement of concerned parliamentarians in the GMO debate. Combined, these alliances were to prove invaluable both during the court case and in the later unfolding of the Constitutional Court battle.

Biowatch's internal dynamics were less supportive. Those who had been involved from the beginning of the case struggled to convey its importance and history to Biowatch's newly-appointed director, who opposed litigation and was concerned that the organisation's public image would suffer if legal action was taken against the ANC government. Media specialists advised that, on the contrary, highlighting the fact that government had a public duty it was not fulfilling would strengthen Biowatch's public image. Why, asked staff and trustees, was Biowatch seen as "the enemy" of the government and what could we do to change that perception?

Other national and provincial government departments and several parliamentary committees were supportive of Biowatch's position, yet the NDA and the Executive Council for the GMO Act continued to portray the organisation as a Luddite NGO with a vendetta against GM crops. Moreover, while the Registrar of Genetic Resources advocated transparency and access to information in phone calls and informal discussions with Biowatch staff and trustees, the official NDA position, articulated in affidavits from the Registrar, was somewhat less supportive.

Corporate influence was clearly working on individual bureaucrats but civil society remained estranged. This bias was of grave concern, and became increasingly palpable as the case proceeded.

4.4 The access to information court case

Biowatch's case was finally heard on 24 and 25 May 2004, the final list of respondents including the Registrar of Genetic Resources, the Executive Council for Genetically Modified Organisms and the Minister of Agriculture as the first, second and third respondents, and Monsanto, Stoneville Pedigreed Seed Company and Delta & Pine Land South Africa Inc as the fourth, fifth and sixth respondents. ODAC joined the case as *amicus curiae*.⁴⁰

Outside the court, crowds gathered, including participants from organisations affiliated to the EJNF who demanded access to GMO information. Protestors, many clad in yellow Biowatch T-shirts proclaiming "Genetically Modified Foods: Our Right to Know, Our Right to Choose" displayed posters saying "Monsanto, Stop Poisoning Us" and "Promote Sane Farming". In Cape Town, parallel demonstrations culminated at the gates of Parliament, where large containers of milk were spilled in protest against the use of recombinant bovine somatotropin (rBST), a genetically modified hormone used to stimulate milk production in cows and banned in many countries, but not South Africa.⁴¹

Inside the courtroom a more sombre atmosphere prevailed but Biowatch was heartened by the presence of many supporters, including several funders and a formidable legal team comprising Advocate John Butler (later appointed as senior counsel) and attorneys Cormac Cullinan and Josie Eastwood. In addition to a large media presence, Biowatch also had its own media team in attendance: journalist Roger Friedman and photographer Benny Gool were able to record and respond immediately to developments in the courtroom and, through their office in Cape Town, prepare and disseminate news releases and coordinate interviews with Biowatch staff, lawyers, trustees and allied organisations. The story was flighted in almost all national newspapers, on SABC television and radio, as well as in a wide range of international newspapers and on listservers.

As the proceedings unfolded it became patently clear that the Biowatch position was overwhelmingly strong and difficult to oppose rationally. On the first day of argument the respondents collectively abandoned most of the issues they had raised in papers, with Monsanto trying desperately not to concede the crucial confidentiality point. Counsel for the Registrar, the Executive Council and the Minister of Agriculture, Advocate Mervyn Rip SC, acknowledged that Biowatch was entitled to most of the information it sought but remarked that the information requested was so voluminous that the Office of the Registrar was incapable of delivering it. Government functionaries responsible for managing genetic engineering in South Africa, it appeared, were too busy processing applications and issuing permits for new releases to comply with the constitutional rights of South Africans to know what they were doing. The Registrar's office comprised just

40. *Trustees, Biowatch Trust v. Registrar, Genetic Resources and Others* 2005 (4) SA 111 (T).

41. Sapa, 2004. 'Food fight' at Parliament. Independent Online, 26 May, available at http://www.iol.co.za/news/south-africa/food-fight-at-parliament-1.213625#UHP_QC7A-nk, accessed 8 October 2012.



five people, two of whom were administrative assistants, and over a four- to five-year period had been responsible for processing more than 2,000 applications and issuing more than 1,000 permits. Advocate Butler remarked that this understaffing, combined with the proliferation of GM crops in South Africa, raised legitimate questions about whether due attention was paid to the environmental impact and risk assessments of GMOs. Advocate Matthew Chaskalson, acting for the Stoneville Pedigreed Seed Company, similarly termed the case “unfortunate” in the sense that an NGO attempting a worthy public interest initiative had been stonewalled by an uncommunicative bureaucracy. Advocate Jacqui Cassette of the Open Democracy Advice Centre argued that anyone wanting to limit the constitutional right of access to information could only do so on specific and compelling grounds.

A central argument of the defence related to the breadth of information sought. As Biowatch did not know what records the authorities held it had included wide “catch all” requests to incorporate unknown possibilities. Remarkd attorney Cormac Cullinan: “When you ask for information and don’t know what is there you ask for *everything*. We envisaged a process of letter writing to and fro and that through a process of negotiation we would solve the issues long before they came to court.”⁴² Both Monsanto and the state attacked Biowatch for embarking on a “fishing expedition”, with Monsanto retorting that it was part of a “general search” by the Biowatch Trust “for aspects that they might be able to criticise in connection with the entire GMO industry”.⁴³ Advocate Mervyn Rip SC continued (in retrospect rather ironically), that the state’s hands “cannot be tied by a continuous stream of requests for information, which results in the state not being able to give effect to good governance”.

Biowatch showed good faith in its agreement with local maize seed company Pannar for the latter to disclose information that was not considered confidential, but long before the court application, Monsanto had refused Biowatch access to information of any kind. In doing so Monsanto gained a distinct advantage, both by portraying Biowatch to be unreasonable and “frivolous” in its wide requests for information, and by then forcing Biowatch to accept its view on what it considered to be confidential. Remarkd a senior advocate involved in the case: “Ostensibly the fight was between Biowatch and the Registrar, but actually it was against Monsanto [which] was hiding behind administrative procedures for strategic reasons. Their aim was to block access completely.”

Respondents were particularly concerned about the disclosure of the co-ordinates of GM crop field trials and commercial releases, believing that “eco-terrorists” would uproot these crops, as had been done in Europe. “These anti-GMO groups,” wrote Daniel Olivier of Delta & Pine Land SA, “hold themselves as protectors of the environment and as the watchdogs for

42. Cormac Cullinan, 2009. Developing legal strategies and framing the relief. Biowatch Think Tank, Constitution Hill, 25 November.

43. Advocate Frank Snyckers, Monsanto South Africa (Pty) Ltd Heads of Argument, 3 March 2007, available at www.biowatch.org.za/docs/courtcase/monsanto_heads.pdf, accessed 15 August 2012.

“It is a landmark case about the threat to the environment through the wholesale testing of GMOs, with financially interested parties benefiting, largely based in the USA. South Africa is being used as a testing ground for GMOs to the benefit of foreign shareholders.”

Senior advocate involved in the Biowatch case, 2011.

an allegedly ignorant public ... I submit that D&PL SA and others will be jeopardised by similar acts of violence should the exact locations ... be known.”⁴⁴

Some measure of the strength of Biowatch’s case was reflected in the turnaround on costs during the two-day trial. While all respondents aside from Stoneville Pedigreed Seed Company had indicated that they would be seeking a costs order against Biowatch at the beginning of the proceedings, by the second day only Monsanto was still pursuing the costs order. As is now all too well known, Monsanto was set to be hoist with its own petard through this belligerence.

Again, Biowatch was vulnerable to internal disruptions. Irreconcilable differences between the then-director, staff and trustees regarding the litigation and other issues had led to the resignation of Natalie McAskill earlier in the year, at a time when the organisation was most in need of leadership and stability. Long-serving trustees Rachel Wynberg and Rosieda Shabodien were appointed as joint acting directors to ensure that Biowatch maintained a strong front for the litigation. Elfrieda Pschorn-Strauss continued to play a pivotal role in coordinating the case, while Haidee Swanby assumed responsibility for national networking and awareness-raising and Lawrence Mkhalihi and Peter Komane for outreach and networking in KwaZulu-Natal (KZN) and Limpopo respectively.

44. Delta & Pine Land SA answering affidavit in the High Court of South Africa. Case No. 2002/23005.

Key organisations involved in the Biowatch Case

Respondents

The National Department of Agriculture

The National Department of Agriculture (now the Department of Agriculture, Forestry and Fisheries) is the government department charged with administering the GMO Act (15 of 1997). This it does through a Registrar, appointed by the Minister and through the GMO Executive Council. The Registrar of Genetic Resources, the Minister of Agriculture and the Executive Council were involved as first, second and third respondents in the legal action.

www.daff.gov.za

The GMO Executive Council

The Executive Council, established by the GMO Act, is the primary decision-making body for GMOs and was also involved as a respondent in the legal actions. It is made up of representatives of eight national departments and is empowered to make decisions regarding the development, production, import, export, contained use, field trials and commercial releases of GMOs.

Monsanto South Africa (Pty) Ltd

Monsanto, the US-based agri-chemical and seed multinational, has a history of involvement in the manufacture of chemicals used in warfare. Now in the agri-business sector, it has been at the forefront of pushing GMOs and its patented herbicides in South Africa. It joined the Department of Agriculture against Biowatch as a co-respondent in the 2004 court case to protect its confidential business information.

www.monsanto.co.za

Stoneville Pedigreed Seed Company

The Stoneville Pedigreed Seed Company started breeding cotton in 1922 and was the first company in the world to commercialise genetically modified cotton. Headquartered in Memphis, Tennessee, it started conducting business in South Africa in 1990, introducing trials of genetically modified cotton plants around 1993. The company was incorporated into Monsanto in 2005, only to be acquired by Bayer Cropscience two years later.⁴⁵

45. Emergent Genetics, 2003. Emergent Genetics announces new structure to strengthen global position. News and Media, 23 August, available at http://www.emergentgenetics.com/news_media/2003_08_25.html accessed 8 October 2012.; Greenpeace, 2005. Companies bought by Monsanto (1995-2005), available at www.greenpeace.de, accessed 8 October 2012.

Delta & Pine Land South Africa

A regional subsidiary of the Delta & Pine Land Company, once the largest cotton seed producer in the USA, Delta & Pine Land South Africa produced and supplied both conventional as well as GMO seed in South Africa. Since 2007, both the parent company and its South African subsidiary have been incorporated into Monsanto.⁴⁶

Friends of the Court

Open Democracy Advice Centre (Access to Information Case)

ODAC is a non-profit company based in Cape Town. It seeks to promote open and transparent democracy, foster a culture of corporate and government accountability and assist people in South Africa to realise their human rights. By providing support to individuals and organisations with a social justice agenda, ODAC makes a material, tangible difference to the lives of the poor. It joined the Pretoria High Court application for access to information as *amicus curiae* but did not continue as an *amicus* in the appeals. Biowatch was joint winner of ODAC's prestigious Openness and Responsiveness (Golden Key) award in 2008 based on its use of the Promotion of Access to Information Act.

www.opendemocracy.org.za

Centre for Child Law (Constitutional Court)

Launched in 1998, the Centre for Child Law (CCL) is based in the Law Faculty at the University of Pretoria. The Centre contributes towards establishing and promoting the best interests of children through education, research, advocacy and litigation. In an affidavit CCL stated that "the heightened risks of a costs order in the wake of the Biowatch (High Court) decision casts a pall of uncertainty that makes public interest litigation more difficult to undertake."⁴⁷ This is what caused it to come to court in the matter.

www.centreforchildlaw.co.za

Lawyers for Human Rights (Constitutional Court)

Similar reasons were proffered by Lawyers for Human Rights (LHR), which also acted as *amicus curiae* in the Constitutional Court, with Advocate Stephen Budlender defending both CCL and LHR. LHR is a non-governmental, non-profit human rights organisation with a history of activism and public interest litigation in South Africa spanning more than three decades. LHR uses the law as a positive instrument for change and to deepen the democratisation of the South African

46. Department of Justice, 2007. Justice Department requires divestitures in \$1.5 billion merger of Monsanto and Delta & Pine Land. Press Release, 31 May, available at http://www.justice.gov/atr/public/press_releases/2007/223676.htm, accessed 8 October 2012.

47. CCL affidavit, paragraph 26, quoted in *amicus curiae*'s submissions to the Constitutional Court, 19 December 2008, CCD 80/08, TCD A831, 2005, p. 3.

society. It achieves this by providing free legal services to vulnerable, marginalised and indigent individuals and communities who are victims of unlawful infringements of their constitutional rights.

www.lhr.org.za

Centre for Applied Legal Studies (Constitutional Court)

The Centre for Applied Legal Studies (CALS) was founded in 1978, at a time when public interest law groups did not exist in South Africa. It is an independent organisation based within the Faculty of Law at the University of the Witwatersrand and is committed to promoting democracy, justice, equality and peace in South Africa and to addressing the legacy of oppression and discrimination through the realisation of human rights for all South Africans under a just constitutional and legal order. CALS decided to become an *amicus curiae* because of its on-going mandate to support the realisation of environmental rights. Doing so allowed it to optimise its limited resources.⁴⁸ Advocates R Keightley and C Cooper acted for CALS in the Constitutional Court.

www.wits.ac.za/academic/clm/law/cals/11159/cals.html

Biowatch legal support

Winstanley, Smith & Cullinan (Access to Information Case)

Winstanley, Smith & Cullinan (now Cullinan & Associates) is a private law firm that acted for Biowatch in the initial application to the Pretoria High Court to secure access to information. This was largely through the efforts of attorneys Cormac Cullinan, well known for his work in the emerging field of Earth jurisprudence and the development of alternative legal approaches for environmental governance, and Josie Eastwood, employed at the time at this legal firm.

www.cullinans.co.za

Legal Resources Centre (Access to Information High Court Appeal and Constitutional Court)

The Legal Resources Centre (LRC) is a human rights organisation that operates from four regional offices. It seeks to promote human rights and socio-economic development by using the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. The Legal Resources Centre acted *pro bono* for Biowatch following the order to pay Monsanto's costs in the Pretoria High Court, right up to the Constitutional Court victory in 2009.

www.lrc.org.za

48. Advocate Carole Cooper, formerly of CALS, Interview, 4 September 2012.

4.5 Delays in the verdict – and Syngenta

Despite being assured of a judgment within a week of the court case, a series of interminable delays now began. This period was far from quiet, however. In a separate development, Biowatch had established another legal precedent by asking the NDA to assemble an appeal board to set aside a decision to grant a permit to the seed and agrichemical giant, Syngenta. NDA granted the permit for the import, field trials and commercial use of so-called Bt11 maize, named after the bacteria *Bacillus thuringiensis* (Bt) which, once inserted into a plant, triggers the modified plant to produce a pesticide. Biowatch was particularly concerned about Bt11 because it had “stacked” genes – both a pesticide gene (Bt) and herbicide resistance gene (the “pat” gene), which increased its instability and potential negative impact on the environment and health.⁴⁹ The case also presented an opportunity to scrutinise the GM permit decision-making process, and, for the first time, enabled access to a risk assessment submitted in lieu of obtaining a permit.

Analysing this information was a taste of things to come. Apart from procedural irregularities in the application, experts such as Professor Chris Viljoen of the University of the Free State and entomologist Dr Peter Hawkes slammed the Syngenta risk assessment as “inadequate and inconclusive”.⁵⁰ Not only was it entirely desk based, but it was based on experiments done abroad, mainly by Syngenta scientists, on species that did not occur in South Africa. In its defence, Syngenta launched a scathing attack on Biowatch, introducing multiple procedural ambushes in an attempt to delay proceedings until the GM maize was in the ground.

These tactics were to pay off. Although the Appeal Board concluded that Syngenta advertisements did not comply with mandatory legal requirements, were published in a way that was misleading and contained information that was both inaccurate and misleading, the appeal process was so protracted that the first crop of maize had already been harvested by the time the Appeal Board reached its decision. It therefore decided that even though the decision to grant a permit was flawed, there was no longer any point in setting it aside. However, it altered Syngenta’s permit conditions to require more comprehensive monitoring, remarking that it was “inexplicable and entirely unjustified” that the NDA kept risk assessments under wraps. Biowatch was deeply disappointed in the overall outcome, believing it revealed “a government that pandered to industry and which was hell bent on forcing unsuspecting South Africans to eat this controversial new food”.⁵¹

49. Defra, 2009. Draft commission decision on the placing on the market of Syngenta’s GM maize (event Bt11) modified for insect resistance and for tolerance to the herbicide glufosinate ammonium, February, available at <http://archive.defra.gov.uk>, accessed 8 October 2012.

50. Biowatch, 2004. Objections to GMO applications: Syngenta Bt maize – Background to the appeal. April, available at <http://www.biowatch.org.za>, accessed 9 October 2012.

51. Biowatch, 2004. Appeal Board reveals state negligence on genetic modification. Press Release 22 December, available at <http://www.biowatch.org.za>, accessed 9 October 2012.

4.6 The verdict

Despite this frustration, good news, albeit bitter-sweet, was in the offing. On 24 February 2005, judgment was finally delivered some nine months after the access to information hearing. Acting Judge Eric Dunn said in his judgment that Biowatch had established a clear right to most of the information to which it sought access. The refusal by the Registrar of Genetic Resources to grant access, the judge said, constituted a “continued infringement of Biowatch’s rights under ... the Constitution”.⁵² The Court found that Biowatch had a constitutional right to the information, that access to this information was in the public interest, that Biowatch had been forced to go to court to get the information, and that granting such access was a necessary part of the correct administration of the GMO Act. Biowatch had won the right to eight out of eleven categories of requested information, including minutes of meetings of the decision-making bodies on GMO crops, copies of all permits, approvals, applications and risk assessments, and all records of the areas of field trials and commercial releases although not the exact co-ordinates for fear of the mythical “crop-pullers”.

For the first time, a comprehensive assessment would be possible of the ways in which environmental, health and social impacts had been assessed for GM crops in South Africa.

Monsanto played down the ruling, which ordered the NDA to supply information. In a flabbergasting and untruthful statement that contradicted its previous actions to prevent Biowatch from securing access to information, the Monsanto spokesperson remarked: “We have always said we are transparent, and we’d make the information available to Biowatch – most of what they want is in the dossiers we’ve submitted to the agriculture department.”⁵³ Statements from the pro-biotech lobby group, AfricaBio, were, in contrast, more telling and slated the court ruling: “Biowatch’s aim is not to contribute to the scientific evaluation of GM technology but to maintain mass negative publicity to sway public opinion,” stated the organisation’s director, Jocelyn Webster.⁵⁴ Indeed, throughout the Biowatch court case, AfricaBio issued a series of vitriolic press statements against Biowatch, claiming that by providing access to information the “door would be opened” for “thoughtless activists to continue to misinform and mislead the public” by “pok[ing] holes in all assessments and reviews previously conducted by experts in the field.”⁵⁵

But this tremendous victory carried a sting in the tail. Instead of applying the general principle that successful litigants normally have their costs paid, and despite the fact that Biowatch had achieved considerable success, Biowatch was,

52. *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others* 2005 (4) SA 111 (T) at paragraph 66, available at <http://www.biowatch.org.za/docs/judgement.pdf>, accessed 9 October 2012.

53. Tamar Kahn, 2005. Court opens the book on state’s gene food secrets. *Business Day*, 25 February.

54. Julia Kupka, 2005. Biowatch gets a peek at GM information. *Farmer’s Weekly*, 11 March.

55. AfricaBio, 2005. Thoughtless activists continue to misinform and mislead the public, press statement.

astonishingly, ordered to pay Monsanto's legal costs. Acting Judge Dunn's reasoning was that Biowatch was too general in its request for some of the information, which forced Monsanto to join the case to prevent Biowatch from having access to confidential information supplied to the state. No order was made regarding payment of Biowatch's legal costs, despite Acting Judge Dunn confirming that Biowatch was forced to go to court to get access to the information.

As Constitutional Court Justice Sachs subsequently remarked,⁵⁶ the High Court judgment sent a "shockwave" through the public interest law community. At the organisational level, Biowatch would have faced almost certain closure were the costs order to be exercised and its public image would have been tainted for (inconceivably) paying the costs of a company notorious for its environmental abuses. Moreover, the costs order would seriously impede the organisation's capacity to analyse and disseminate to the public the very information to which the court ordered it must have access, because court costs would consume the organisation's funds. The wider implications were considerable, suggesting that public interest litigation could be jeopardised by the severe financial penalty of negative costs orders.

"We reject this disregard of the basic human right to information, to a safe environment, to safe food, and the right to assert these human rights in the courts without facing astronomical legal bills ... We are deeply concerned that this infringement of the right of ordinary people to know what they eat and what grows in their fields, will not only impact on SA, but also affect the whole of Africa. It will embolden the multinationals to impose and push their invasive technologies on Africa, but it will also have a chilling effect on ordinary people trying to defend their rights."

A group of seed savers, farmers, CSOs and NGOs, representing 40 organisations from 18 countries in Africa, Europe, Asia and Latin America, meeting in Ethiopia, November 2007.

56. *Trustees, Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) paragraph 5, available at <http://www.biowatch.org.za/docs/courtcase/judgmentJune03.pdf>, accessed 9 October 2012.

JUDGE CONTRADICTS HIMSELF, SAYS DEFENCE COUNSEL

Costs ruling against Biowatch raises questions

TONY CARNIE

DID high court Judge Eric Dunn act "capriciously" against the environmental

dog gr
he disp
balm" i
informa

These
argumen
of the hi
over at th
peal case
have majo
public inter
enge the
multination
South Africa

The appa
n Pretoria la
er a partial
005 by the Bi
nental group
ourt to ferret
bout genet
GM) plant ex
outh Africa
multinational gr

Moultrie, counsel for Biowatch.

Moultrie argued that Dunn's ruling was contradictory, lacking in logic.

Biowatch loses faith in legal process as it loses GM battle

The board found that Monsanto's risk assessment was not in line with legal requirements.

Biowatch heads back to court over Monsanto

mean that such bodies

should be co
from this f
udges shou
ion and or
they
exhaustively

A simi
fection
ups w
Natio
agem
at M
Fran
liffe
sa
la
to
e

Biowatch in appeal bid against hefty court costs

MELANIE GOSLING
Environment Writer

WHEN environmental lobby group Biowatch SA won a court case against the government and international seed company Monsanto over access to information on genetically modified organisms (GMOs), the court took the unusual step of ordering Biowatch to pay Monsanto's costs.

Now Biowatch, a non-profit organisation, has applied for

pay Monsanto

its order in its favour. aid the approach the trust compelled to come to court to interests. He ordered to pay Monsanto's

told judges Fanie Justice Poswa and Ilopa-Sethosa that r created a chilling litigants who were oor. Dunn had treat-as an ordinary liti-d not consider the st role it played in rmation.

aid Dunn misdirect-failing to consider

future public interest | this nature, and the c tial negative impac enforcement of the co right of access to inform

He said Dunn failed er the impact that the would have on the tr activities. The order courage the trust fro in future public intere on important environ constitutional issues.

Frank Snyckers, c Monsanto, said Dunn that Biowatch was not tially successful party. request for inform Biowatch was sympto

know how decisions are mad about the growing of GM crop in South Africa".

The court found that Biowatch had a constitutional right to the information, that access to this information was in the public interest, that Biowatch had been forced to go to court to get the information and that granting such access was a necessary part of the correct administration of the Genetically Modified Act.

4.7 Obtaining access to information

Acting Judge Dunn held that the Executive Council for Genetically Modified Organisms should grant Biowatch access to the information by no later than 30 April 2005. In November 2005, nine months after Dunn's ruling and after some to-ing and fro-ing between Biowatch lawyers and the Registrar's office to ascertain the extent of information available, the NDA informed Biowatch that the documentation was available for inspection at its Pretoria headquarters. Significant changes had taken place in Biowatch by then. A new director, Leslie Liddell, was appointed in early 2005, along with new staff responsible for media and communications (Estelle Randall), advocacy (Ardiel Soeker) and research (Munyaradzi Saruchera), and both Elfrieda Pschorn-Strauss and Haidee Swanby had resigned. Although the trustees remained the same, an entirely new office team was now in place, with the exception of Nicci van Noordwyk, the office manager, Lawrence Mkhaliphi, who remained responsible for the exceptional work with small farmers in KZN demonstrating agro-ecological alternatives to industrial agriculture and GMOs, and Peter Komane, who was running farmer support programmes from an office in Limpopo.

Biowatch staff went to Pretoria from 5-7 December 2005 with a view to assessing the documentation that was released, which included:

- 134 permits granted to 20 applicants
- 108 further applications from 21 applicants
- a dossier on Monsanto's stacked maize grain NK603 x MON810
- a dossier on general release by SAGENE
- documents related to the Agricultural Pesticides Act No. 36 of 1983 under which GMOs were approved prior to the passage of the GMO Act No. 15 of 1997
- 21 review samples from 10 applicants.⁵⁷

Biowatch found some gaps – for example, minutes of Executive Council meetings, which were excluded from the record, and some of the earliest files had already been destroyed. All other legally sanctioned documentation was included.

Based on an initial analysis of the documents, Biowatch concluded that the granting of permits for GMOs in South Africa was severely flawed, both procedurally and substantively, and heavily influenced by the gene industry. There were serious contraventions of public administration policy. These included a failure by the decision maker to reveal reasons for granting permits or to communicate these decisions to interested parties, despite objections by these parties to

57. Munyaradzi Saruchera, 2005. Report to the then director of Biowatch on access to GMO documentation at the National Department of Agriculture. Pretoria, 9 December 2005.

applications, and a lack of procedural fairness and effective public participation in the process. The permits themselves were extremely permissive and vague, imposing standard conditions regardless of the GMO in question or the specific environmental or social context. Although risk assessments were conducted as a pre-condition for the permit, they were without exception prepared by the applicants themselves, raising questions of objectivity, independence and bias. Further scrutiny of the risk assessments revealed a lack of scientific rigour, typically resembling “cut-and-paste” versions from applications made elsewhere in the world, citing species that did not even occur in South Africa. They were also primarily desk based, drawing from existing literature rather than empirical work. There was no evidence of any EIA or socio-economic assessment having been done.

These findings affirmed Biowatch’s premise that the proliferation of GM crops in South Africa was based upon weak decision making, using flawed information and flouting public administration principles.

It soon became apparent that many of these questions required legal follow-up, yet Biowatch already had its hands tied in challenging the negative cost order. A concern of becoming embroiled in endless (unfunded) legal interventions thus acted against comprehensive follow-up. Moreover, despite obtaining access to a substantial amount of information, its practical use and relevance was limited. Most notably, Biowatch received the information six years after the initial request, by which time more than 130 permits had been approved, a further 108 applications received and more than one million hectares planted with GM crops – an area that has since more than doubled to 2,3 million hectares.⁵⁸ At the same time, all records relating to GM crops between 1991 and 1999 were disposed of, precluding any access at all to this information. Justice delayed in this case was thus justice denied.



“Justice delayed is justice denied.”
© Vanessa Black

58. Clive James, 2011. *Global status of commercialised biotech/GM crops*. Ithaca: ISAAA.



5. Challenging the costs order

5.1 After the High Court verdict

Strategising around an appeal

Within a month of the verdict in the High Court, Biowatch faced the question of whether or not to launch an appeal. Initial responses to the verdict were of outrage, particularly on the question of costs. Biowatch felt it had substantially won the case in that eight of the eleven categories of information it requested were allowed by the Court. It seemed unjust that it was also ordered to pay Monsanto's legal costs. If anything, the judge should have awarded costs against the state and in favour of Biowatch and Monsanto's beef should have been with the state. After all, it was the state that had failed to indicate exactly what information it proposed to release to or refuse Biowatch.

Biowatch regarded Monsanto as a wealthy multinational corporation, which, however much it felt it had been injured by the case, did not actually need the money. It was insisting on costs, Biowatch felt, purely to destroy the organisation's finances. Biowatch considered that it had been acting in the public interest and should not be penalised for this. Paying Monsanto's legal costs would put it out of business. In any case, the Biowatch Trust had almost no assets of its own and relied for its operations on donor finance. Donors would not have appreciated their funds being spent on repaying the legal costs of a large corporation hostile to Biowatch's aims. The organisation's staff and trustees had also lived through the apartheid era, and had all been involved in some way in opposing injustices. It was in this same spirit that Biowatch felt it was important to challenge what was patently regarded as an unjust verdict.

But how easy would this be? If the appeal had to turn on the question of costs, Biowatch was at a disadvantage: costs orders issued by South African judges are notoriously difficult to overturn. Judges have enormous power in determining costs and are protected by section 21A (1) and (3) of the Supreme Court Act⁵⁹ from having their determinations overturned. Because of this, when Biowatch attempted to get legal advice on the prospects of an appeal, it was informed that chances of success were deemed "evenly balanced".⁶⁰ The advocate in the High Court was more circumspect and regarded the chances as "less than even".⁶¹

59. Supreme Court Act No. 59 of 1959.

60. Advocate Angus Stewart, 2005. Memorandum submitted to Biowatch, 10 March.

61. Advocate John Butler, 2005. Memorandum to instructing attorneys Winstanley & Cullinan, paragraph 13, 2 March.

An appeal would have further financial implications. Biowatch's legal firm in the High Court, Winstanley, Smith & Cullinan, had charged the organisation favourable rates, but would not be in a position to do so for an appeal. Moreover, Biowatch did not have funding to carry these costs. An appeal would also require the lodging of an amount of R70 000 with the court as a security deposit.

Monsanto was not prepared to drop its entitlement to costs. Kumi Naidoo, then executive director of Civicus, a global organisation promoting the interests of civil society, appealed to Monsanto CEO Hugh Grant to ignore the costs order but the company issued an outright refusal, stating that "should the costs awards in favor of Monsanto be confirmed on appeal, any recovery will be donated to an appropriate charity in South Africa for sustainable agriculture."⁶² This seemed rich coming from a company whose rationale and agricultural product range were, in the view of Biowatch, the antithesis of building sustainable agriculture.

Despite advice to the contrary, the trustees felt that it was vital for the organisation not to accept the costs order. Biowatch approached the Legal Resources Centre (LRC), the country's foremost public interest law firm, with a long reputation of upholding human rights. Despite earlier concerns about taking on the access to information case, the LRC found that it now met with LRC's brief of support for environmental justice and defence of civil society organisations. In an interview with Janet Love, director of the LRC, she stated:

"The basis on which we pursued the case to the extent that we did was the belief that the order posed a threat to the vibrancy and survival of civil society and NGOs. It firstly places the need to defend civil society at the centre and secondly to get an appreciation of how civil society organisations with limited resources are able to play a critical public interest role and that the relative affluence of its opponents should not result in a muzzling of that public interest voice and that questioning."⁶³

The LRC assigned its in-house advocate, Richard Moultrie and attorney Ellen Nicol of its Pretoria office to support the case. Nicol's departure point was to reason that Biowatch had been forced to apply for access to information to which it was entitled. She felt that the costs order could have a deterrent effect on future public interest litigation. In future, if any request for information was deemed to be insufficiently specific, even a successful litigant could be penalised heavily. An appeal would require the court to consider how the issue of costs should be handled in cases where public interest litigants are forced to approach a court to protect constitutional rights.⁶⁴

62. David F. Snively, Senior Vice-President, General Counsel and Secretary, Monsanto, St Louis, undated correspondence with Kumi Naidoo, Civicus, Johannesburg, in response to Naidoo's letter dated 12 April 2007.

63. Janet Love, director LRC, interview, 20 April, 2011.

64. Interview by Kennedy Mudzuli, Challenge to ruling on costs. *The Citizen*, 23 April 2007.

“The biggest point about Biowatch is that it publicised the problem. There is hardly a lawyer in town who doesn’t know about the case.”

Richard Moultrie, Biowatch advocate, 2009.

On 23 June 2005, Biowatch was granted leave to appeal against the costs order, and at the same time had to lodge the security deposit. It initiated a process of intensive consultation with the LRC’s attorney over the nature of the legal strategy for the appeal.

Strategies to safeguard the organisation

Biowatch trustees, having a fiduciary duty to safeguard the organisation, felt there was a good chance that losing the forthcoming appeal would place Biowatch’s funds at risk. The courts could allow Monsanto to attach Biowatch’s bank accounts as well as any saleable office equipment. It was felt that the Biowatch Trust, then responsible for all contracts including salaries and incoming donor finance, should create a second legal entity to manage any new contracts and donations. The Trust sought extensive legal advice⁶⁵ before deciding to set up a second legal entity, naming it the Biowatch Association, with trustees and director as directors of a section 21 non-profit company.

The costs order also raised the question of whether trustees were personally liable for its payment. Without limited liability being recognised, trustees initially felt their personal assets were vulnerable. However, the attorneys convinced them that as long as they had been acting responsibly, both in the fiduciary interests of the organisation and in genuinely defending the public interest, it was unlikely that any court could impose liability on individual trustees. Even so, there was a sense that these assurances could be overturned and trustees remained conscious of the risk entailed in taking the appeal forward.

65. Ellen Nicol, 2007. LRC Attorney, to then Biowatch director, electronic mail, 16 January. Advice was sought from Cape Town attorneys Matthew Walton of Walton Jessop, Michael Evans at Mallinicks and Mandy Taylor, based at the time at Cheadle Thompson.

Gradually, the Trust – which had lodged the case – persuaded its donors to sign their contracts in favour of the Biowatch Association.⁶⁶ Funds for salaries were deposited with the Association, of which Biowatch staff became employees. In this way, it was hoped that funds held in the Trust would gradually be depleted but funding for salaries and daily running costs would be protected in the legally untouchable Association, thus securing Biowatch's financial future.

However, the decision to take the appeal forward was propelled more by the Board of Trustees than it was by the staff. Director Leslie Liddell and communications officer Estelle Randall were reluctant to throw themselves into building public support for the appeal, reasoning that Biowatch's persistence might be regarded by government as confrontational and would alienate officials and build an oppositional reputation, with which they felt uncomfortable. Internal differences over the appeal lowered staff morale and led to a level of paralysis in the office around the need to build solidarity for Biowatch's principled position.

On legal advice from Ellen Nicol, Biowatch decided to approach Monsanto to request it to drop the costs awarded to the company. This move was embraced by the director and some staff, who felt it was worthwhile making approaches to company officials in the hope that they would "see reason". However, the Board was more sceptical of this strategy, understanding that Monsanto's intention was to put Biowatch out of business. The director was instructed to put it to local Monsanto CEO Kobus Lindeque that destroying Biowatch would not put an end to the movement opposed to GMOs in South Africa. However, Lindeque refused to give any decision and stalled on the question of letting Biowatch off the hook. This tended to confirm the trustees' views that Monsanto was bent on getting its pound of flesh and seeing Biowatch's destruction. This was confirmed in subsequent approaches to the company's head office in the US where requests to overturn the costs order were met with Monsanto's derision.⁶⁷

Approaching Monsanto had been a difficult decision. There were different views on whether Monsanto would "see reason" and back down. As it turned out, Monsanto proved to have no public relations need to do Biowatch any favours. It retained the inimical stance it had displayed during the litigation. Given the attitudes of the court, it had no reason to alter this and sought actively to win the appeal. Monsanto's intransigence was clear. It was treating the case as a SLAPP suit (strategic lawsuit against public participation), a common tactic used by hardnosed corporates in the US to destroy civil society opponents.

Having exhausted all attempts to reason with the corporation Biowatch was spurred on afresh in taking the case further. The Board decided at its meeting in February 2007 that, in an attempt to resolve the internal morale question and reanimate public support for the beleaguered organisation, one of its members should be placed in the office to try to

66. Biowatch, 2007. Letter to donors regarding establishment of a new Biowatch entity, drafted 9 March.

67. See footnote 62.

turn this situation around. Board chair David Fig relocated to Cape Town for March and April and formed a task team including the director, communications, research, finance and administrative officers. The team developed a strategy and assigned different duties based on earlier documentation.⁶⁸ With advice from the LRC's Ellen Nicol, the legal bounds within which the team could operate were established. The broad strategy was to contact numerous organisations and individuals to explain Biowatch's legal appeal. The law prevented Biowatch from soliciting letters of support, but it was able to disseminate very widely an outline of the facts of the case. Biowatch received a very favourable response from South Africa and abroad (see below).

Support for the Biowatch appeal against costs

Quoting from the Biowatch website at the time:

More than 200 organisations and individuals from 26 countries, besides South Africa, have sent messages supporting Biowatch South Africa in its appeal against an order to pay the legal costs of Monsanto South Africa (Pty) Ltd, local component of Monsanto Company, the multinational seed and chemical corporation.

Local messages of support include those from Cardinal Wilfrid Napier, Jeremy Cronin (poet, member of parliament and deputy general-secretary of the South African Communist Party), Neo Muyanga (musician), Ingrid de Kok (poet), Graeme Bloch (education analyst), Phillip Dexter (politician), Professor Leslie London (University of Cape Town School of Public Health and Family Medicine), Jennifer Ferguson (poet and singer), the Treatment Action Campaign and the AIDS Law Project, the University of Cape Town's Environmental Evaluation Unit and Chennells Albertyn Attorneys.

Messages from outside South Africa include those from Greenpeace International, the Berne Declaration, Dr Tewolde Gebre Berhan Egziabher (Institute for Sustainable Development, Ethiopia), Dr Graham Dutfeld (Queen Mary University, London), Professor Phillip L Bereano (Washington Biotechnology Action Council, USA), the Organic Producers' and Processors' Association of Zambia, Nicholas Hildyard (The Corner House, UK) and the Gaia Foundation.⁶⁹

68. David Fig, 2007. Campaign to highlight Biowatch court case, 18 January.

69. Biowatch website, Messages of support: Full list of individuals and organisations, available at <http://www.biowatch.org.za/main.asp?include=docs/pr/2007/pr0420list.html>, accessed 13 August 2012.

Board member Rachel Wynberg informed hundreds of scientists and other academics about the case through a series of cyber networks, resulting in responses from around the world. Director Leslie Liddell established contact with a very wide range of potential supporters, including one who mobilised considerable international support through a petition. Leslie also helped inform a circle of local donor organisations.

Outside Cape Town, staff and board worked hard to achieve public support. In KwaZulu-Natal (KZN), outreach worker Lawrence Mkhaliphi's approaches to rural and faith-based communities included obtaining a letter of support from Cardinal Wilfrid Napier. Board member Rose Williams worked with other activist groupings in KZN to arrange a highly successful press conference addressed by a range of organisations including GM-Free KZN Campaign, groundWork, Centre for Civil Society (UKZN) and Diakonia (who hosted the conference and spoke in support). The meeting resulted in well-briefed journalists and a number of informed articles subsequently appeared in local papers.⁷⁰

In Gauteng, David Fig approached various organisations including Civicus, the Freedom of Expression Institute, the Atlantic Philanthropies and the Human Rights Commission. Civicus director Kumi Naidoo agreed to raise the issue with high-profile politicians around the world. Soon after the High Court judgment COSATU, the country's largest labour federation, and the South African Faith Communities' Environmental Institute, a multi-faith network dedicated to environmental and social justice, also offered support.⁷¹

Biowatch circulated materials to Southern African members of the People's Dialogue (mostly small farmer organisations and some activist academics) as well as sending Portuguese-language materials to important networks in Brazil and Mozambique.⁷²

Community leaders from 12 countries meeting at a Training for Transformation workshop in Kleinmond, outside Cape Town, were moved to write an open letter to the Minister of Agriculture in support of Biowatch. Their opposition to the costs order was couched in dramatic language: "We want to uphold South Africa as a country that not only preaches justice but actually practices justice."⁷³

At Debre Zeit, Ethiopia, at an international meeting entitled "From Seed Security to Seed Sovereignty", representatives of 40 organisations from 18 countries signed a Declaration of Support to Biowatch South Africa. The signatories stated:

70. For example, Tony Carnie, 2007. Biowatch challenge heads back to court. *The Mercury*, Durban, 20 April.

71. Estelle Randall, 2005. Biowatch gains COSATU support for leave to appeal court costs decision. *Cape Times*, 3 May.

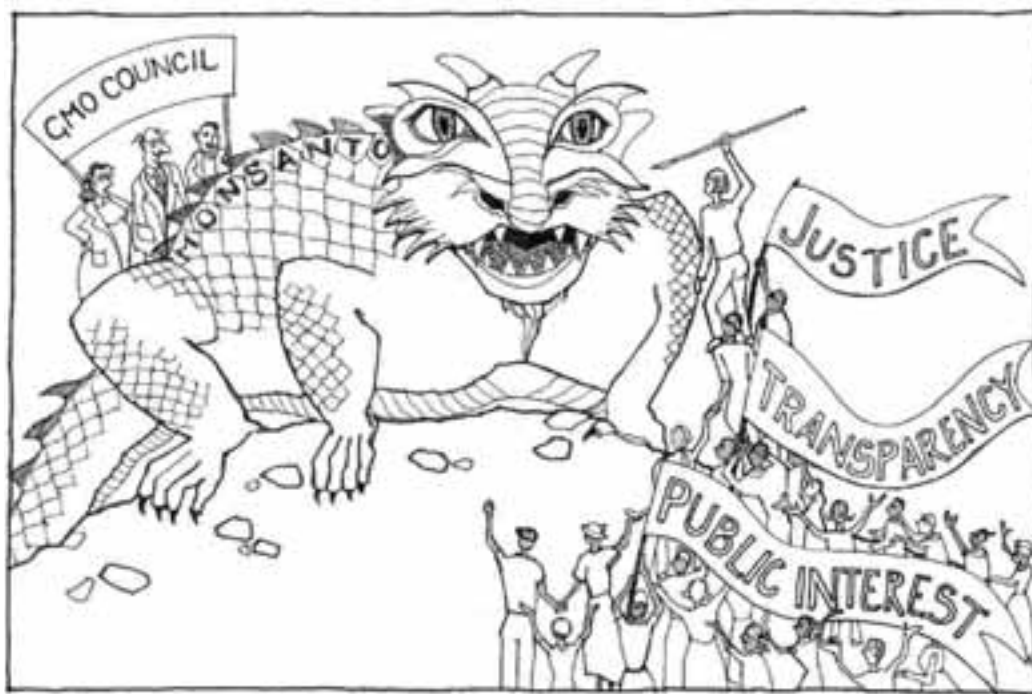
72. David Fig and Dot Keet, 2008. Biowatch – Nosso Caso Tribunal, 13 August.

73. Open letter to the Minister of Agriculture from community leaders in response to the judgment against Biowatch, 8 November 2007.



"We consider that the GMO companies use South Africa as the gateway for GMOs to the rest of Africa and therefore feel that Biowatch South Africa acted on behalf of the whole of Africa. For this reason we are outraged at the court's judgment, and appeal to the South African courts to relieve Biowatch from paying Monsanto's legal costs."⁷⁴

This broad global and national outpouring of support heartened the Biowatch board, which felt that the organisation's strategy was vindicated, but did little to encourage the staff of the Cape Town office. A spate of resignations followed, not always openly linked to the court case. It is likely that staff felt that the organisation might go under, dragging them along with it.



"Buoyed by local and international support, Biowatch takes on Monsanto."

© Vanessa Black

74. Declaration of support for Biowatch South Africa, signed at Debre Zeit, Ethiopia, on 11 November 2007.

5.2 The appeal

Arguments in the appeal

A deposit of R70 000 now had to be lodged with the court. Intriguingly, on the day this was up for discussion by the Biowatch Trust, an anonymous donor called to request bank details for a donation towards the organisation's legal fees and a deposit of R200 000 into Biowatch's account followed. To this day, the name of the donor remains unknown (but is very gratefully acknowledged).⁷⁵

The essential legal problem now was not the question of the public right to information, but the fraught legal issue of contesting a costs order. Many legal minds found the idea of challenging Justice Dunn's order daunting and some regarded Biowatch's prospects of successfully overturning such an order as being less than 50 percent. The legal system at the time regarded judges as having almost absolute discretion in making costs orders, which were seldom contested and even more rarely overturned. Biowatch, however, was determined to contest the order as a matter not only of constitutional justice, but also of survival.

The appeal was heard by a full bench of the North Gauteng High Court on 23 April 2007 in Pretoria, with Justices S J Mynhardt (presiding), L M Malopa-Sethosa and J M Poswa. Biowatch's director, staff and board members were present along with supporters mobilised from the media, academics, donors and civil society. Richard Moultrie (LRC) argued the appeal, while Frank Snyckers represented Monsanto.

The essence of Moultrie's argument was that Biowatch had effectively won the case in the High Court, and therefore the costs order in Monsanto's favour was a misdirection or a demonstrable legal blunder by Dunn. This approach was chosen because of the narrow scope of the appeal challenging the costs order. Moultrie felt it would have been inappropriate to argue the punitive nature of the costs order for an impecunious NGO. To some extent this approach prefigured the later judgment in the Constitutional Court, which distanced itself from deciding any costs award on the basis of the identity of the parties.⁷⁶ Moultrie spent considerable time researching case law from South Africa and elsewhere to provide a solid basis in precedent for the protection of those litigating in the public interest. Among cited cases were those of a 1996 ruling by former Chief Justice Ismail Mohamed, who claimed that groups acting in the public interest should not be

75. Then director to Biowatch trustees, electronic mail, 29 November 2007.

76. Richard Moultrie, formerly of the LRC, interview, 11 June 2011.



THE FLAME OF DEMOCRACY

10 DECEMBER 2011

Commemorating the 15th anniversary of the
signing of the South African Constitution

discouraged from doing so by the risk of having to pay the costs of their adversaries. This principle was also echoed in recent environmental legislation contained in NEMA.⁷⁷

Monsanto advocate Frank Snyckers argued that Moultrie had been unable to show that Dunn had committed a demonstrable legal blunder. Dunn had no option but to administer “the healing balm of a costs award” to punish Biowatch for submitting vague requests for information.⁷⁸ Moultrie countered that if some applications for documents had been imprecise, this was because the Registrar of GMOs and Monsanto itself had refused to co-operate in providing Biowatch with detailed information on the kinds of documents it was requesting to see as a matter of right.

The majority judgment

In delivering the verdict of the full bench on 6 November 2007, Judge Mynhardt stated that Judge Malopa-Sethosa had concurred with his opinion but the views of Judge Poswa had not yet been incorporated. However since Judge Mynhardt was due to retire the following week, he felt obliged to come to court minus the opinion of Judge Poswa, the third member of the full bench. The verdict was that the appeal had failed to convince two of the three judges, who, as a majority, therefore rejected it. Judges Mynhardt and Malopa-Sethosa were unconvinced by the argument that Acting Judge Dunn had misdirected himself in the costs awards.⁷⁹ Biowatch was ordered to pay not only the legal costs of Monsanto South Africa for the initial application, but also the legal costs of the appeal for the Minister of Agriculture, the Registrar of Genetic Resources and the Executive Council for GMOs.

Biowatch was disappointed that the legal system had failed to recognise the paradox that, despite the fact that it had enjoyed a substantial success in gaining the right to requested information granted by the High Court, it nevertheless had to bear the legal costs of a major multinational corporation. Instead of recognising the paradox, the bench reinforced it. It appeared that the judges rated the narrow commercial interests of a large corporation over the issues of broader public rights upheld in the Constitution.

77. Advocate Richard Moultrie assisted by Attorney Ellen Nicol, Biowatch South Africa Heads of Argument, 28 March 2007. Available at www.biowatch.org.za/docs/courtcase/bio_heads.pdf, accessed 14 August 2012.; Tony Carnie, 2007. Costs ruling against Biowatch raises questions. *The Mercury*, 2 May.

78. Advocate Frank Snyckers, Monsanto South Africa (Pty) Ltd Heads of Argument, 3 March 2007, available at www.biowatch.org.za/docs/courtcase/monsanto_heads.pdf, accessed 15 August 2012.

79. Mynhardt J. and Malopa-Sethosa J., *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others* Case No. A831/2005, North Gauteng High Court, Pretoria, 6 November 2007, unreported, available at http://www.biowatch.org.za/docs/courtcase/judgmentNov07pp1_29.pdf, accessed 14 August.

This seemed unjust to Biowatch, a view echoed by many of its supporters who had been mobilised in the run-up to the appeal process.

Others, however, were less supportive. One newspaper report suggested, rather misleadingly and patronisingly, that the appeal had given “a hard but fair lesson, to the effect that even altruistic and well-intentioned litigants must do their homework properly and be aware of their potential opponents’ constitutional rights which will be taken into account through any legal challenge.”⁸⁰ What this report failed to mention was that Advocate Donrich Jordaan, a director of Sylvean Biotech and vehement supporter of genetic modification had made this criticism. He argued that Biowatch alone was to blame for the cost order against it and that it had not explored other reasonable avenues. This view was astonishing given that Biowatch had spent months corresponding with the NDA and that Dunn had found that Biowatch “had no alternative remedy to enforce its rights.”⁸¹ There was also support for the judgment from other quarters, including, surprisingly, from a senior legal academic, previously close to Biowatch, who regarded the judgment as “reasonable and fair”.

Judge Poswa’s dissent

On 5 May 2008, a full six months after the full bench gave its verdict on the appeal, Judge Poswa issued a minority dissenting judgment in favour of Biowatch’s case. The delays were attributed to problems with the judge’s computer’s hard drive. The judge rejected the majority view that there was no rule that a winning party should be awarded costs and held that although a judge must apply this rule flexibly, he or she must have good reasons to depart from it. Judge Poswa found that Biowatch had demonstrated that it was acting in the public interest, had been “wholly successful” against the state and Monsanto, and was accordingly entitled to its costs. He argued that the order of costs against Biowatch should be set aside and that the Minister of Agriculture, Registrar of GMOs and the Executive Council for GMOs should pay Biowatch’s costs.⁸²

The majority verdict was a heavy blow, but was not unanticipated. Judge Poswa’s dissenting judgment was heartening and gave some hope to Biowatch that a further appeal could possibly bear some fruit.

80. John Yeld, 2007. Biowatch ruling a lesson for NGOs. *Cape Argus*, 23 November. See also the response to this article from Josie Eastwood, 2007. Biowatch was denied information – yet paid a heavy price. *Cape Argus*, 3 December.

81. *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others* 2005 (4) SA 111 (T), paragraph 66.

82. Dissenting judgment of Justice Poswa in *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others* Case No. A831/2005, North Gauteng High Court, Pretoria, 5 May 2008, unreported, available at http://www.biowatch.org.za/docs/courtcase/judgmentMay08pp1_30.pdf, accessed 14 August 2012.

5.3 Steps after the appeal hearing

The next legal steps to a further appeal

Having lost the appeal in the High Court, Biowatch was in no better legal position than it had been after the Dunn verdict, save that the appeal judgment was not unanimous. Instead of dropping the case at this point, the organisation felt it was important both to pursue the reversal of the costs orders against it and to be vindicated in terms of having acted in the public interest. The LRC was, commendably, still prepared to take it forward to higher courts. However, attorney Ellen Nicol had left LRC in early 2008 and advocate Richard Moultrie was no longer working as its in-house counsel. Advocates Moultrie and Tim Bruinders SC, nevertheless, agreed to act for Biowatch on a contingency basis.

Which route to follow was an open question. Legal advice was that it might be worthwhile approaching the Constitutional Court directly, in order to shift the emphasis to the constitutional rights aspect of the case and away from a narrow focus on costs. It would be necessary to justify very carefully Biowatch's motives for approaching the Constitutional Court rather than taking the onerous journey through the Supreme Court of Appeal (SCA) in Bloemfontein. It was feared the SCA would focus very narrowly on costs and not on the constitutional aspects of the case. Advice from Advocate Tim Bruinders SC endorsed the route of the Constitutional Court,⁸³ while that solicited from a very senior LRC-linked lawyer with relevant Constitutional Court experience advised Biowatch not to approach the Constitutional Court directly.⁸⁴ Other senior practitioners with experience of the Constitutional Court advised Ellen Nicol that chances of success in the SCA would be "extremely thin" and those in the Constitutional Court "less than 50 percent", with a real possibility that the latter would not grant leave to appeal.⁸⁵ This opinion was somewhat pessimistic because appeal courts seldom overturn costs orders. They give wide discretion to trial court judges and are historically nervous of litigants using appeals on costs to delay implementation of judgments. In fact there is a Rule in the High Court forbidding appeals simply against costs orders.

After much agonised debate, Biowatch opted to accept the path of going to the Constitutional Court.⁸⁶ This created less of a time constraint since affidavits only needed filing by mid-December 2007.

However, the Constitutional Court refused to hear the case before all prior legal remedies had been exhausted, announcing this on 15 July 2008. This meant placing the case before the SCA after all, which occurred in September 2008.

83. Timothy Bruinders SC to Ellen Nicol, Biowatch Attorney, Biowatch - Leave to Appeal, electronic mail, 20 November 2007.

84. Ellen Nicol to then director of Biowatch, Biowatch Appeal, electronic mail, 9 November 2007.

85. Ellen Nicol to then director of Biowatch, Biowatch Appeal – additional Information, electronic mail, 13 November 2007.

86. Rose Williams to trustees of Biowatch, Message on behalf of the Board, electronic mail, 29 November 2007.

Once again, the appeal was dismissed with costs, this time without reasons being offered, and once again, Biowatch was left feeling that the legal system had not lived up to the spirit or the letter of the new democracy, whose new laws deliberately allowed for whistle-blowing and the protection of rights to information.

Strategy

Biowatch recognised in advance that the SCA was unlikely to overturn the costs order but the outcome was the placing of even more burdensome costs on the organisation. However, this dismissal of the appeal had a positive aspect: it opened the way for the case to be heard by the highest court in the land, the Constitutional Court.

This Court was not a residue of the apartheid legal system. It had been created after the death of apartheid and its bench of 11 eminent judges was steeped in the experience of crafting and upholding the Bill of Rights in the new Constitution. It was felt that the Court would not see the case narrowly around reversing a costs order, which had been a difficult challenge in the lower courts. Instead, it was expected that the Court would take the rights aspects of the case into account.

Biowatch was therefore much more optimistic about the new possibilities for justice opened up by the prospect of a hearing in the Constitutional Court.

Administrative changes

As the build-up to the case increased, so too did tensions within the organisation. Director Leslie Liddell chose not to renew her contract towards the end of 2008 and office manager Nicci van Noordwyk resigned to accompany Leslie to a new position. By this time, the communications and research officers had also left, as had the coordinator in Limpopo. Each cited different reasons for resigning but it was clear that the director was unable to build staff morale during a very challenging time for the organisation.

Not for the first time in the organisation's decade-long history, the trustees felt obliged to step into the breach. Rose Williams agreed to become the acting director. As she was based in Durban and the majority of Biowatch's rural work was in KZN, the office relocated from Cape Town in 2009 to new offices in Glenwood. Rose set about patiently rebuilding the organisation. Its finances steadily improved and confident new staff were hired. Biowatch was beginning to find new inspiration for its work.

5.4 In the Constitutional Court

The hearings

Rising from its historic home on Constitution Hill set between Braamfontein and Hillbrow, Johannesburg, South Africa's most senior court was established with the advent of democracy just under two decades ago. The Constitution Hill precinct contains the Old Fort Gaol and the adjacent Women's Gaol, both of which date back to Kruger's republic. Their most famous political prisoners included Mohandas Gandhi, Albert Luthuli, Nelson Mandela, Robert Sobukwe, Winnie Mandela and Fatima Meer.⁸⁷ The Constitutional Court has its own, modern building in the complex, characterised by one of the country's most highly esteemed art collections. Inside the courtroom, the semi-circular bench can accommodate up to 11 judges. Each is a senior appointment, with presidential approval, and the bench is headed by the country's Chief Justice. To emphasise its close relations with citizens, a glass panel in a courtroom wall reveals the shoes, skirt hems and trouser legs of passing pedestrians.

Since its inauguration, the Constitutional Court has become known for adjudicating key questions of human and political rights, defending the precepts enshrined in the Bill of Rights. The Court is a recent creature of the legal system, untainted by the sad history of apartheid, and is located in a city not traditionally associated with South Africa's senior courts.

On 17 February 2009 the Court opened for its first session of the year and the Biowatch case was the first on its roll. Initial business entailed the inauguration of the newest judge, Justice Edwin Cameron. The full bench of 11 judges was to hear the case: Chief Justice Pius Langa, Deputy Chief Justice Dikgang Moseneke and Justices Edwin Cameron, Yvonne Makgoro, Sandile Ngcobo, Bess Nkabinde, Kate O'Regan, Albie Sachs, Thembile Skweyiya, Johann Van der Westhuizen and Zak Yacoob. Four of them – Justices Langa, Makgoro, Sachs and O'Regan – were the last founder members of the Court, having been appointed in 1994 by Nelson Mandela as head of South Africa's first democratic government. They were now close to retirement after 14 years' service to the Court, each having made a major contribution to improving human rights in South Africa. Biowatch's trustees agreed that, with the timely addition of Justice Cameron, they could not have wished for a better bench.

The role of the Biowatch legal team was to get the Constitutional Court to grant Biowatch leave to appeal to the Court, and to consider the content of the appeal, namely reversing the earlier decisions on costs.

The atmosphere in the court was electric. Many felt the case would be given a fair hearing for the first time, in which the constitutional rights of the matter would be recognised as would the notion of Biowatch having acted in the broad public

87. The list of all the significant political prisoners who were kept in the Old Fort or Women's Gaols is available at <http://www.constitutionhill.org.za/about-us/political-prisoners/>, accessed 21 August 2012.



INKHUNDLA YOMBAODSI
INKHANTOLO YOMTHETHOSISE
INKHANTOLO YEMTSETFOSISEKELO
INKHANTOLO YOMTHETHOSISEKELO

LENGUTLA LA DINYEWE LA MOLATHEO
KHOTHE YA NDAYOTHEWA
KONSTITUSIONELE HOF
KHOTLA TSHEKELO YA MOLATHEO

interest. Trustees, staff and supporters came from all corners of the country. The “David and Goliath” dimension of the case also drew a great deal of attention from the media.

Representing Biowatch was Advocate Gilbert Marcus SC, one of the most senior advocates in the country. Marcus agreed to step in because Advocate Tim Bruinders SC was unavailable on the day, and he was ably assisted by Advocate Richard Moultrie, now in private practice. Bruinders SC agreed to be available should consultation prove necessary. The state did not contest the appeal to the Constitutional Court. Advocate Frank Snyckers represented Monsanto.

According to Advocate Moultrie⁸⁸, Biowatch’s legal team lodged similar heads of arguments to those placed before the full bench of the High Court. The team argued that since Biowatch had substantially won the case in the High Court, it and not Monsanto should have been awarded costs.

The Constitutional Court gave a brief hearing to the *amici curiae*, namely the Centre for Child Law in the University of Pretoria and Lawyers for Human Rights (both represented by Advocate Stephen Budlender) and the Centre for Applied Legal Studies at the University of the Witwatersrand (represented by its director Advocate Raylene Keightley, assisted by Advocate Carole Cooper). Counsel for the *amici* argued that the costs order in Monsanto’s favour was punitive for a small donor-dependent NGO, and had already had a chilling effect on poor organisations acting in the public interest. Several of the judges responded favourably to this intervention. Justice Albie Sachs noted that courts must be particularly careful not to disempower groups that are empowering the disadvantaged.

Advocates Marcus SC and Snyckers were each granted time to place their cases before the court. The nature of the hearings in the Constitutional Court is that judges have leave to interrupt counsel at will. Based on the number of interrogations each of the 11 judges seemed to be actively pursuing clarification of the arguments. By the time Monsanto took the stand Biowatch was reassured that its concerns were being recognized.

“It [costs] is not a healing balm,” said Justice Kate O’Regan to the Monsanto advocate, “it is annihilation.” Justice Zak Yacoob confronted Monsanto about its attitude towards Biowatch: “You interfered and tried to block Biowatch [securing access to information] as you did every millimetre of the way,” he remarked passionately, while the Monsanto legal representative retorted, rather unconvincingly, that “Biowatch is on a crusade to put an end to the activities that Monsanto conducts.” Tough questions were also asked of Biowatch but the organisation felt confident that finally, its case had been heard.

Argument took a whole day of the Court’s time. It recessed to consider its judgment.

88. Richard Moultrie, formerly of the LRC, interview, 11 June 2011.

The judgment

After months of considerable anticipation, the Court announced that judgment would be delivered on 3 June 2009. Nine years of litigation had reached their culmination. Justice Albie Sachs was given the task of writing the judgment, and it was therefore he who was made responsible for reading it. It turned out that all 10 of the other judges concurred.⁸⁹

Sachs deemed that it was appropriate that the Constitutional Court deal with the case as it concerned not costs in the narrow sense, but costs involved in constitutional litigation. He showed how it was in the interests of justice for the current appeal to the Court to be heard.

Contrary to the views of the *amici*, Sachs did not single out impecunious public interest organisations for special treatment. Instead he reminded the Court that all parties should be equal before the law. When determining costs orders, it was not the parties but the issues that needed emphasis, especially those issues that would hinder or promote constitutional justice.

Sachs decided that the judges in the previous courts had been misdirected in requiring Biowatch to pay the costs of Monsanto. In Dunn's case, it was part of a penalty for framing the request to the state for information too vaguely, on the grounds that this had caused Monsanto to come to court. Sachs disagreed. He found that the costs order was not justified. Organisations were feeling their way in attempting to clarify their constitutional rights to information. Monsanto came to court not because of Biowatch's conduct, but because of the state's persistent failure to provide information to which Biowatch was constitutionally entitled. Sachs noted that the case was not between two private parties but between Biowatch and the state, with private parties intervening (ostensibly) to protect their interests. Since Biowatch had been substantially successful, the state should pay its costs.

Sachs reversed the costs orders of the lower courts and also directed the statutory parties to pay Biowatch's costs. The relief at hearing this judgment was boundless. After years of seeking justice Biowatch was finally vindicated. For the first time in many years, the broader community in which Biowatch operated could regain some confidence in the South African justice system. "This is the best news I have had for six months ... I am elated by the outcome," said Andy Gubb, a seasoned campaigning environmentalist linked to the Centre for Environmental Rights.⁹⁰

89. *Trustees, Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), available at <http://www.biowatch.org.za/docs/courtcase/judgmentJune03.pdf>, accessed 9 October 2012.

90. John Yeld, 2009. Biowatch win gives "Davids" some hope. *Cape Argus*, 4 July.

“The Biowatch judgment has been extensively cited in other judgments. This is a landmark judgment. Whenever the Constitutional Court, and increasingly so other courts, talk about costs, particularly in public interest and constitutional matters, you now get a greater recognition that the more nuanced approach needs to be taken. Every time the Constitutional Court says anything about costs it puts in a footnote that refers to Biowatch.”
Richard Moultrie, Biowatch advocate, June 2011.

Well-wishers from all over the world contacted Biowatch to congratulate it on the landmark Constitutional Court judgment.

Biowatch was in the middle of moving and its plans to celebrate its victory never materialised. However, it convened a meeting later that year to discuss the outcome of the case and evaluate its legal implications. Called a Think Tank, the meeting included members of the Biowatch legal team, representatives of the *amici* and other interested parties who had been close to the case.⁹¹

Within a short space of time the Biowatch case has gained a degree of celebrity in the world of jurisprudence. Between June 2009 and June 2011 it was cited 17 times in Law Reports, 12 times in the Constitutional Court, twice in the Supreme Court of Appeal, twice in the Land Claims Court and once in the High Court.⁹²

Biowatch has now entered legal history. What is not reflected in the judgment is the courage and persistence of all those within Biowatch, its legal team, and its broader supporters, in continuing to fight the case despite the odds being stacked against a successful outcome. This story is one of everyday heroism, of how a small organisation stuck tenaciously to the defence of its constitutional rights, not for the sake of narrow self-interest but in the broader interests of the communities it serves.

91. Biowatch Think Tank, 2009. Victory at the Constitutional Court and the implications of the case for South African jurisprudence and public interest litigation. Constitution Hill, 25 November.

92. Richard Moultrie, formerly of the LRC, interview, 11 June 2011.

Win for GM foods watchdog

THE Constitutional Court has ordered the state to pay legal costs incurred by the environmental watchdog, the Biowatch Trust, in its quest for information about the genetic modification of crops in South Africa.

The judgment overturned two previous high court judgments.

Established in 1997, Biowatch is a non-governmental

Victory for public interest

Biowatch win gives 'Davids' some hope

State has to pay Biowatch costs after all

Constitutional Court says private parties should not have to pay for successfully suing government

ERNEST MABUZA
Legal Affairs Correspondent

THE Constitutional Court yesterday ordered three government bodies responsible for monitoring the development of genetically modified organisms to pay the costs of non-governmental organisation Biowatch in its high court application.

Biowatch director Rose Williams said.

After a number of unsuccessful requests for information from the registrar of genetic resources, the executive council for genetically modified organisms and the Ministry of Agriculture, to disclose details on all modified crops being grown in SA, Biowatch launched an application in the North Gauteng High Court in Pretoria in 2003 request-



Constitutional Court Judge Albie Sachs says that adverse orders on costs can have a 'chilling effect' on attempts to assert constitutional rights.

Although Biowatch had been successful in the high court, it found itself in the position of having to foot the bill for all its costs and to pay the costs incurred by Monsanto.

Judge Albie Sachs, in his Constitutional Court judgment in which all judges concurred, said the general rule for an award of costs in constitutional litigation between a

would have on parties seeking to assert constitutional rights. Secondly, constitutional litigation might bear not only the interests of the particular litigant but on the rights of all those in similar situations. Thirdly, the state bore responsibility for ensuring that both law and the state's conduct were consistent with the constitution.

"In the present matter, >

would be
ing court
financial

In a u
constitu
the ear

Deliv
Judge
high
misdri
sider
Biow

Si
gro
mo
an
tri
gy
g/f

in
ed
he
be

TONY CARNIE

A

NINE-YEAR battle over public access to information ended in the Constitutional Court yesterday with a landmark victory for public interest groups that take on opponents with deep pockets.

Overtur-

officials, "but on the existence of a civil society willing to litigate at its own cost."

PREVIOUS JUDGMENTS OVERTURNED

Landmark Concourt victory for Biowatch

previous cost rulings on the matter, adding that their decisions had sent a "shockwave" through the public interest law community.

Judge Sachs emphasised that the Biowatch case centred on the issue of the awarding of costs.

Openness
&
Responsiveness
Award
2008



The South African
Human Rights
Commission
&
The Open
Democracy
Advice
Centre

Best Usage of the Promotion of
Access to Information Act.
Awarded to
Biowatch



ODAC
Open Democracy Advice Centre

6. Lessons and conclusions

“Biowatch should feel very good about the contribution they have made – at great cost to themselves. Biowatch is now eternalised; the organisation has made a contribution beyond its mandate.”

Melissa Fourie, Director, Centre for Environmental Rights, May 2011.

What can we learn from the nine gruelling years which this process took? Was the effort worthwhile? Did we achieve real impacts? Would we recommend litigation as a course of action to other organisations? These are questions we are often asked but still find difficult to answer.

Without doubt, there were positive impacts. We paved the way to securing access to information about GM crops. We improved understanding about the decision-making process on GM crops – and this cast light on many systemic flaws. We created conditions within which public interest organisations can litigate without expecting the chilling effect of costs orders being made against them, and helped develop legal clarity and guidance on when costs can be applied. The case also led to Biowatch spearheading a process of legislative reform around GMOs, with provision now made for EIAs on GMOs in the National Environmental Management: Biodiversity Act 10 of 2004 and changes made in the GMO Amendment Act 23 of 2006.

Whether or not the Biowatch case changed information flow and government responsiveness is difficult to ascertain. Some NGOs report that information about GM crops became easier to obtain during and after the High Court action, largely due to greater awareness among civil servants of their responsibilities under the Constitution and PAIA.⁹³ For the first time, information about GM crop permits was included on the NDA website and officials were very quick to respond to information requests. But at the same time, PAIA brought with it a new set of restrictions and bureaucratic obstacles and this may well have clouded any victories achieved by Biowatch in the window that was used to assert rights to information under the Constitution. For example, although information flow has undoubtedly improved, much is now classified and, arguably, hidden as “confidential business information” to prevent disclosure under PAIA.

93. Elfrieda Pschorn-Strauss, former staff member of Biowatch, telephone interview, November, 2010.

From a government perspective, the Biowatch case helped to “streamline” the administrative process for GM crop authorisations, and enhance the capacity of the government to manage risk assessments and permit applications. The NDA has “definitely become more attuned and there has definitely been increased scrutiny over the years,”⁹⁴ remarked Dr Julian Jaftha, Director of Genetic Resources in the National Department of Agriculture NDA. There has also been a substantial increase in applications for access to information, although it is difficult to attribute this directly to the Biowatch case. “We haven’t changed because someone is watching us,” commented Jaftha. “It is no longer just your Biowatches that want access but also research institutions. Interest groups have evolved over the years. There are more substantive inputs now. NGOs are not just crying wolf and being anti-genetic engineering.”

Ironically, the greatest impact arose not from the leverage rights gained by access to information, but rather from the clarity provided for public interest litigation by the ruling on costs.⁹⁵ Civil society organisations, both in South Africa and elsewhere, rallied against what was perceived to be a travesty of justice. The costs order in favour of Monsanto was interpreted by some as being tantamount to a SLAPP (strategic litigation against public participation) suit designed to silence critical voices.⁹⁶ The Constitutional Court victory has meant that organisations acting in the public interest will be able to litigate to gain their rights without necessarily expecting the “chilling effect” of costs orders against them. Noted one of the advocates for the *amici*: “Biowatch has revolutionised the law of costs – not so much in terms of the core principles but in terms of when that core principle is to be applied. It has opened up a whole area of litigation without fear of costs.”⁹⁷

Interestingly, the case was launched prior to the promulgation of the PAIA and therefore appealed directly to the sections of the Constitution which established the principled right to information.⁹⁸ It has been argued that despite this right and the subsequent promulgation of PAIA, there is a “lack of support within government for the right of access to information ... Political motivation for promoting and ensuring compliance with PAIA is clearly lacking.”⁹⁹

94. Julian Jaftha, Director of Genetic Resources, NDA, Interview, May 2011.

95. Specifically, (a) whether costs awards in constitutional litigation should be determined by the status of the parties or by the issue; (b) what the general approach should be in relation to suits between private parties and the state; (c) what the general approach should be in constitutional litigation where the state is sued for a failure to fulfill its constitutional and statutory responsibilities for regulating competing claims between private parties; and (d) the role of appellate courts in appeals against costs awards. See Kotzé and Feris, 2009; Humby, 2010; and the case judgment.

96. See, for example, the recent (unsuccessful) defamation suit brought by the developers of a luxury golf estate, Wraypex, against four environmental activists representing the Rhenosterspruit Conservancy.

97. Stephen Budlender, 2009. The Significance of the Biowatch Judgment for South African Jurisprudence, Biowatch Think Tank, Constitution Hill, 25 November.

98. See footnote 32.

99. Kate Allen (ed.), 2009. *Paper wars: Access to Information in South Africa*. Johannesburg: Wits University Press, xvi.

In a broader context the case has been regarded as an important victory against the tyranny of companies such as Monsanto, widely regarded as having little regard for the rights of consumers and farmers.

One of the most interesting findings arising from analysis of the Biowatch case is that the ground-breaking legal precedents that were set with respect to the proper judicial approach to determining costs awards in constitutional litigation were not only entirely unforeseen, but were also far removed from the initial (and successful) intent to secure access to information to uphold environmental and other rights. This points to the difficulties of developing and planning legal strategies. It also yields important lessons about the importance of multifaceted strategies to secure environmental rights, including strategic alliances, astute media, organisational resilience and the importance of emergency financial reserves.

The case had less positive impacts on Biowatch itself. The nine-year experience was a gruelling one. Although staff and trustees were initially upbeat about winning access to information and fighting the negative costs order, the failure of the appeal and the subsequent rejection in the Supreme Court took its toll. Staff were often diverted from their core functions to deal with the immediacy of the case, Biowatch lost some of the research momentum it had gained in earlier years and there was high staff turnover and discontent over the period of the litigation. An allied organisation noted that “The case was very detrimental to the anti-GM movement. The court case took away resources and people.”¹⁰⁰

There were also disagreements within Biowatch about the vigour with which the case should be pursued. Some of the staff, mindful of their jobs and security, opted for a softer approach, such as appealing to Monsanto to drop the costs order and paying them if this was not forthcoming. Monsanto, however, continued to insist on the “healing balm of costs”. The Board of Trustees, in contrast, felt it was important to exhaust all legal remedies and that paying Monsanto's costs was not only unjust in legal and moral terms, but would in practice have put an end to Biowatch's activities. The emotional energy consumed in these processes, along with the diversion of time and resources and the disjuncture between Board and staff, had a significant negative impact on the organisation. The complexity of running two legal entities added to these pressures and took another three years to unravel.

Some ironic situations have also emerged. Shortly after the Constitutional Court judgment it came to light that Biowatch's former director, Leslie Liddell, and office manager, Nicci van Noordwyk, who had subsequently joined an NGO promoting science education in primary schools in the Western Cape, used their knowledge of and contacts with Monsanto to secure

100. Mariam Mayet, director, African Centre for Biosafety, telephone interview, 12 May 2011.

“The government’s duty was to act as impartial steward ... This required objectivity and distance in respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution.”

Justice Sachs speaking for a unanimous Court in *Trustees, Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at paragraph 45.

funding from the company for their new work.¹⁰¹ This opened the door for Monsanto to gain a propaganda and profile foothold in many of the province’s primary schools, particularly in science education. In a similar twist, government officials responsible for prohibiting access to information about GM crops, and using tax-payer’s money to defend these actions, have been promoted to top positions in public institutions – or have gone to work for agribusiness.¹⁰²

Yet there has also been good news. After a period of great uncertainty and threatened closure, to the extent of not having the resources to celebrate the victories gained, funding was secured to enable Biowatch to continue its work. Moreover, funds obtained by Biowatch from the state as a result of the costs order being reversed, an amount of about R200 000, have been ring-fenced for the purchase of a property for the organisation. Thus one outcome of the case is that it has assisted the organisation in attaining long-term sustainability and survival. There is also renewed stability and unity among the staff and strong cohesion between staff and trustees, under the very able directorship of Rose Williams.

Through the case, Biowatch not only made its mark on legal history but also emerged more solid and sustainable as an organisation, confident that it maintained its integrity. The eventual court victory vindicated and underlined its commitment to its principles. Through the legal battles it deepened its relationship with its constituent communities, largely comprised of women farmers in rural areas in KZN and the Eastern Cape. Although the case consumed energies and resources, its outcome has also allowed Biowatch to flourish with renewed vigour. An even brighter future is in store.

101. Monsanto Fund, 2010. Teacher education programme to benefit 50 000 children in the Western Cape, Press release, 29 September. Reproduced in NGOPulse, 5 October 2010, available at <http://www.ngopulse.org/press-release/teacher-education-programme-benefit-50-000-children-western-cape>, accessed 22 August 2012.

102. For example, a senior official involved in the case now holds a top position at the Agricultural Research Council while others involved in processing applications in the Registrar’s office have found work at Monsanto and Syngenta.





The inside story ... snapshots

(Left to right) Top row: Biowatch's "No2GM" beaded pin; Demonstrations outside the High Court in Pretoria; Haidee Swanby and Elfrieda Pschorn-Strauss; Biowatch's "Openness & Responsiveness Award" for "Best Usage of the Promotion of Access to Information Act"; Rajasvini Bhansali and Samu Sithole. Middle row: John Butler, Cormac Cullinan and Josie Eastwood; Peter Komane, Elfrieda Pschorn-Strauss, Rachel Wynberg and Josie Eastwood outside the High Court; Civil society protest at World Summit on Sustainable Development (WSSD), Johannesburg; Constitution Court of South Africa; Demonstrations outside the High Court in Pretoria. Bottom row: Richard Moultrie and Gilbert Marcus SC; The Constitutional Court's Court Roll – 1st Term (2009); Lawrence Mkhalihi, Achmed Mayet, Adeline Malema, Rose Williams, David Fig, Richard Moultrie and Carole Cooper celebrate inside the Constitutional Court.

Captions and credits

Page 11	Artwork at the Constitutional Court of South Africa: Cecil Skotnes and Hamilton Budaza, <i>Freedom</i> , 1995, engraved wood panels, 253.5 x 278 cm (detail).
Page 12	(Left to right) Benolta Mkhwanazi, Bongekile Msweli and Busisiwe Ngema from Zimele Rural Women's Empowerment Organisation (ZRWE), a Biowatch project site at KwaHhohho.
Page 15	Demonstrations outside the Pretoria High Court in May 2004.
Page 19	Biowatch work and briefing documents.
Page 23	A field of Bt Cotton in Makhathini Flats, KwaZulu-Natal.
Page 25	Mail & Guardian headline poster, 20 August 1999.
Page 30	(Clockwise) Workers on a farm growing Bt Cotton in Makhathini Flats, KZN; Monsanto signage demarcating GM maize fields; GM maize field; A field trial of GM potatoes. All photos: Oryx Media.
Page 35	(Left – top and bottom) Support demonstrations in Cape Town during Biowatch's High Court hearing in Pretoria, May 2004. (Right top) Civil society protest at World Summit on Sustainable Development (WSSD), Johannesburg; (Right bottom) Demonstrations outside the Pretoria High Court in May 2004.
Page 44	Newspaper headlines following the High Court judgement.
Page 47	Traditional mealies grown by a Biowatch project member in KwaHhohho, KwaZulu-Natal.
Page 54	Artwork at the Constitutional Court of South Africa: Cecil Skotnes and Hamilton Budaza, <i>Freedom</i> , 1995, engraved wood panels, 253.5 x 278 cm (detail).
Page 57	"The Flame of Democracy" at Constitutional Hill, Johannesburg. The "Eternal Flame of Democracy" was lit on 10 December 2011 in celebration of the 15th anniversary of the signing of the South African Constitution.

Page 62	Signage outside the Constitutional Court, in all official languages.
Page 67	Newspaper headlines following the Constitutional Court judgment on 3 June 2009.
Page 68	The South African Human Rights Commission and The Open Democracy Advice Centre awards Biowatch the “Openness & Responsiveness Award” in 2008 for “Best Usage of the Promotion of Access to Information Act”.
Page 72	Artwork at the Constitutional Court of South Africa: Beaded South African flag in the Court Chamber. 250 x 600 cm, designed and created by the African Art Centre in Durban.

Chronology of events and decisions

<i>Date</i>	<i>Event/Decision</i>
1992	Monsanto field trials for GM cotton approved by the apartheid government.
1997	Biowatch established as an informal group of concerned individuals.
1997	First commercial plantings of GM crops in SA.
1997	GMO Act tabled by the NDA, after the first commercial GM crop planting, without a policy in place and with limited public participation.
1999	Biowatch South Africa registered as a legal Trust and first trustees and staff appointed.
1999	AfricaBio established by the GM industry to counteract growing civil society resistance to GM crops and to promote their uptake.
1999	Biowatch begins requesting official information from the NDA about the planting of GM crops in SA, the risk assessments undertaken and the decision-making process to approve such crops.
2000	GM crops cover 100 000 ha of South African land, 175 field trials are underway, and 5 commercial releases have been approved.
February 2000	A legal think-tank of environmental and human rights lawyers and NGOs concludes that the GMO Act is conceptually flawed and that legal action should be taken.
February 2000	Promotion of Access to Information Act (PAIA) enacted.
2000	On-going requests from Biowatch to the NDA for access to information remain unanswered.
November 2000	A follow-up legal strategy meeting is held. Biowatch, supported by legal specialists, agrees on a course of action for litigation. Winstanley, Smith & Cullinan appointed to act on behalf of Biowatch.

February 2001	Final letter of demand sent to the Registrar of Genetic Resources, requesting access to 11 categories of information.
March 2001	Most of PAIA's provisions commenced.
March 2001	NDA advised that Biowatch will litigate.
August 2002	Biowatch serves papers on the NDA, which advises it will oppose.
February 2003	Monsanto, Stoneville Pedigreed and D&PL SA join the state against Biowatch to protect information they consider confidential.
February 2003	ODAC join the case as <i>amicus curiae</i> .
24-25 May 2004	Case is heard in the Pretoria High Court. Protests in Pretoria and Cape Town in support of access to information.
November 2004	Biowatch appeals a decision to grant Syngenta a permit for the import, field trials and commercial use of Bt11 maize. Appeal Board decides that the decision to grant the permit was flawed but does not set it aside.
24 February 2005	Acting Judge Dunn hands down judgment on access to information case in the Pretoria High Court. Biowatch wins the right to eight of eleven categories of requested information, but is ordered to pay Monsanto's legal costs.
June 2005	Biowatch granted leave to appeal against the costs order and has to lodge a security deposit.
November 2005	Biowatch is notified by the NDA that the documentation is available for inspection.
2007	Messages of support for the appeal are received from over 200 organisations and individuals from 26 countries and all 6 inhabited continents.
2007	An anonymous donor deposits R200 000 into Biowatch's account, part of which is used as a further court deposit.



April 2007	Appeal is heard by a full bench of the North Gauteng High Court in Pretoria, by Justices Mynhardt (presiding), Malopa-Sethosa and Poswa.
Mid-2007	A second legal entity, the Biowatch Association, is set up to protect the organisation's assets.
November 2007	A majority decision (2/3) – rejects the appeal. Biowatch is ordered to pay the legal costs of Monsanto, as well as the legal costs of the appeal for the Minister of Agriculture, the Registrar of Genetic Resources and the Executive Council for GMOs.
5 May 2008	Judge Poswa issues a minority dissenting judgment in favour of Biowatch, arguing that the order of costs against Biowatch be set aside and that the Minister of Agriculture, Registrar of GMOs and the Executive Council for GMOs should pay Biowatch's costs.
15 July 2008	Constitutional Court refuses to hear the case before all prior legal remedies are exhausted.
September 2008	The appeal comes before the Supreme Court of Appeal in Bloemfontein, but is once again dismissed with costs.
17 February 2009	Hearings take place in the Constitutional Court. Biowatch and LRC joined by the Centre for Child Law, Lawyers for Human Rights and the Centre for Applied Legal Studies, as <i>amici curiae</i> .
3 June 2009	Justice Albie Sachs sets aside the costs order awarded against Biowatch in favour of Monsanto and awards legal costs in the High Court hearings in favour of Biowatch and against the state.
2012	The Biowatch Association is closed down, having served its purpose as an emergency vehicle. The Biowatch Trust continues as the legal instrument governing Biowatch South Africa.



Timeline of the four court cases

2004

Biowatch access to information case that was brought against the state in 2002 is heard in the Pretoria High Court. Respondents include the Registrar, Genetic Resources, Executive Council for Genetically Modified Organisms, and Minister of Agriculture. Corporate parties, including Monsanto South Africa (Pty) Ltd, Stoneville Pedigreed Seed Company and Delta & Pine Land South Africa Inc. later join the case to protect their interests.

2007

Appeal against costs heard in North Gauteng High Court in Pretoria.

2008

Appeal against costs heard before Supreme Court of Appeal in Bloemfontein.

2009

Appeal against costs heard before Constitutional Court in Johannesburg.



Anyone campaigning for environmental or social justice needs to read this feel-good David and Goliath account of how a reasonable request for access to GMO permit applications catapulted an environmental watch-dog into almost a decade of litigation against the South African state and monolithic Monsanto.

This publication, by the founding trustees of Biowatch, documents the organisation's courageous battle to overturn two unjust costs orders, providing an insider's perspective on the organisational toll and lessons learnt. A story of right over might, it demonstrates what courage and tenacity can achieve and serves as an inspiration to civil society and a warning to those pursuing narrow profit motives at the expense of the environment.

"The government's duty was to act as impartial steward ... This required objectivity and distance in respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution."

Justice Albie Sachs speaking for a unanimous Court in *Trustees, Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at paragraph 45.



biowatch
SOUTH AFRICA

biodiversity | food sovereignty | biosafety | social justice www.biowatch.org.za

ISBN:978-0-620-55828-0



9 780620 558280