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A victory for access to information and a landmark decision on costs awards in public litigation

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A victory for access to information and a landmark decision on costs awards in public litigation

by **Josie Eastwood**

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CONTENTS

1

INTRODUCTION

In June 2009, the Constitutional Court ruled unanimously on the *Biowatch* appeal[1], overturning two costs orders that sent shockwaves through the public interest law community and threatened the existence of the appellant non-governmental organisation (NGO).

Hailed for its clarity, the Constitutional Court judgment crystallises the principles that apply to costs awards in constitutional litigation against the state. What matters primarily is not that certain categories of litigants be shielded from adverse costs awards but that a court always considers how a costs order will contribute to the advancement of constitutional justice.

As noteworthy is the apparent toppling of a sacred cow – judicial discretion to decide costs. In a significant departure from prior practice, the *Biowatch* judgment implies that an appellate court will always have grounds to interfere if the court of first instance failed to consider adequately the constitutional justice implications when making a costs order. It is certainly a resounding slap on the wrist for the lower courts that dismissed the appeal before it reached the Constitutional Court.

Unsurprisingly, the appellant, Biowatch South Africa, has been lauded for this contribution to legal jurisprudence, with fellow public interest NGOs describing it as "heroic" and having "eternalised" the organisation.[2] Academic commentators recognise the Constitutional Court judgment on costs as creating an important opportunity for environmental interest groups to embark "more frequently and vehemently on public interest litigation".[3]

The supreme irony though is that the case was never about costs in the first instance. In a classic example of the tail wagging the dog, Biowatch launched a High Court application in 2002 for access to information about the permitting system for genetically modified organisms (so-called GMOs) after requests for access, directed to the South African Department of Agriculture, went largely ignored. The Court, accepting that Biowatch was acting in the public interest and with no alternative remedy, ordered the release of most of the information sought. Yet, in what can only be described as a pyrrhic victory, the Court declined to make a costs order against the Department of Agriculture, contrary to the well-established rule that costs follow the result. More worryingly, despite its non-profit status and the constitutional rights (environmental protection and access to information) which it asserted genuinely and in the public interest, Biowatch was ordered to pay the costs of an intervening respondent, Monsanto.

Unable to accept the economic and moral consequences of the costs orders, and mindful of their chilling effect on similar public interest litigation, Biowatch embarked on a long road of appealing the orders, first to the North Gauteng High Court (Full Bench), which dismissed the appeal by a two to one majority,[4] and

saddled Biowatch with a further costs order. After unsuccessfully petitioning the Constitutional Court for direct access, Biowatch was redirected to the Supreme Court of Appeal, which dismissed the appeal again with costs. Biowatch thereafter returned to the Constitutional Court, armed with a favourable dissenting judgment from the Full Bench appeal.[5] Finally, four years after being imposed, the two costs orders in the High Court application as well as the Full Bench appeal costs order were reversed by the Constitutional Court.

This *Biowatch Research Paper* is a legal review of the Biowatch case, beginning with its origins, which are rooted in concerns about the regulatory system for GMOs, and examining the legal contributions of both the High Court judgment in the area of access to information, and the Constitutional Court judgment in clarifying the principles for determining costs awards in all cases with a constitutional dimension.

2

ORIGINS OF THE CASE:
GMOs and access to information

Biowatch is a non-profit trust, established in 1997 to advance conservation and protect biodiversity.[6] One of its objectives is to monitor the implementation of South Africa's obligations to ensure protection and sustainable use of biodiversity under the Convention on Biological Diversity.[7] There are many long-standing and broadly understood threats to biodiversity, such as alien invasive species, habitat changes, climate change and the unsustainable use of resources.[8] However, a more recent threat is the application of modern biotechnology or genetic engineering. Whereas traditional biotechnology refers to the manipulation of processes that ordinarily occur in nature, such as the selective breeding of plants for hybrid production, modern biotechnology involves the transfer of genes between unrelated organisms, across normally impenetrable reproductive barriers. The resulting GMOs contain a novel combination of genes that could never be created through ordinary breeding methods and therefore present a host of environmental[9] and other impacts.

In 1999, aware of the increasing commercialisation of GM crops in South Africa, and the attendant risks to biodiversity as well as to food security and farmers rights, Biowatch began to focus its attention on the permitting system for field trials and commercial release of these crops under the Genetically Modified Organisms Act.[10] The main concern was that the environmental, health and socio-economic impacts of GM crops were not being assessed adequately in the permitting process, thus compromising the constitutional right of all to a safe and healthy environment.[11]

Biowatch suspected that applicants for permits relied on risk assessments prepared internally and recycled from other countries with different ecosystems. The fear was that the regulators did not have the capacity or technical expertise to evaluate these assessments or process the rapidly growing number of commercial permit applications. In addition, the process was shrouded in secrecy, with little or no civil society awareness of, or participation in, the decision-making processes under the Act.

These concerns informed a strategy to obtain access to all documentation pertaining to permit applications so as to promote transparency in decision making, enhance public participation, and enable Biowatch to undertake an independent review of risk assessments and other supporting documentation.

The permitting authority was the Directorate of Genetic Resources, housed within the National Department of Agriculture. Biowatch wrote to various officials in the Department,[12] requesting access to a range of documents. Requests were motivated: for example, the request for risk assessment data accompanying applications for release of GMOs, explained that "releases of genetically modified

organisms, based on permits issued as a result of inadequate risk assessment, may place our biodiversity under threat.… [I]t is necessary to study and evaluate the risk assessments carried out to date, and to find out what they do and do not assess".[13]

After receiving unsatisfactory, partial responses to its first three requests Biowatch sent a final letter of demand to the Registrar of Genetic Resources, requesting access to eleven categories of information. Essentially, the information sought covered the content of permit applications submitted under the Genetically Modified Organisms Act; the decisions on those applications; and the constitution and processes of decision-making bodies established under the Act. In what later proved to be controversial, the letter included general, catch-all requests because Biowatch did not know exactly what records the Directorate held.[14]

The four requests were made between 17 July 2000 and 26 February 2001, an eight-month period after the promulgation of the Promotion of Access to Information Act (PAIA) but prior to its date of operation.[15] The timing was no accident. Although PAIA is intended to give effect to the constitutional right of access to information, Biowatch was advised by its legal representatives[16] that PAIA presented problems to a requesting party by creating time delays in responding to requests and providing a range of grounds for refusing access to records. As a result, Biowatch was advised to base its application for access to information solely on section 32 of the Constitution,[17] which provides a broad entitlement to information held by the state and is qualified only by a general limitations clause.[18]

The decision to rely on Section 32 had far-reaching consequences. It shaped the formulation of the relief sought by Biowatch in its court application, a formulation that was criticised by the High Court and, together with the inclusion of certain catch-all requests for information, influenced its decision on the two costs orders. This is returned to further in this research paper.

3

HIGH COURT JUDGMENT:
Victory for access to information

High Court application for access to information

More than a year after its final request, in August 2002, Biowatch instituted application proceedings in the North Gauteng High Court (then the Transvaal Provincial Division).[19] Citing the Registrar, the Minister of Agriculture and the Executive Council for Genetically Modified Organisms, Biowatch sought an order directing the three statutory respondents to provide access to the information set out in its requests. The application was instituted well after the commencement of PAIA.

In order to remain under the aegis of section 32 of the Constitution, Biowatch had to rely on the original requests made prior to the operation of PAIA.[20] Thus, in its notice of motion, instead of describing the categories of information to which it sought access, Biowatch referred to the four original requests and attached copies of them.

Three permit holders – Monsanto South Africa (Pty) Ltd, Stoneville Pedigreed Seed Company and D&PL South Africa – joined as respondents. In addition, the Open Democracy Advice Centre (ODAC), a non-profit NGO, joined the proceedings as a friend of the court in order to promote transparent democracy and corporate and government accountability.

Collectively, the government and corporate respondents opposed the application on various technical and substantive grounds. Primarily, they all contended that PAIA applied to the requests for information and that the application should fail on that ground alone since Biowatch had neither complied with the procedural requirements of the Act nor exhausted its internal appeal remedies. In a lengthy and carefully reasoned judgment, Acting Justice Dunn rejected the argument that PAIA applied retrospectively to the four requests or that the Act's internal appeal remedies were applicable in the circumstances of the case.[21] He also rejected other technical arguments raised by the respondents.[22]

Instead, he found that Biowatch had a clear right to most of the information sought – eight out of the eleven categories identified in Biowatch's requests – and that Biowatch's rights under section 32 of the Constitution had been infringed by the Registrar's failure to grant access to the records.[23] He ordered the Registrar to grant access except where a specific ground for refusal applied in terms of PAIA.[24] In such event, written reasons for refusing access to the whole or a portion of a record were to be provided.[25] This approach was consistent with Biowatch's stance, articulated in its court papers, that it had no objection to the exclusion of confidential information.

The three categories of information to which Biowatch was refused access were described by Acting Justice Dunn as either overbroad or too vague. In addition, he criticised Biowatch for the manner in which its notice of motion was formulated,[26] apparently without insight into the rationale behind it, namely to preserve the original requests under section 32 of the Constitution. The excessive breadth of some requests, together with the formulation of the notice of motion, influenced the two costs orders. Acting Justice Dunn used this to justify, firstly, a departure from the ordinary rule that costs should follow the result, in refusing to award Biowatch its costs against the Department. Secondly, he saw merit in submissions by the respondents that the "catch-all requests were clearly vexatious and oppressive", finding that the respondents were compelled to come to court to protect their interests. This justified awarding costs to Monsanto, the only corporate respondent who sought a costs order against Biowatch.
Apart from the two costs orders, the judgment by Acting Justice Dunn represents a victory from several perspectives, discussed below.

Insight into regulatory system for GMOs

Biowatch obtained access to eight out of the eleven categories of information sought.[28] These included copies of risk assessments submitted by permit applicants and details of public participation processes. Obtaining access to the documents was an important step. Inevitably, much of the information had become outdated in the six years that ensued between the date of the initial requests and the date of obtaining access to the documents requested. However the information remained valuable in building an understanding of the regulatory system and informing further strategies.

An overall review of the risk assessments and public comment process revealed material weaknesses in the administrative procedures. In a summary of the review findings, Wynberg and Fig[29] conclude that the proliferation of GM crops in South Africa was based upon weak decision-making, using flawed information, and flouted principles of reasonable and fair administrative decision-making. The findings included a lack of procedural fairness and effective public participation, evidenced by the failure of decision-makers to provide reasons for the granting of permits, or to communicate their decisions to interested parties on record as objecting to applications. The permits themselves were extremely permissive and vague, imposing standard conditions regardless of the GMO in question or the specific environmental or social context. Another finding that is of concern was that the Directorate relied on the industry to conduct its own risk assessments without independent peer review. Scrutiny of the risk assessments indicated that they were recycled from applications in foreign jurisdictions: they cited species that did not even occur in South Africa. They were also primarily desk-based, drawing from existing literature rather than from empirical work. There was no evidence of any environmental or socio-economic assessments having been submitted as part of permit applications.

These findings were used to inform submissions made by the organisation on improvements to the regulatory system for GMOs.[30]

Valuable interpretation of Section 18 of GMO Act

In asserting that its confidential information could not be disclosed to Biowatch, Monsanto relied on Section 18 of the Genetically Modified Organisms Act, which prohibits the disclosure of information acquired by a person through the exercise of powers or the performance of duties under the Act subject to certain exceptions.[31] One of the exceptions is where disclosure is necessary for the proper application of the Act.

In an important contribution to more transparent decision-making, Acting Justice Dunn held that, generally speaking, the granting of access to information is necessary for the proper application of the Act. In terms of his reasoning, there is a wider purpose of access to information, namely to ensure

> open and accountable administration at all levels of government – a vital ingredient in our new constitutional culture and in an open and democratic society. The disclosure of information, or the granting of access to information, should therefore, in my view, be necessary for the proper application of the provisions of the GMO Act. In other words, the Registrar is not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMO Act, if such disclosure is aimed at giving effect to the right of access to information enshrined in section 32 (1)(a) of the Constitution.[32]

This interpretation of Section 18 is in line with the constitutional imperative to interpret legislation in a manner that promotes the spirit, purpose and objects of the Bill of Rights. It was not challenged on appeal.

Duty on state to facilitate access

Acting Justice Dunn chastised the Registrar for his passive approach in response to Biowatch's requests for information and concluded that Biowatch was compelled to approach the court for relief.[33] He recognised that a requester will not always have knowledge of the precise description of the document in which the information is obtained. The recipient of a request (in this case, the Registrar) is obliged to take steps to clarify what precisely the requester seeks and to assist the requester in that regard. He noted that the duty to assist requesters which is imposed on the state, is carried through in Section 19 of PAIA which requires an information officer of a public body to assist requesters. The Constitutional Court also frowned on the Registrar's conduct in failing to respond to Biowatch, and this was a factor in its decision to award costs against the Registrar.[34]

It will be interesting to see whether the emphasis by both Courts on the state's proactive duty to facilitate access will be taken up in future cases. Humby[35] interprets the Constitutional Court's attitude toward the Registrar as an attempt to incentivise the state to fulfil its constitutional and statutory obligations so as to avoid the costly route of litigation.

Interestingly, none of the judgments took issue with the intractable stance of the respondent permit holders in refusing to engage with Biowatch as to which records it sought and what information they regarded as confidential. On the contrary, the High Court (Full Bench) specifically found that Monsanto had no duty to engage with Biowatch or the statutory respondents because of the opposing views held by

Biowatch and Monsanto on the confidentiality of the latter's information.[36] Yet, in its court papers, Biowatch indicated a willingness to negotiate on the exclusion of confidential information from the records that it sought. A successful negotiation took place with Pannar (Pty) Ltd, a seed company that voluntarily agreed to provide partial disclosure (by making documents available with confidential information excised) and consequently was excluded from the ambit of the court order.[37]

In his dissenting judgment in the North Gauteng High Court (Full Bench) appeal, Justice Poswa commented on the fact that the Registrar and Monsanto appear not to have communicated about Biowatch's request for access to information pertaining to Monsanto.[38] In his view, had they done so, the Registrar could have made Biowatch aware of Monsanto's concerns and avoided the need for Monsanto to intervene in order to protect its interests.

4

APPEAL TO THE CONSTITUTIONAL COURT AGAINST COSTS ORDERS

After unsuccessful appeals in the North Gauteng High Court (Full Bench) and the Supreme Court of Appeal, Biowatch's appeal against the two costs orders handed down by Dunn AJ was heard by the Constitutional Court. The first hurdle that Biowatch faced was to persuade the Constitutional Court that it could hear an appeal on a costs order solely.

One of the main obstacles that Biowatch faced in its appeals to the lower courts was Section 21A of the Supreme Court Act,[39] which provides that appeals solely on costs should only be entertained in exceptional circumstances. In the North Gauteng High Court (Full Bench) appeal, the majority held that unless Biowatch could show that Acting Justice Dunn had committed a demonstrable blunder or reached an unjustifiable conclusion, the appellate court had no power to interfere and no exceptional circumstances could be said to exist.[40] The Supreme Court of Appeal dismissed Biowatch's application for special leave to appeal without giving reasons.

Writing for a unanimous Constitutional Court, Justice Sachs agreed with the submission of counsel for Biowatch that the Court is not bound by Section 21A of the Supreme Court Act. However, the Court recognised the merit in this provision – valuable appellate court time should not be wasted with appeals on ancillary questions of no value to the broader public.[41] For this reason, the Court held that it will not ordinarily be in the interests of justice to allow an appeal on a costs award only.[42] What distinguished this appeal was that it highlighted the wide-ranging impacts of costs awards, particularly for civil society groups. This is amply demonstrated by the fact that three public interest organisations joined the Constitutional Court proceedings as friends of the Court – the Centre for Child Law, Lawyers for Human Rights and the Centre for Applied Legal Studies. They presented argument to the effect that such organisations rely on donor funding in order to undertake constitutional litigation and that funding will be jeopardised by the threat of an adverse costs order.[43] Without accepting or rejecting the argument, Justice Sachs recognised a need to consider whether the existing principles governing costs awards require modification to cater for constitutional litigation and concluded that in light of this it is in the interests of justice to consider an appeal solely on costs.[44]

5

THE COSTS OF CONSTITUTIONAL LITIGATION: Amplification of principles

Existing principles of costs awards formulated by the Constitutional Court

Although the origins of the *Biowatch* case lie in a request for access to information, its greatest contribution to legal jurisprudence is in producing a Constitutional Court judgment that crystallises the principles of costs awards in constitutional litigation.

In a clear, concise judgment, Sachs J began with a summary of the existing rules applicable to costs orders. Drawn from the judgment in *Ferreira v Levin*,[45] one of the earliest cases heard by the Constitutional Court, the general principles of costs are, firstly, that the award of costs is in the discretion of the judicial officer (in the absence of a contrary statutory directive) and, secondly, that the successful party should generally have his or her costs.[46]

These are flexible principles, providing a point of departure; they must be adapted to accommodate the needs of constitutional litigation. For example, in *Ferreira v Levin* Justice Ackermann held that one may depart from the second principle and deprive a successful party of costs in light of factors such as the conduct of the parties, the conduct of their representatives, or the nature of the litigants.[47] Notably, Sachs J appeared to reject the last of these factors in his move to expand on the two flexible rules. This is returned to below. He pointed out that the Constitutional Court has gained considerable experience since *Ferreira v Levin* was decided in 1995 and formulated four additional departure points for deciding costs in constitutional litigation.

Costs awards must promote the advancement of constitutional justice

The first guiding principle formulated by Sachs J is that costs awards should be determined primarily with reference to the issues, not the parties:

> In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[48]
> (Emphasis added)

Sachs J recognised that public interest groups play a vital role in the South African democracy and that many vulnerable groups depend on their support. However, he cautioned that costs awards should not be used as a means to indicate approval or disapproval of specific work done by or on behalf of a particular litigant claiming their constitutional rights.[49] Elaborating on this, Sachs J said it would be wrong to treat a litigant unfavourably because it is asserting commercial, property or privacy rights against poor people or the state.[50] Similarly, a litigant acting in the public interest should not automatically have a privileged status.[51] What matters is the character of the litigation and the litigant's conduct in pursuing it.[52] The question is whether, "rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution."[53] Importantly, the primary consideration must be the way in which a costs order will hinder or promote the advancement of constitutional justice.[54]

State ordinarily not awarded costs against private litigants

The second departure point for costs orders applies in litigation against the state. The general rule established by the Constitutional Court in *Affordable Medicines*[55] is that, if the state loses in constitutional litigation against a private party, the state should pay the other party's costs, and, if the state wins, each party should bear its own costs.[56] To be considered constitutional, the litigation must genuinely raise constitutional considerations relevant to the issues for adjudication.[57]

Sachs J summarised the rationale for this general rule thus: (1) it diminishes the chilling effect of adverse costs orders for parties seeking to assert constitutional rights; (2) constitutional litigation ordinarily has broader application beyond the litigants and therefore benefits others in similar situations; and (3) it recognises that the state bears primary responsibility for, and thus should bear the cost of a genuine challenge to, the constitutionality of state conduct or legislation.[58]

The judgment cautions that the rule is not absolute: an application that is frivolous or vexatious or otherwise manifestly inappropriate will not confer protection on the applicant against an adverse costs award.[59]

Private litigants with competing claims remain entitled to protection against costs awards in favour of the State

The third departure point for costs orders arises in the context of what Sachs J termed "the radiating impact" where multiple private parties are drawn into litigation against the state by virtue of competing claims. For example, company A challenges the award of a tender by the state and the successful tenderer intervenes to oppose company A.

Sachs J made the point that generally constitutional issues arise in a context where the state is required to perform a regulating role between competing private interests.[60] The involvement of more than one private party in constitutional litigation does not, on its own, characterise the litigation as being between private parties.[61] Where the issue is whether the government agency has fulfilled its constitutional and statutory duties, the litigation remains between a private party and the state with a "radiating impact on other private parties". This is essentially what happened in the *Biowatch* case when Monsanto and other

seed companies intervened to protect their confidential information from being disclosed by the Registrar. Accordingly, as in litigation between the state and a single private party, the general approach remains that the pursuit of constitutional claims should not be discouraged, irrespective of how many parties seek to support or oppose the state's position in the litigation.[62] It follows that the general rule on costs remains the same as in litigation between the state and a single private party.[63]

Role of appellate courts in appeals against costs awards

Finally, Sachs J considered the role of appellate courts in relation to costs orders. He noted that the court of first instance has a discretion when determining costs and an appeal court must have good reason to interfere with the exercise of that discretion.[64]

Examining the judgment of Dunn AJ, the Court found that it is extensively and carefully reasoned, save for the two brief paragraphs on costs. Although Dunn AJ stated, in his judgment on the application for leave to appeal, that he did consider the constitutional dimension of the matter, his failure to refer expressly to this in his first judgment raises serious doubts about the weight, if any, given to the constitutional aspect of the case.[65] Similarly, Justice Sachs found that the Full Court failed to consider the constitutional aspect when it dismissed the appeal against the costs orders; this failure by both Courts constitutes a serious misdirection and allowed the Constitutional Court to reconsider the costs decision.[66]

In fact, in contradiction to what Sachs J found, the Full Court had considered the constitutional dimension, certainly as regards the second order. Writing for the majority, Justice Mynhardt recognised that the Constitutional Court follows a trend of not awarding costs against a litigant seeking to test the constitutionality of a statute but found that this is a flexible rule and that the Court retains its discretion to make a costs order against a losing party even if an important constitutional principle is involved.[67] Similarly, he found that the court of first instance retains a discretion to make a costs order against an applicant litigating in the public interest and for the protection of the environment, even though there is an existing trend of avoiding such orders.[68] Agreeing with the contention by Monsanto that it won "hands down" on the issue of protecting its confidential information, the court could not find that Dunn AJ committed a demonstrable blunder in awarding Monsanto its costs.[69]

This directs attention to another noteworthy aspect of the Constitutional Court judgment. Up until this time, the wide discretion applicable to costs and the absence of fixed rules made it very difficult for an appeal court to say that the court of first instance was wrong. The *Biowatch* judgment changed that. It says that a failure to consider the constitutional dimension of a case when awarding costs is always a misdirection that justifies revisiting the decision. More significantly though, even if the court of first instance explicitly says that it considered the constitutional dimension when deciding costs, the appellate court will still revisit the decision if it is not convinced by the lower court's reasoning.

Application of the principles to the Biowatch appeal

The Court applied the four principles to the facts, beginning with the refusal to award Biowatch its costs against the state. The Court noted that Biowatch achieved substantial success, both in rebutting

preliminary points and in obtaining access to eight of the eleven categories of information requested.[70] Furthermore, the application raised important constitutional issues concerning access to information and environmental rights; Biowatch was compelled to go to court; and the root cause of the dispute was a persistent failure by the state to provide legitimately-sought information.[71] Accordingly, the applicant needed to have committed some compelling misconduct to justify a departure from the general rule that the state should pay the costs of a successful private party. Sachs J was not persuaded that the lack of precision in framing the requests for information and the notice of motion justified such a departure. He noted that the lack of precision did not hinder the High Court in giving a thorough judgment on the merits.[72] Sachs J concluded that the decision on costs was "out of sync with [the] judgment on the merits."[73] Accordingly, he ordered the state to pay Biowatch's costs.

Sachs J then turned to the second costs decision, being the costs award in favour of Monsanto. He found that Monsanto "wrongly sought costs against Biowatch".[74] In fact, the state provoked the litigation by its conduct and this is a primary factor justifying the reconsideration of the costs decision.[75] Sachs J explained that the litigation centres on the responsibilities of the state to make information given to it by Monsanto and other parties available to Biowatch. As such, it is not litigation between Biowatch and Monsanto. They are simply private parties with competing interests, participating in a legal dispute to determine whether the state has shouldered its legal obligations.[76] In such a case, where private parties are affected by the failure of the state to fulfil its statutory and constitutional duties, the state should bear the costs of successful litigants and there should be no costs orders against private litigants involved.[77]

6

THE IMPLICATIONS OF FOCUSING ON CONSTITUTIONAL JUSTICE

During the hearing of Biowatch's appeal in the Constitutional Court, Deputy Chief Justice Moseneke remarked that "there is a new duty on the [Constitutional] Court to facilitate the vindication of constitutional rights". In line with that statement, the first costs principle enunciated by Justice Sachs is that the starting point in costs orders is not the nature of the parties – public interest or otherwise – but the character of the litigation. Is the litigant asserting rights protected by the Constitution? If so, the primary consideration is the way in which a costs order will hinder or promote the advancement of constitutional justice.[78]

How does one give meaning to the notion of "constitutional justice"? Consider the example of an indigent community evicted from a derelict building in downtown Johannesburg and represented by a law clinic that relies on public donations. The clinic asserts the constitutional right of protection against arbitrary eviction on behalf of litigants who would not otherwise have access to legal representation.[79] The ready conclusion is that this advances constitutional justice but it is difficult to imagine reaching that conclusion without taking account of the status of the litigants, and the cause being advanced, two factors that Sachs J says should not be determinative of a costs order.

Kotzé and Feris[80] argue that it is a near impossible and unfair task for any court to consider the status of the parties as completely separate to the nature of the dispute since the two issues often go hand in hand. It is important to ask whether litigants are asserting constitutional rights but this should not be the overriding factor. They make a convincing argument for considering the character of the litigants:

> The nature of public interest litigation in constitutional matters, in our view, would require many factors to be considered in making a costs award. This should necessarily also include the character of the parties simply because it seems only logical that public interest litigation groups, which usually are poor, disadvantaged and disenfranchised, should be dealt with more favourably by a court in costs awards insofar as rules on fairness would permit this.

It seems inevitable that deciding how a costs order will advance constitutional justice must hinge on a range of issues, including the status of the parties, the causes they advance, their relative wealth or poverty and, in the case of non-profit organisations, the impact of a costs order on their funding arrangements. In other words, it requires reference to the factors that Sachs J says are not determinative. What appears to be an internal contradiction in the judgment is perhaps more a matter of nuance. Implicit in the judgment is that no single factor should be applied mechanically to decide costs. In other words, courts should avoid a

rigid rule of looking only at the public interest status of a litigant when deciding costs. This is not to say that the identity of the parties is irrelevant, just that it cannot be the starting point or the primary determinant of how costs are awarded.

There are several observations that flow from this. Firstly, a public interest litigant cannot assume that its mandate or financial status alone will confer protection against an adverse costs order. It must demonstrate that it asserts a constitutional right and that it seeks to advance constitutional justice.

Secondly, protection from adverse costs orders in constitutional litigation may be invoked by litigants other than public interest organisations. Sachs J specifically cautions against a litigant being treated less favourably in a costs order simply because it is a commercial entity with a profit motive. It is relatively easy to see how this would apply in litigation against the state, although some may find it unpalatable for the state to carry the costs of corporate forays into constitutional litigation. The counter, of course, is that the ventilation of constitutional issues is always a matter of public interest – it is the way in which the framework Bill of Rights acquires meaning.

Less clear is the application of this principle in constitutional litigation between private litigants. Applications for access to information may well be one of the arenas in which this debate plays itself out because of the duty imposed by PAIA on private bodies to make records available to requesters. For example, a public interest organisation is denied access to an environmental management plan by the mining company in question on the grounds that the information is protected under PAIA. The organisation applies to court for access, arguing that the information is not protected or, alternatively, that the protection provision is unconstitutional. It will be difficult for courts to make findings on constitutional justice in this context without looking at the relative status and causes advanced by the opposing litigants.

In his dissenting judgment in the Full Bench appeal, Poswa J examined the trend in other jurisdictions of distinguishing between public interest litigants and truly private litigants driven by profit motives, when using costs awards to encourage public interest litigation.[81] He referred to the Canadian case of *Mahar v Rodgers Cable Systems Ltd*,[82] in which the following is stated:

> [W]hile the targets of public interest litigation are certainly entitled to the protection of the rules of court it should not be forgotten that those rules include a discretion to relieve the loser of the burden of paying the winner's party and party cost.…[P]ublic interest litigants are in a different position than parties involved in ordinary civil proceedings. The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interest. (Emphasis added)

Similarly, the means of the litigant is a factor in determining costs, where the litigant is acting in the public interest. In *British Columbia (Minister of Forests) v Okanjan Indian Band*[83], the following is stated:

> [A]ccess to justice is a relevant factor in determining costs. This has become of increasing importance as public interest litigation has increased. In matters where individuals of limited means seek to enforce constitutional rights, the courts often exercise their discretion on the matter of costs so as to avoid the harshness that would result from following the traditional rules (costs follow the result). This ensures that members of the public have access to the courts where they seek to resolve matters of interest to the community at large (i.e. public interest matters). (Emphasis added)

Poswa J also undertook a review of South African Courts and found that they follow the international trend of not awarding costs against applicants in public interest litigation.[84] He referred with approval to *The Institute for Democracy in South Africa v African National Congress*[85] in which this approach is applied to litigation between private litigants.[86] The applicant (IDASA) sought access to records of donations over R500 000 made to various political parties. Accepting that the applicant was acting in the public interest, Griesel J held that a uniformly applied principle in litigation between the state and a public interest litigant is that litigants who litigate to test a constitutional law usually seek to ventilate important constitutional issues and should not be discouraged by the risk of an adverse costs order if they are unsuccessful. He found that the same principles should apply between private litigants where a party litigates for public purposes and in the public interest and accordingly he declined to make any costs order.[87] This approach clearly requires the court to make a finding on the relative causes advanced by litigants, something that Justice Sachs urges us not to do. The alternative is to make no costs awards – an approach that will leave public interest litigants unable to replenish their war chests when they succeed in constitutional litigation against private parties. Give the significant role played by public interest organisations in promoting constitutional litigation, dodging the question of costs orders in the realm of litigation between private parties does not seem destined to promote the advancement of constitutional justice.

7

CONCLUSIONS

The *Biowatch* case is a victory on many levels.

From a practical perspective, Biowatch obtained access to important records that, although out of date, revealed material shortcomings in the regulatory system for GM crops and informed the organisation's further advocacy strategies.

In relation to regulatory matters, the High Court judgment sent an unequivocal message to the Directorate of Genetic Resources that the public has a right to know how GMOs are regulated and that shrouding decisions in secrecy is not tolerated by South African courts. It also emphasised the Registrar's role in promoting access to information, a duty echoed by the Constitutional Court.

The Constitutional Court judgment went even further, placing the duty to advance all constitutional rights squarely at the state's door. The finding that private litigants are shielded from adverse costs orders in constitutional litigation against the state is a huge financial incentive to the state to ensure that its conduct and legislation are consistent with the Constitution. It demonstrates the commitment of the Court to promoting the ventilation of constitutional rights, regardless of whether the private litigant acts in the public interest or out of narrow profit motives. What remains unclear is how these principles find application in the less frequently occurring but no less important realm of constitutional litigation between private litigants.

In a significant move, the Constitutional Court found that whenever a lower court fails to consider expressly the constitutional dimension in making a costs award and, specifically, the impact that the award will have on the advancement of constitutional justice, then that will always constitute a misdirection justifying an appellate court to reconsider the decision. The judgment sends a clear signal to the lower courts in relation to all matters before them that have a "constitutional dimension". Hopefully, it will ensure that no other organisation is compelled to wage a similar battle to that undertaken by Biowatch.

ENDNOTES

1. Reported as *Biowatch Trust v Registrar: Genetic Resources and Others* 2009 (6) SA 232 (CC).
2. As conveyed to Biowatch in interviews with Alison Tilley, Director of the Open Democracy Advice Centre (ODAC) and Melissa Fourie, Director of the Centre for Environmental Rights (CER).
3. Kotzé, L. and Feris, L. "*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" (2009) 18 RECIEL 338 at 345.
4. Then the Transvaal Provincial Division. *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others* Case number A831/2005, North Gauteng High Court, Pretoria, 6 November 2007, unreported. Judgment was handed down by Mynhardt J with Molopa J assenting and Poswa J dissenting.
5. The dissenting judgment of Justice Poswa sitting in the North Gauteng High Court (Full Bench) appeal. *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others* Case number A831/2005, North Gauteng High Court, Pretoria, 5 May 2008, unreported.
6. Biodiversity is a composite word derived from the term "biological diversity". Article 2 of the Convention on Biological Diversity defines *biological diversity* as "the variability among living organisms from all sources including, *inter alia,* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems."
7. The convention came into force on 29 December 1993. South Africa was one of the original signatories to the convention in 1993 and became a party to the convention on 2 November 1995.
8. Wynberg, R.P. 2002. A decade of biodiversity conservation and use in South Africa: tracking progress from the Rio Earth Summit to the Johannesburg World Summit on Sustainable Development. *South African Journal of Science 98* May/June: 233-243.
9. The environmental impacts of genetically modified crops are serious, irreversible, and can include 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.
10. Act 15 of 1997, which took effect in 1999, and the "Regulations under Genetically Modified Organisms Act, 15 of 1997" (published in GN R1420 in *Government Gazette 20643* of 26 November 1999). This constitutes the primary South African regulatory regime for GMOs. The National Environmental Management Act 107 of 1998 and the National Environmental Management: Biodiversity Act 8 of 2004 both regulate genetic modification and GMOs to a lesser extent. See Eastwood, J. and Pschorn-Strauss, E. "The Genetically Modified Organisms Act: Paying Lip Service to Public Participation Sows Seeds of Dissent" (2005) 12 *South African Journal of Environmental Law and Policy* 123 at 132-133 for a discussion of those provisions.
11. Section 24 of the Constitution of South Africa, 1996 states in part that: Everyone has the right – to an environment that is not harmful to their health or well-being.
12. Two requests were addressed to officials in the Genetic Resources Directorate, and one to an official within the Ministry of Agriculture.
13. Extract from fax dated 23 August 2000 sent by Biowatch representative Ms Christine Jardine to the Registrar, quoted at paragraph [19](b) of Dunn AJ's judgment in the High Court (note 21).
14. For example, one of the catch-all requests was "Copies of all internal, interdepartmental, interstate departmental and/or external letters, telefaxes, e-mails, circulars, memoranda and similar documents which relate to the development, production, use and application of GMOs."
15. Act 2 of 2000. PAIA was promulgated on 2 February 2000 (the date on which the President assented to the Act) and took effect on 9 March 2001, being the date proclaimed by the President in Proclamation 20, in *Government Gazette 22125* of 9 March 2001.
16. An advocate at the Cape Bar instructed by a private legal firm contracted to work for a reduced fee.
17. Constitution Act, 1996.

18. The general limitations clause, contained in section 36 of the Constitution, only permits reasonable and justifiable limitations of constitutional rights and requires a balancing of the right against the purpose of the limitation and a consideration of less restrictive means to achieve that purpose. Section 32 states that:

    (1) Everyone has the right of access to –
    any information held by the state; and
    any information that is held by another person and that 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.

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

20. PAIA commenced on 9 March 2001. See note 15.

21. See paragraphs 29-30 of the *Biowatch* High Court judgment (note 19) for findings on the non-retrospective application of PAIA and paragraph 32 for findings on the inapplicability of appeal remedies under PAIA.

22. Acting Justice Dunn rejected the argument that section 19 of the Genetically Modified Organisms Act automatically barred Biowatch from recourse to the courts until it had lodged an internal appeal under section 19, against the decision of the Registrar. See paragraph 38 of the *Biowatch* High Court judgment (note 19).

23. Paragraph 66 of the *Biowatch* High Court judgment (note 19).

24. Chapter 4 part 2 of PAIA. Paragraph 69(b) of the *Biowatch* High Court judgment (note 19).

25. Paragraph 69(c) of the *Biowatch* High Court judgment (note 19).

26. Paragraph 42: "Unfortunately Biowatch also did not engage in the task of specifying in its notice of motion the precise list of information it seeks access to." And see paragraph 68 of the *Biowatch* High Court judgment (note 19).

27. Paragraphs 42 and 68 of the *Biowatch* High Court judgment (note 19).

28. The eight categories of information are: (1) all data relating to risk assessments accompanying applications under the GMO Act for trial or commercial release of GMOs; (2) all applications for permits and other authorizations submitted under the Act; (3) details of permits granted; (4) details of public participation in relation to applications since the Act commenced; (5) the register of academic and research institutions for specified years; (6) minutes of meetings of the decision-making bodies (Executive Council and Advisory Committee); (7) records of all persons on the Advisory Committee, including confirmation of the public sector appointees; and full details (excluding exact co-ordinates) of the areas for trial and commercial releases of GMOs.

29. Wynberg, R. and Fig, D. (2011) Realising environmental rights in South Africa. In: Symbols or Substance? Socio-Economic Rights Strategies in South Africa. Edited by M. Langford, B. Cousins, J. Dugard and T. Madlingozi. Cambridge: Cambridge University Press. In press.

30. Wynberg and Fig (note 29).

31. Section 18 of the Genetically Modified Organisms Act states:
    18 (1) No person shall disclose any information acquired by him or her through the exercise of his or her powers or the performance of his or her duties in terms of this Act, except –
    (a) in so far as it is necessary for the proper application of the provisions of this Act;
    (b) for the purposes of any legal proceedings under this Act;
    (c) when ordered to do so by any competent court; or
    (d) if he or she is authorised to do so by the Minister. (Emphasis added)

32. At paragraph 37 of the *Biowatch* High Court judgment (note 19), footnotes omitted.

33. Paragraphs 43 and 66 of the *Biowatch* Constitutional Court judgment (note 1).

34. Paragraph 44 of the *Biowatch* Constitutional Court judgment (note 1).

35. Humby, T. "The *Biowatch* Case: Major Advance in South African Law of Costs and Access to Environmental Justice" (2010) 22:1 *Journal of Environmental Law* 125 at 134.

36. At paragraph 28 of the majority judgment in the *Biowatch* High Court Appeal (note 4), Mynhardt J states: "If regard is had to the opposing views held by Biowatch and Monsanto about the confidentiality of Monsanto's information, I do not think that it could reasonably have been expected of Monsanto at any stage of the proceedings to have engaged either the statutory respondents or Biowatch to assist any of them in identifying the information it claimed to be confidential."
37. In the final paragraph 69(e) of his order, Dunn AJ refers to the fact that Pannar voluntarily made information available to Biowatch by agreement and therefore the order does not require the first to third respondents to make available to Biowatch information pertaining to applications submitted by Pannar.
38. The dissenting judgment of Poswa J in the *Biowatch* High Court Appeal (note 5) at paragraph 84.
39. Supreme Court Act 59 of 1959.
40. Paragraph 23 of the majority judgment in the *Biowatch* High Court Appeal (note 4).
41. Paragraph 11 of the *Biowatch* Constitutional Court judgment (note 1).
42. Paragraph 11 of the *Biowatch* Constitutional Court judgment (note 1).
43. Paragraph 12 of the *Biowatch* Constitutional Court judgment (note 1).
44. Paragraphs 12 and 13 of the *Biowatch* Constitutional Court judgment (note 1).
45. *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC).
46. *Biowatch* Constitutional Court judgment (note 1) at paragraphs 7-8.
47. *Ferreira v Levin* (note 45) at paragraph 3.
48. *Biowatch* Constitutional Court judgment (note 1) at paragraph 16.
49. *Biowatch* Constitutional Court judgment (note 1) at paragraphs 19 and 20.
50. *Biowatch* Constitutional Court judgment (note 1) at paragraph 20.
51. *Biowatch* Constitutional Court judgment (note 1) at paragraph 18.
52. *Biowatch* Constitutional Court judgment (note 1) at paragraph 20.
53. *Biowatch* Constitutional Court judgment (note 1) at paragraph 17.
54. *Biowatch* Constitutional Court judgment (note 1) at paragraphs 16 and 20.
55. *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).
56. *Biowatch* Constitutional Court judgment (note 1) at paragraph 22.
57. *Biowatch* Constitutional Court judgment (note 1) at paragraph 25.
58. *Biowatch* Constitutional Court judgment (note 1) at paragraph 23.
59. *Biowatch* Constitutional Court judgment (note 1) at paragraph 24.
60. *Biowatch* Constitutional Court judgment (note 1) at paragraph 28.
61. *Biowatch* Constitutional Court judgment (note 1) at paragraph 28.
62. *Biowatch* Constitutional Court judgment (note 1) at paragraph 28.
63. The general rule on costs in litigation between the state and a private party is that if the state loses it should bear the victor's costs and if the state wins, each party should pay its own costs. There should be no costs order as between the private parties.
64. *Biowatch* Constitutional Court judgment (note 1) at paragraph 29.
65. *Biowatch* Constitutional Court judgment (note 1) at paragraph 41.
66. *Biowatch* Constitutional Court judgment (note 1) at paragraph 42.
67. Majority judgment in the *Biowatch* High Court Appeal (note 4) at paragraph 33.
68. Majority judgment in the *Biowatch* High Court Appeal (note 4) at paragraph 34.

69. Majority judgment in the *Biowatch* High Court Appeal (note 4) at paragraphs 26 and 36.

70. *Biowatch* Constitutional Court judgment (note 1) at paragraph 43.

71. *Biowatch* Constitutional Court judgment (note 1) at paragraph 43.

72. *Biowatch* Constitutional Court judgment (note 1) at paragraph 44.

73. *Biowatch* Constitutional Court judgment (note 1) at paragraph 47.

74. *Biowatch* Constitutional Court judgment (note 1) at paragraph 59.

75. *Biowatch* Constitutional Court judgment (note 1) at paragraphs 57-58.

76. *Biowatch* Constitutional Court judgment (note 1) at paragraph 54.

77. *Biowatch* Constitutional Court judgment (note 1) at paragraph 56.

78. See discussion headed: "Existing principles of costs awards formulated by the Constitutional Court".

79. Section 26(1) and (3) of the Constitution (note 17).

80. *Kotzé and Feris* (note 3) at 345.

81. Paragraph 53 of the dissenting judgment of Poswa J in the *Biowatch* High Court Appeal (note 5).

82. (1995) 25 OR (3d) 690 (GD) at 703b.

83. (2003) 3 S.C.R (SCC) at paragraphs 27 and 28.

84. Paragraphs 61 and 66 of the dissenting judgment of Poswa J in the *Biowatch* High Court Appeal (note 5). At paragraph 61, Poswa J quotes with approval from the Land Claims Court judgment in *Hlatshwayo v Hein* 1999 (2) SA 834 (LCC) at para 18: "our law recognises that in the exercise of its discretion relating to costs a court may deprive a successful party of his or her costs and the trend, in the Constitutional Court at least, appears to be in the direction of recognising public interest litigation cases as one of those circumstances where it may be appropriate to do so." (Emphasis added)

85. *The Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 ("IDASA").

86. *IDASA* (note 85) at paragraphs 60-62.

87. *IDASA* (note 85) at paragraph 60.

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