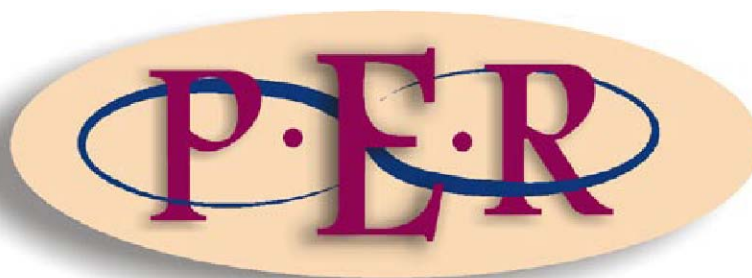

**REFLECTIONS ON THE BIOWATCH DISPUTE – REVIEWING THE FUNDAMENTAL
RULES ON COSTS IN THE LIGHT OF THE NEEDS OF CONSTITUTIONAL AND/OR
PUBLIC INTEREST LITIGATION**

ISSN 1727-3781



2009 VOLUME 1

REFLECTIONS ON THE BIOWATCH DISPUTE – REVIEWING THE FUNDAMENTAL RULES ON COSTS IN THE LIGHT OF THE NEEDS OF CONSTITUTIONAL AND/OR PUBLIC INTEREST LITIGATION

T Humby*

1 Introduction

This article is concerned with the application of the "fundamental rules"¹ governing the awards of costs to litigation of a constitutional and/or public interest character.² My interest in this topic arose from the decision on costs in *Trustees, Biowatch Trust v Registrar: Genetic Resources (Biowatch I)*³ and the subsequent appeal on this issue in *Trustees of the time being of the Biowatch Trust v Registrar, Genetic Resources (Biowatch II)*⁴ in which Mynhardt J

* Senior Lecturer, School of Law, University of the Witwatersrand, South Africa. Email: Tracy-Lynn-Field@wits.ac.za.

1 A term used in Cilliers *Law of Costs*, arguably the most authoritative work on costs in South Africa.

2 As my use of the sign 'and/or' implies, I am of the view that 'public interest' litigation could be coextensive with constitutional litigation, or not. Of course, at a certain level all constitutional litigation is in the public interest, but not all litigants who raise a constitutional issue are acting chiefly with the public interest in mind, but may rather be seeking to advance their own commercial or private interests – the reliance on the environmental right in the Constitution by the Fuel Retailers' Association in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) is a case in point. The question as to what constitutes a "public interest matter" or the criteria by which one determines that a party is acting in the "public interest" is a difficult one (as the arguments put forward in the *Biowatch* matter attest) that merits further elaboration. For the purposes of this article I can suggest a definition that emerged from a consultation process around the English Access to Justice Act, viz: "The potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question)". See Lord Justice Brooke 2006 *JEL* 348. This definition, further, resonates with the Constitutional Court's observation in *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC), 2006 (6) BCLR 682, where the court noted that while the applicant is the "immediate beneficiary of the outcome of the case; ... it is also true that there are similarly situated people who are not before us. The outcome of this litigation has a wide reach and is clearly in the public interest" (par 78).

3 2005 (4) SA 111 (T).

4 TPD Case No A831/2005 unreported.

delivered the majority judgment (in which Molopa J concurred)⁵ and Poswa J the minority judgment.⁶ An appeal against the decision of the majority has since been lodged by Biowatch with the Constitutional Court.⁷

My main argument is that the fundamental rules governing costs awards are not sufficient to meet new needs which arise in constitutional and/or public interest litigation, as the *Biowatch* matter illustrates, and that aspects of these rules need to be reframed in the light of the value framework established by the Constitution. While one of the primary issues in the *Biowatch* matter is ostensibly whether the courts' approach to costs in constitutional litigation should be characterised as a "trend" or a "rule",⁸ my view is that the real issue is the appropriateness to constitutional and/or public interest litigation of the complex of existing rules that vest a discretion to award costs in the presiding officer, that articulate the standards by which that discretion must be exercised, and that prescribe the circumstances under which a higher court may interfere in that discretion.

Section 2 below outlines the content and provenance of the fundamental rules that form the focus of the discussion, while Section 3 considers how they have been applied in the jurisprudence of the Constitutional Court to date. Section 4 subsequently looks at how these rules were applied in the *Biowatch* matter, both in the court *a quo* and on appeal. In Section 5 I set out my reasons for holding that in the case of constitutional and/or public interest litigation these

5 Handed down on 6 November 2007. See *Trustees for the time being of The Biowatch Trust v Registrar Genetic Resources* (A831/2005) [2007] ZAGPHC 270 www.saflii.org/za/cases/ZAGPHC/toc-T.html.

6 Handed down on 13 May 2008. See *Trustees of the time being of the Biowatch Trust v Registrar Genetic Resources (Open Democracy Advice Centre as Amicus Curiae)* (A831/2005) [2008] ZAGPHC 135 www.saflii.org/za/cases/ZAGPHC/toc-T.html.

7 During the process of peer review, the question was raised if it would not make more 'sense' for this article to be written after the Constitutional Court judgment in the case. This view seems to assume that the role of the academic lawyer is confined to analysis, consolidation and clarification of settled law. While these are certainly important functions, I believe that the academic lawyer should also seek to be at the vanguard of current legal developments and to participate in the debates which these raise. The judgment of the Constitutional Court, whilst the final authority in our legal system, is not necessarily the final or only authority in the world of ideas.

8 *Biowatch II* (Minority) par 92.

fundamental rules are not "fit for purpose" and set out some suggestions for their possible reformulation within a constitutional value framework.

The issue at the heart of this paper – the question of legal costs in relation to access to justice – is not unique to South Africa. In this article, however, I eschew a comparative analysis of other jurisdictions as I believe it is important to provide a qualitative, in-depth analysis of how and why the rules and principles governing the judicial discretion to award costs were applied with such different outcomes in the decisions of the *Biowatch* matter. My aim, here, is to articulate the assumptions and values underlying the exercise of the discretion, and to question whether or not these are in line with constitutional values.⁹

2 Fundamental Rules Governing Costs

For the purposes of this article, the complex of rules governing costs comprises four dimensions: (1) the traditional principles applicable to costs orders (the first of which is that an award of costs is in the discretion of the court of first instance) and their relationship; (2) the requirement that the court's discretion be exercised judicially; (3) the test for interference in the discretion of the court *a quo*; and (4), closely related to this, the characterisation of the nature of the judicial discretion to award costs in both the court *a quo* and court of appeal and the underlying rationale thereof. A closer examination of the rules and principles within each area is required.

9 For a comparative analysis of costs in relation to access to courts in the United States, United Kingdom and Germany see Hirte 1991 *ICLQ* 91. For a recent consideration of the issue in the context of environmental litigation see Working Group on Access to Environmental Justice 2008 *JPEL* 1253. For a fairly comprehensive comparative overview of the treatment of costs in public interest litigation see also *Biowatch II* (Minority) par 43-53.

2.1 *Two principles and their relationship*

The two principles which have governed costs orders in South African law since the earliest time¹⁰ are, firstly, that the court of first instance has a judicial discretion to award costs and secondly, that costs follow the event in that the successful party is usually awarded costs. Cilliers refers to these principles as the "basic rule" and "general rule" respectively,¹¹ but following the nomenclature used in the *Biowatch* cases I will refer to them as the first and second principle.

As Cilliers himself concedes, these principles exist in a "curious" relationship. Lying at the heart of this curious relationship is the paradox of holding that a judicial officer of first instance has the discretion to make a costs award whilst at the same time apparently prescribing how that discretion should be exercised. The tension has been managed in two ways. Firstly, there is an extensive body of precedent in support of the rule that the second principle yields to the first.¹² As a result, the nature of the judicial discretion in the court *quo* has been described as "very wide"¹³ or "overriding".¹⁴ However, it is not surprising to find judicial officers then maintaining that the discretion is wide and *unfettered*¹⁵ although there is also a large body of case law maintaining that the discretion is not unfettered.^{16 17}

10 See for instance Lord De Villiers CJ's opening remarks in *Fripp v Gibbon* 1913 AD 354, 357.

11 Cilliers (n 1) § 2.01. For case law citing the basic rule or first principle see Cilliers (n 1) § 2.03 note 1, and for the second principle § 2.08 note 1. On the relationship between the first and second principles see § 2.05.

12 *Ibid* § 2.03 note 4.

13 *K & S Dry Cleaning Equipment v South African Eagle Insurance* 2001 (3) SA 652 (W) at 668G.

14 *Griffiths v Mutual & Federal Insurance* 1994 (1) SA 535 (A).

15 As per Mynhardt J in *Biowatch II* (Majority) par 21.

16 Cilliers (n 1) § 2.04 note 6. The cases noted by Cilliers as *contra* in fact affirm that the discretion is not unfettered.

17 This tension was already evident in the very early decision of *Fripp v Gibbon* where De Villiers JP had held: "Discretion implies latitude, and it cannot affect the matter that the members of this Court, or some of them, might have arrived at a different conclusion ... [I]n my view it is undesirable to lay down any hard and fast rules for the guidance of magistrates to which they will be expected to conform in the absence of exceptional circumstances. Where the law has given the magistrate *absolute discretion, free and unfettered by any rules*, it is not for the Court to lay down rules which, while purporting to guide him, will only have the effect of fettering his discretion" (n 10 above at 363-364, my emphasis). In the same matter, Lord de Villiers CJ held that "[t]he discretion of such Court,

The second approach towards reconciling the two principles was put forward in *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd*¹⁸ where Murray CJ proposed that where the first principle must be exercised "upon grounds which a reasonable man could have come to the conclusion arrived at", the second principle should not be departed from "without the existence of good grounds for doing so".¹⁹ The judge did not put forward any other criteria by which to evaluate "good grounds", although his statement is authority for the proposition that a departure from the second principle must be justified. The question of who is the successful party in a case, a question that is not without considerable complexity at times, is therefore primarily relevant for determining if there has been a departure from the second principle. Apart from the "good grounds" referred to by Murray CJ there are many High Court decisions in which it was held that a judge may depart from the second principle only if "special circumstances" are present.²⁰ Because these precedents have not emanated from the Appellate Division or Supreme Court of Appeal, however, the standard of accountability that applies where a judge departs from the second principle is not clearly specified in our law.

Further, given that the larger body of authority sits behind the rule that the second principle yields to the first, the proposition that ultimately emerges is that costs are in the judicial discretion of the judge of first instance. Even if the courts' present approach to costs in constitutional and/or public interest matters was acknowledged as a new, third principle of the same status as the second principle, it would not trump the first principle but would rather have to yield to it, if the current understanding of the relationship between the first and second principle is retained.

therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs" (*Ibid* 357-358). And Solomon JA, noting the 'rule' towards the award of costs in claims of convention and reconvention in the Transvaal and English courts, stated: "That rule, however, is not a rigid one, but may be departed from in special circumstances. And it is only, in my opinion, where there are such special circumstances, that there is room for the exercise of any discretion by the judge or magistrate" (*Ibid* 360-361).

18 1957 (4) SA 225 (SR).

19 *Ibid* at 227B–D.

20 Cilliers (n 1) § 2.08 note 2.

2.2 *Judicial exercise of discretion*

The most frequently employed descriptor of the nature of the discretion is that it must be exercised "judicially" which essentially means "not arbitrarily".²¹ In *Fripp v Gibbon* De Villiers JP held that "[The presiding officer] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties".²² The judicial exercise of a discretion thus entails taking into account circumstances "which may have a bearing upon the question of costs" (although no parameters for identifying relevant from irrelevant circumstances are established) and trying to act in a manner that is fair to both sides.

2.3 *Test for interference in the discretion of the court a quo*

The test for interference in the discretion of the court *a quo* was foreshadowed in the *dictum* of De Villiers JP in *Fripp v Gibbon* where he held that if the presiding officer indeed weighs all issues in the case and makes an order as to costs that is fair and just between the parties "and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion".²³

The most recent formulation of the test which subsequently crystallised²⁴ occurred in *Naylor & another v Jansen*²⁵ (commonly known as *Naylor II*) where Cloete JA held:

Where the law has given a Judge an unfettered discretion, it is not for this Court to lay down rules which, while purporting to guide the Judge, will have the effect only of fettering the discretion. If, therefore, there are factors which the trial Court, in the exercise of its discretion does decide to take into account so as to reach a different

21 Cilliers (n 1) § 2.04 note 3.

22 N 10 above 363.

23 *Ibid* at 363.

24 See, for instance, *Penny v Walker* 1936 AD 241 at 260; *Rondalia Assurance Corporation of SA v Page* 1975 (1) SA 708 (A) at 720C; *Protea Assurance v Matinise* 1978 (1) SA 963 (A) at 976 G–H; *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) 815-816 and *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670D–F.

25 2007 (1) SA 16 (SCA).

result, a Court of appeal is not entitled to interfere – even although it may or probably would have given a different order. The reason is that the discretion exercised by the Court's giving the order is not a "broad discretion" (or a "discretion in the wide sense" or a "discretion loosely so called") which obliges the Court of first instance to have regard to a number of features in coming to its conclusion, and where a Court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the Court below, simply because it considers its conclusion more appropriate. The discretion is a discretion in the strict or narrow sense (also called a "strong" or a "true" discretion). In such a case, the power to interfere on appeal is limited to cases in which it is found that the Court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the Court of first instance exercised the power conferred upon it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.²⁶

Further on in the judgment Cloete J emphasised that there is no "normal rule" applicable to the exercise of a discretion by a trial judge to award costs. The fact that a judge follows a particular approach to the award of costs creates no precedent binding on judges called upon to exercise such a discretion in exactly the same set of circumstances in future. The exercise of a narrow discretion involves a "choice between permissible alternatives" and, therefore "different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts".²⁷

2.4 The characterisation of the discretion

The distinction between a "broad" and a "narrow" judicial discretion which Cloete J recalled in *Naylor II* is a deeply-rooted feature of the law governing the relationship between appeal courts and courts of first instance and is one that is not confined to the question of costs. In *Tjospomie Boerdery (Pty) Ltd v Drakensburg Botteliers (Pty) Ltd*²⁸ Stegmann J traced the differences between, and casuistic development of, the two types of discretion. The issue at hand in the *Tjospomie* case was whether an order made by the court of first instance for the winding-up of a company was "just and equitable" as contemplated in section 344 (h) of the *Companies Act* 61 of 1973 and one of the first legal issues that arose was the nature of the appeal in the case. The court had been referred to two apparently antithetical precedents: *Mahomed v Kazi's Agencies*

²⁶ *Naylor II* par 14.

²⁷ *Naylor II* par 28, quoting *Ganes v Telecom Namibia* 2004 (3) SA 615 (SCA) par 21.

²⁸ 1989 (4) SA 31 (T), [1989] 4 All SA 228.

(Pty) Ltd,²⁹ in which it had been held that an appeal court's power under a similar provision of the *Companies Act* of 1926 was one in which a court of appeal was in as good a position as the court below to exercise the discretion anew; and *Ex Parte Neethling*,³⁰ in which the discretion exercisable under section 87 of the *Administration of Estates Act* 24 of 1913 was characterised as one where its function was not simply to substitute its discretion for that of the court below, but rather to consider the prior question whether the court below had or had not exercised its discretion judicially. Stegmann J held that there was in fact no essential antithesis between these two cases and that a correct statement of the law was as follows: Courts are called upon to exercise discretions which vary infinitely in their nature and it is impossible to formulate a general principle to govern all cases where the exercise of a discretion by a court is brought on appeal.³¹ There is therefore no general principle to the effect that a court of appeal is always precluded from substituting its own decision for that of the trial court unless the latter can be shown to have been vitiated by a failure to exercise the discretion judicially. Rather, the question is to be approached casuistically and "there are particular categories of cases in which interference by a court of appeal with the exercise of a discretionary power by a court below is conditional upon the appellant's establishing a failure on the part of the court below to exercise the discretion judicially".³² Although it is merely a technical point, it should be noted that in the case of the law of costs, the discretion is therefore wide on the part of the presiding officer, whilst the discretion to interfere in that discretion on the part of an appeal court is narrow.

According to Greenberg JA in *Ex Parte Neethling*, the question of costs (together with postponements, an amendment of pleadings and alteration of sentence) had previously been held to fall within this category of cases.³³ Dealing with the contention that the courts' approach in such cases reduced the

29 1949 (1) SA 1162 (N).

30 1951 (4) SA 331 (A).

31 *Tjospomie* (n 28) at 35I.

32 *Ibid* at 35G–H.

33 *Ex Parte Neethling* (n 30) at 335D–E. In *Tjospomie* (note 26 above) Stegmann J lists matters which were subsequently decided to fall within this category of cases at 37F–I.

right of appeal to that of a review, Greenberg JA held that "the true position is that there is a right of appeal but in cases of this kind the Appeal Court, because of the nature of the case, has only a limited power of correction".³⁴

The identification of the question of costs with this category of cases took place in *Rex v Zackey*³⁵ where Greenberg JA had referred to, in particular, De Villiers JP's *dicta* in *Fripp v Gibbon*.³⁶ Here De Villiers' JP had held that "[q]uestions of costs are always important and sometimes complex and difficult to determine, and in leaving the magistrate a discretion the law contemplates that he should take into consideration the circumstances of each case ...".³⁷ The underlying rationale for characterising the question of costs in this manner is implied in this statement but stated more explicitly in *Neugebauer & Co Ltd v Herman*³⁸ where Innes CJ, in refusing to make a special order as to costs, said that "The matter was one with which [the presiding officer] was in the best position to deal".³⁹ It is because the judge of first instance sits at the coalface of the dispute and experiences the complexities of the suit and the conduct of the parties (and where relevant their witnesses at first hand) that he or she is best positioned to make a fair order as to costs.

3 Constitutional Court's Application of the Fundamental Rules to Constitutional Litigation⁴⁰

The Constitutional Court had occasion in *Ferreira v Levin NO (2)*⁴¹ to consider the application of the traditional principles relating to the award of costs to constitutional litigation. Here Ackermann J stated:

The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs,

34 *Ex Parte Neethling* note 30 above at 335 G–H.

35 1945 AD 505 at 513.

36 N 10 above.

37 *Ibid* 363.

38 1923 AD 564.

39 *Ibid* at 575.

40 See, in general, Friedman "Costs" ch 6.

41 1996 (2) SA 61 (CC), 1996 (4) BCLR 441.

unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.⁴²

The overriding import of this pronouncement is to uphold the primacy of the first principle – the judicial discretion to award costs – without binding that discretion in any way. Thus although the second principle is recognised, it is subject to the first. Further, the reasons upon which a judge may depart from the second principle are, seemingly, not subject to any moral order; i.e. a reason relating to the conduct of the parties is just as good as one relating to the nature of the litigants or the nature of the proceedings. Ackermann's reluctance to formulate "comprehensive rules" that would impede the casuistic development of the traditional principles on costs in the context of constitutional litigation is perhaps understandable, however, given that this case was heard very near the start of the Constitutional Court's existence.

Over time, the Constitutional Court has developed a fairly consistent position on the award of costs in constitutional litigation. For instance, where the applicant – the individual or entity contending for the protection of constitutional rights – is successful, costs follow the result. Where, however, the respondent is successful, a government entity will not receive its costs if the applicant raised an important constitutional issue against it. In *Motsepe v Commissioner for Inland Affairs*⁴³ Ackermann J stated that "one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked,

42 *Ibid* par 3.

43 1997 (2) SA 898 (CC), 1997 (6) BCLR 692.

lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category".⁴⁴ ⁴⁵ On certain occasions, the court has extended this particular "principle" to costs orders in which the respondents were private companies.⁴⁶

Moving a step beyond a refusal to mulct an unsuccessful party with costs, in certain exceptional circumstances the Constitutional Court has even ordered the state or state institutions to pay the costs of unsuccessful parties, simply on the basis that the unsuccessful parties raised important constitutional issues⁴⁷ or on the basis that mulcting the unsuccessful party with costs would undermine another important objective.⁴⁸

The problem with these "principles" for the potential constitutional litigant, however, is their very flexibility, because there have also been cases in which the Constitutional Court has *not* refrained from making a costs order against litigants who unsuccessfully sought to ventilate a constitutional issue – the *Motsepe* case being one in point. Here Ackermann had continued as follows:

44 *Ibid* par 30.

45 Friedman (n 40) 6–2 with particular reference to the case-law quoted in note 6. See also *Steenkamp v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 par 62, *Armbruster v Minister of Finance* 2007 (6) SA 550 (CC), 2007 (12) BCLR 1283 par 82, *Chirwa v Transnet* 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 par 78. Interestingly in *MEC: Department of Agriculture, Conservation and Environment v HTF Developers* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 the applicant department tendered the costs of the appeal, which raised an important interpretive issue that required resolution, irrespective of the outcome (par 55).

46 *Ibid* 6-2–6-3 with reference to *SACCAWU v Irvin & Johnson (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC). See also *Giddey v JC Barnard* 2007 (5) SA 525 (CC), 2007(2) BCLR 125 par 35.

47 *Gory v Kolver (Starke intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 par 65, *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC), 2007 (4) BCLR 339.

48 See *MEC for Education: KwaZulu Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute* 2008 (2) BCLR 99 (CC) where the court found that while the school, as one of the appellants, had been unsuccessful, it had been at the centre of a difficult constitutional issue and had played an important role in ventilating a constitutional issue. Moreover, if ordered to pay the costs of the respondents, the funds would be diverted from being otherwise spent on learners. As such, the Department was required to bear the full burden of costs towards the respondents (par 118).

This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.⁴⁹

Notwithstanding that the overwhelming majority of the Constitutional Court's decisions affirm the principle that a party who raises an important constitutional issue but is unsuccessful should not be mulcted in costs, a precedent like *Motsepe* indicates that, ultimately, the decision still lies squarely with the presiding officer, who is not bound to follow this principle; i.e. the "constitutional principle", if you like, stands in a similar relationship to the first principle on costs as does the second principle. Further, the Constitutional Court has not expressly indicated the formal or substantive criteria that should apply when a judge departs from the "constitutional principle".

So far, I have looked at costs granted by the Constitutional Courts in proceedings before it. What of its position on costs orders made by the Supreme Court of Appeal or High Courts? The Constitutional Court has affirmed the traditional test for interference⁵⁰ and, where it has found that the court misdirected itself, has interfered in the costs order.⁵¹ Where it has done this, it has also implicitly accepted the characterisation of costs issues as narrow in the court of appeal.⁵² However, beginning with *Sanderson v Attorney-General, Eastern Cape*⁵³ and subsequently in *ANC v Minister of Local Government and Housing, KwaZulu-Natal*,⁵⁴ *Van der Merwe Road Accident Fund*,⁵⁵ *Department of Land Affairs v Goedgeleden Tropical Fruits (Pty) Ltd*,⁵⁶

49 *Motsepe* (n 43) par 30.

50 See the cases cited in Friedman (n 40) 6–9 note 5.

51 See *Swartbooi v Brink* 2006 (1) SA 203 (CC), 2006 (5) BCLR 502 (CC) where the Constitutional Court found that the High Court had failed to take into account legislation providing immunity to councilors from civil proceedings and had thus materially misdirected itself. The Constitutional Court was therefore free to consider the costs issue afresh (par 23) and in the event rejected the High Court's approach (par 25).

52 See also *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 par 53. For the affirmation of the characterisation in other contexts see Justice O'Regan's comments in *Giddey* (n 46) notes 16 and 17.

53 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 par 44.

54 1998 (3) SA 1 (CC), 1998 (4) BCLR 399 par 34.

55 N 2 above par 78.

Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg,⁵⁷ *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*⁵⁸ the Constitutional Court has indicated or simply implied that the principle that an unsuccessful party who raises an important constitutional issue should not be mulcted in costs applies equally to other courts and has interfered in costs orders made by the Supreme Court of Appeal or High Courts. Importantly, the Constitutional Court's interference in these costs orders was not dependant on a prior enquiry according to the traditional test for judicial interference and the justification given was usually simply a reference to the demands of justice and equity, if any justification was given at all. In the *Goedgelegen* case, the Constitutional Court for instance simply stated:

[T]he Supreme Court of Appeal ordered the claimants and the Department to pay costs jointly and severally including costs attendant upon the use of two counsel. The applicants have raised an important matter of land restitution and have succeeded in this Court. I can find no reason why this Court should not set aside the costs order of the Supreme Court of Appeal.⁵⁹

And in the *Olivia Road* case the court's words were:

This is an appropriate case in which the City should be ordered to pay the costs of the applicants. The proceedings would have been obviated if there had been meaningful engagement before the case had been started. In the circumstances the City should also pay the applicants' costs in the High Court and in the Supreme Court of Appeal.⁶⁰

It is notable that in these cases the Constitutional Court found no difficulty in setting aside the costs orders in the lower courts. No reference, for instance, was made to the traditional test for interference in these orders and no elaborated justification was given when interference actually took place. The Constitutional Court's boldness in setting aside these costs orders is commendable but the lack of an *account* weakens the jurisprudential basis of this development.

56 2007 (6) SA 199 (CC), 2007 (10) BCLR 1027 par 88.

57 2008 (4) SA 237 (CC), 2008 (5) BCLR 475 par 53.

58 2008 (4) SA 237 (CC), 2008 (6) BCLR 571. See the court's extensive justification for ordering that the provincial department pay all of the costs of the applicant in the High Court (both *a quo* and on appeal), the Supreme Court of Appeal and the Constitutional Court from par 61–91.

59 *Goedgelegen* case (n 56) par 88.

60 *Olivia Road* case (n 57) par 53.

While the Constitutional Court has not made an express pronouncement on the propriety of the reasons which may be put forward to justify costs orders, it is interesting to note that in *Swartbooï v Brink*⁶¹ the court found that the High Court's approach and purpose towards the costs order was improper because the costs order was apparently aimed at teaching the councilors involved in the litigation a lesson and attempting to influence the way in which they made similar decisions in future. It impinged upon the executive domain and thus on the separation of powers. This decision could therefore be used to justify the proposition that in making costs orders certain reasons could be improper or inappropriate in the light of the value framework established by the Constitution.

4 Costs issue in the *Biowatch* matter

4.1 Nature of the litigation

It is firstly important to note that the issues raised in *Biowatch I* were of a constitutional nature. The trustees of the Biowatch Trust brought an application for access to information relating to genetically-modified organisms (GMOs) held by the first respondent, being the Registrar: Genetic Resources; and the second respondent, being the Executive Council for Genetically Modified Organisms (the statutory respondents).⁶² The Minister of Agriculture had been joined as a third respondent, while the fourth to sixth respondents, being Monsanto South Africa (Pty) Ltd, Stoneville Pedigreed Seed Company and D&PL South Africa respectively, had intervened in the application at a later stage. The fourth to sixth respondents were all private biotechnology companies with varying levels of interest in the South African GMO market. The requests were made between the date that the *Promotion of Access to Information Act 2 of 2000 (PAIA)* was promulgated (2 February 2000), and the date it entered into force (9 March 2001).⁶³ In its application Biowatch therefore

61 N 51 above.

62 *Biowatch I* par 1.

63 Par 18.

relied not on PAIA but on section 32(1)(a) of the Constitution⁶⁴ together with the access to information provisions in NEMA (section 31(3)(c)(iii) and (v)) and the *Genetically Modified Organisms Act* 15 of 1997 (section 18).⁶⁵

Secondly, although this matter was placed in dispute by the respondents, all of the judges in the matter either accepted or concluded that *Biowatch* was indeed acting in the public interest.⁶⁶ In my view *Biowatch I* was clearly a public interest matter. Biowatch maintained that it sought access to information held by the State in order to further its objective of protecting the right of everyone to an environment that is not harmful to their health or well-being and to have the environment protected for present and future generations.⁶⁷ In particular, it sought this information in fulfilment of its role as a 'watchdog' in respect of the use, control and release of GMOs in South Africa. Its capacity to access and use the information sought therefore held potential benefits for consumers who were not before the court as well as for the environment, which factor accords with the Constitutional Court's description of public interest matter in the *Van der Merwe* case.⁶⁸

64 S 32(1) of the Constitution provides that "(1) Everyone has the right of access to- (a) any information held by the state; (b) any information that is held by another person and that is required for the exercise or protection of any rights."

65 Par 2.

66 On the issue of whether Biowatch had acted in the public interest, Mynhardt J in *Biowatch II* (Majority) had been prepared, like the court *a quo*, to "accept" that Biowatch had indeed acted in the public interest in instituting the proceedings (par 38). In contrast, Poswa J, after an exhaustive review of the founding affidavits and the respondents' responses, found that (*Biowatch II*, Minority, par 12): "[I]t is evident that the appellant was, in approaching the statutory respondents for information, actuated by genuine concerns about public interest. It is also important, in my view, to highlight that the fourth respondent [Monsanto] vehemently and relentlessly disputed that Biowatch was acting in the public interest ... I seek further to emphasise and illustrate that, unlike the court *a quo* and the majority judgment in this Court, I do not merely accept that the applicant acted in the public interest but find that it demonstrated that with convincing evidence. In my view, *the fact that the fourth respondent denied that the appellant was acting in the public interest is not a matter of mere observation. It went into great detail to support its submission in that regard. A finding that Biowatch has standing and is acting in the public interest is, in my view, a comprehensive success by Biowatch and a comprehensive loss by the fourth respondent*". (Judge's emphasis.)

67 The rights protected in s 24 of the Constitution.

68 See n 2 above.

4.2 *Success of the parties in the court a quo*

On the face of it, the merits of the case related to Biowatch's right to the information to which it sought access, and if the Registrar's failure to furnish such information constituted a continued infringement of Biowatch's rights under section 32(1)(a) of the Constitution. Much of the judgment, however, was concerned with the array of defences brought by the phalanx of lawyers representing the first to sixth respondents, which included:⁶⁹ (1) The applicability of PAIA to the matter together with Biowatch's failure to comply with such provisions (and a variety of sub-issues relating to this);⁷⁰ (2) Biowatch's failure to exhaust the internal appeal remedy in the *GMO Act*; (3) the alleged commercial confidentiality of the information sought by Biowatch; and (4) Biowatch's failure to articulate properly the information to which it sought access.

Dunn AJ in the court *a quo* summarised the outcome of the case in relation to these issues as follows:⁷¹

Biowatch has, in my view, established that it has a clear right to *some* of the information to which access was and is now requested; that the Registrar's failure to grant it access to such information as it was legally entitled to, constituted a continued infringement of Biowatch's rights under section 32(1)(a) of the Constitution; that Biowatch had no alternative remedy to enforce its rights; that Biowatch should not be non-suited for the inept manner in which the information sought in its fourth request, as well as in its notice of motion, is formulated, and that the Registrar would be entitled to refuse access to certain records, or parts thereof, in terms of the grounds for refusal contained in ch 4 of Part 2 of PAIA. (My emphasis.)

Dunn AJ's use of the word "some" implies a partial victory on the part of Biowatch and does not reflect the fact that in respect of the *legal* issues raised in the case, Biowatch was indeed the overwhelmingly successful party.⁷²

69 See *Biowatch I* par 24.

70 Dunn AJ points to the range of sub-issues encompassed by this question in note 26 of the judgment.

71 *Biowatch I* par 66.

72 A summary of Dunn AJ's decisions on these issues and sub-issues (together with an assessment of the winning party in parentheses) is as follows:

- In regard to the issue of the applicability of PAIA, he found that PAIA did not operate retrospectively and that its requests for information should not be invalidated simply because they were not made in terms of, and did not comply with, PAIA – Biowatch (*Biowatch I* par 29).

Indeed, the only legal issue on which the respondents achieved any substantial success was the retrospective applicability of Part 2, Chapter 4 of PAIA, which could thus be relied upon by the Registrar as grounds to refuse Biowatch access to the information.

Biowatch's success on the legal issues, however, was clouded by the issue that arose in connection with their actual requests for information – namely, that the requests, both in their original formulation and in the notice of motion, were apparently vexatious and made in an inept manner. Prior to launching the litigation, Biowatch had submitted four requests for information to the Registrar pertaining to the use of GMOs in South Africa, which were not fully granted.⁷³

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- He rejected the argument, advanced by Monsanto, that Biowatch's right of access to information crystallised only when it launched its court application (on 22 August 2002 by which time PAIA had entered into force), finding that they crystallised on each of the occasions Biowatch submitted a request for information to the Registrar – *Biowatch I* par 30).
 - He rejected the argument that Biowatch should have exhausted the internal appeal procedures in PAIA – *Biowatch I* par 32).
 - He rejected the argument, advanced by the first to third respondents and Monsanto, that Biowatch should have exhausted the internal appeal procedures in the GMO Act – *Biowatch I* par 38).
 - On the argument advanced by Stoneville that s 31 of NEMA limited Biowatch's right of access to information under s 32 of the Constitution, he found that Biowatch's attempts to rely on s 31 of NEMA were misplaced because these provisions in NEMA ceased to apply the moment PAIA was promulgated and that for this reason alone s 31 could not constitute a permissible limitation on Biowatch's rights under s 32 – *Biowatch I* par 36).
 - Similarly, on the argument that Biowatch's s 32 right was limited by s 18 of the GMO Act, he found – contrary to the submissions advanced by Stoneville – that interpreting s 18(1)(a) in a manner that did not limit the right of access to information was in keeping with the approach to interpretation required by the Constitution – *Biowatch I* par 37).
 - On the commercial confidentiality of some of the information requested, he found that PAIA could apply retrospectively to the degree that the Registrar could rely on the provisions of Part 2, Chapter 4 as grounds for refusing access to the information – *Respondents I* par 41).
 - He further found that the strict standard that applies to the intelligible identification of documents during a process of litigation, as embodied in Rules 35(14) and 38(1) of the Uniform Rules of Court, did not apply to a request for information under s 32 of the Constitution and that Biowatch should not be non-suited on the excessive breadth of its requests for information alone – *Biowatch I* par 43-44).

⁷³ The nature of Biowatch's requests and the Registrar's response thereto are set out in detail in *Biowatch I* par 18-23. The information Biowatch sought related to: Risk assessments accompanying requests for trial and commercial releases of GMOs, permits and approvals granted in terms of the GMO Act including information in such authorisations on the methods and plans for monitoring GMOs and for emergency measures in the case of an accident; details of public participation relating to the granting of authorisations in terms of the GMO Act; the location of field trials and commercial

Reflecting, perhaps, Biowatch's frustration with the fact that many aspects of these requests for information were either ignored or overlooked by the first respondent, the fourth request was particularly exhaustive as regards the information to which access was sought.⁷⁴ Rather than precisely listing the information to which it sought access in its notice of motion, Biowatch simply attached the records of its four attempts to correspond with and elicit information from the statutory respondents. Although Dunn AJ did not non-suit Biowatch because of the excessive breadth of its requests for information, he found some substance in the respondents' submissions that its requests for information were inherently vague, vexatious, oppressive and amounted to a "fishing expedition". He nevertheless acknowledged that requesters for information under section 32(1)(a) of the Constitution would often not have knowledge of the precise description of the record to which access is sought, and that a duty rested on the Registrar to adopt an active role in ascertaining the records to which access was sought.⁷⁵ In regard to the 'inept' manner in which Biowatch had approached the court, he complained:⁷⁶

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. Its approach seems to have been to expect the respondents and the court to read through all the correspondence and to divine precisely what information is requested and what information is outstanding.

He nevertheless proceeded with the task of determining which of the items in the first to fourth requests were valid and justifiable. Essentially, he found that all of the items in the first to third requests had either already been granted or

releases; registered academic and research institutions; minutes of the meetings of the Executive Council and the Advisory Committee established in terms of the GMO Act; and details of persons represented on the Advisory Committee.

74 The content of this correspondence is set out in par 23. An appreciation of the exhaustive nature of these requests is perhaps best illustrated by items (ii), (ix) and (x) of the schedule which read as follows:

(ii) All data relating to RR wheat.

...

(ix) Copies of all internal, inter-departmental, inter-State departmental and/or external letters, telefaxes, e-mails, circulars, memoranda and similar documents which relate to the development, production, use and application of GMOs.

(x) Any other recorded information held by the State relating to the development, production, use and application of GMOs.

75 *Biowatch I* par 43.

76 *Ibid* par 42.

were encompassed in the fourth request and that reference to the first to third requests in the notice of motion was therefore entirely unnecessary.⁷⁷ He then examined the eleven items of information listed in a Schedule to the fourth request, essentially finding that three of them were impermissibly vague or overly broad. Biowatch accordingly had a right to the other eight items, subject to the right of the Registrar to refuse access on the basis of Part 2, Chapter 4 of PAIA.⁷⁸

On appeal, the majority and minority decisions differed on the extent of Biowatch's success. While both Mynhardt J and Poswa J seemed to agree that Biowatch was the successful party as against the statutory respondents (although Mynhardt J placed hardly any emphasis on this whereas Poswa J expressly affirmed it⁷⁹), they differed on Biowatch's success vis-à-vis Monsanto. Mynhardt J went to some lengths⁸⁰ to argue that Monsanto was the successful party against Biowatch on the basis of Dunn AJ's finding on the retrospective application of Chapter 4, Part 2 of PAIA, referring to this fact no less than three times in the introductory part of his judgment.⁸¹ In contrast, Poswa J argued that Biowatch was the successful party against Monsanto, relying on Dunn AJ's own summary of the judgment⁸² and Biowatch's victory on the question on whether it was acting in the public interest. Because the majority and minority decisions differed on Biowatch's success against Monsanto, they also differed in this regard on the extent to which there had

77 *Ibid* par 45-50.

78 *Ibid* par 52-65. Was Biowatch successful then as regards its actual requests for access to information? On the basis of the judge's finding on those requests that were necessary for purposes of citing in the notice of motion, they were successful on eight out of eleven items (a success rate of some 72%). However, a more formalistic approach would take into account those items of information formulated in the first to third requests, which were dismissed as unnecessary by the judge. If one construes dismissal as failure, then Biowatch's success rate as regards its actual information requests was lower. However, given that Dunn AJ found that most of the items in the first to third requests were incorporated in the fourth request, this approach – in my view – is overly technical and inaccurate. In the case of its actual requests for information, Biowatch was successful in establishing a clear right to *most* of the information to which it sought access, but this victory was qualified by the respondents' one victory on a question of law, namely that relating to the retrospectivity of Part 2, Chapter 4 of PAIA.

79 *Biowatch II* (Minority) par 32.

80 See *Biowatch II* (Majority) par 26-28.

81 See *Ibid* par 10, 12 and 13.

82 *Biowatch II* (Minority) par 93.

been a departure from the second general principle applicable to costs, as the next section shows. In the opinion of Mynhardt J there had in fact been no departure from the general rule, while in the view of Poswa J there had been an extraordinary departure from the principle in that a successful party had been required to pay the costs of an unsuccessful party.

4.3 Decision on costs in the court a quo

Notwithstanding Dunn AJ's own summary assessment that Biowatch's application had met with some degree of success, he decided that no costs order against the statutory respondents should be made in favour of Biowatch ("the first costs order"), and that Biowatch should be ordered to pay the costs of Monsanto ("the second costs order"). His reasons for both costs orders were contained in and confined to the following paragraph:⁸³

As far as costs are concerned, the general rule in litigation is that the costs should follow the result. However, although Biowatch has been partially successful in obtaining some of the relief sought, the manner in which some of its requests for information were formulated, as well as the manner in which the relief claimed in the notice of motion was formulated, has convinced me that it should not be granted a costs order in its favour in these circumstances. Furthermore, the approach adopted by it compelled Monsanto, Stoneville and D&PL SA to come to court to protect their interests. The issues were complex and the arguments presented by them were of great assistance. Stoneville and D&PL SA did not seek any costs order against the applicant. On behalf of Monsanto its counsel sought an order for costs against the applicant. In my view the applicant should be ordered to pay Monsanto's costs. No other order as to costs is warranted in the circumstances of this case.

Dunn AJ demonstrated an awareness that he was departing from the second generally accepted principle relating to costs and offered three reasons in justification: (i) The manner in which Biowatch had formulated its requests for information and the relief claimed in the notice of motion – this reason, presumably, being associated with the judge's earlier comments as regards the vexatious, oppressive and inept nature of Biowatch's conduct; (ii) that Biowatch's approach to the matter had compelled the fourth to sixth respondents to come to court to protect their interests; and (iii) that the arguments presented by these respondents were of great assistance. *As it*

83 *Biowatch I* par 68.

appears from the judgment, these were the parameters that guided the exercise of Dunn AJ's discretion as to costs.

On appeal, two disputes of a factual nature relating to Dunn AJ's reasoning on the costs award emerged between the majority and minority judgments. Firstly, there was disagreement on whether or not Monsanto had in fact been compelled to come to court. Mynhardt J simply agreed with Dunn AJ, finding no merit in the submissions that Monsanto could or should have engaged the statutory respondents and indicated to them which documents it regarded as confidential; that Monsanto could have relied on the statutory respondents to protect its confidential information, and that Biowatch was under no duty to approach Monsanto beforehand to ascertain if it was amendable to the order being sought.⁸⁴ Poswa J, on the other hand, regarded it as an "anomaly that the Registrar and Monsanto had failed to communicate about Biowatch's request. If they had communicated Monsanto could have conveyed its fears regarding the protection of confidential information in the custody of the Registrar, who would in turn have communicated this to Biowatch. It would therefore not have been necessary for Monsanto to join as a party in the application".⁸⁵

Secondly, there was a sharp difference of opinion as to whether Dunn AJ had in fact taken the constitutional/public interest nature of the litigation into account and, related thereto, the "trend" or "principle" or "rule" relating to costs in constitutional litigation. From the judgment itself, it appears that Dunn AJ did not, but in paragraph 15 of his judgment on the application for leave to appeal he maintained that "a failure to expressly articulate all the grounds in favour of not making such an order certainly do (*sic*) not mean that they were not considered".⁸⁶ He pointed out that he was acquainted with the case law concerning costs in constitutional litigation, not least because he had been involved in at least one of them.⁸⁷ He therefore implied that these factors were

84 *Ibid* par 28.

85 *Biowatch II* (Minority) par 82.

86 Quoted in *Biowatch II* (Minority) par 41.

87 *Democratic Alliance v Masondo NO* 2003 (2) SA 413 (CC).

in fact taken into account, although they did not work in Biowatch's favour. However, because he admittedly did not expressly articulate all the grounds relating to his decision on costs, what was or was not in his mind at the time he made the order became a moot point. In this Biowatch relied on an exchange between Dunn AJ and counsel for Monsanto in the proceedings for the application for leave to appeal in respect of an affidavit Biowatch had attempted to place before the court indicating the effects of an adverse costs order on its operations.⁸⁸ In this exchange, Dunn AJ asked counsel for Monsanto if one could not take into account the fact that Biowatch was an NGO which needed funding from outsiders, to which counsel responded that the judge could have taken this into account. Dunn AJ then stated: "But that is something that I did not take into account. I must say, you know, at face value I treated the applicant as a normal litigant". And later, he stated: "What concerns me is this, did I not, where a party comes to Court to protect its constitutional rights, did I not, you know, treat that too lightly?" The thrust of counsel's response was to reassure the judge that the test was whether he had "judicially applied his mind" to the exercise of the discretion and not if another court would come to a different decision based on those facts.

Mynhardt J essentially dismissed the significance of this exchange by holding that "I do not think that the impecuniosity of Biowatch, if that is a fact, provides a ground or reason for holding that Dunn AJ misdirected himself. To the extent that a costs order against an NGO might have a 'chilling' effect that is something that is common knowledge".⁸⁹ In contrast, Poswa J analysed this exchange, finding in it contradictory moves that at first denied the fact that the public interest nature of the litigation was taken into account and then later seemed to affirm this.⁹⁰ In Poswa J's final opinion, Dunn AJ did not take this factor into account.⁹¹

88 Both the majority (par 36) and minority (par 40) judgments referred to and produced segments of this exchange.

89 *Biowatch II* (Majority) par 36.

90 *Biowatch II* (Minority) par 41.

91 *Ibid* par 42.

4.4 *Application of the fundamental rules on costs in Biowatch II*⁹²

The basis of Biowatch's appeal against the two costs orders to a full bench of the Transvaal Provincial Division was that Dunn AJ had misdirected himself in a number of respects: Firstly, Biowatch argued that Dunn AJ acted *capriciously* in making the first and second costs orders in that the decision was based on the manner in which the relief had been formulated.⁹³ Secondly, it argued that Dunn AJ misdirected himself by *failing to take relevant considerations into account*, including the "trend" in judgments delivered by the Constitutional Court and the other courts of South Africa not to make costs orders in matters in which a party seeks to establish an important constitutional principle or in matters where the protection of the environment is relevant.⁹⁴ As a result of these misdirections, it accordingly maintained that the appeal court was entitled to determine the issue of costs afresh. As regards the "test" for judicial interference in the award of costs by the court *a quo*, Biowatch maintained that the "traditional test" as recently re-formulated by Cloete J in *Naylor II* applied only where the court had followed the general principles applicable to costs. But where the trial court had departed from the general rule and had deprived the successful party of his costs, "a court of appeal will ordinarily interfere and apply its own judgment as to whether or not there are any grounds to depart from the general rule".⁹⁵

92 This article focuses on how the fundamental rules on costs were applied in the majority and minority decisions on appeal. As such, it does not deal with two of the other important legal issues raised in the case, namely, whether the appeal was barred by the provisions of s 21A of the *Supreme Court Act* 59 of 1959 (in terms of which an appeal court has a discretion to dismiss an appeal if it has no practical effect other than costs); and whether the provisions of s 32 of the NEMA were applicable to the judge's discretion. In respect of the latter it is my opinion that the provisions of s 32 were in fact applicable and that this in itself, on the authority of *Swartbooi v Brink* (n 51) would have been enough to establish that Dunn AJ had misdirected himself as to costs.

93 *Biowatch II* (Majority) par 24.

94 *Ibid* par 30.

95 *Biowatch II* (Majority) par 21. Counsel for *Biowatch* had obtained this formulation from *Merber v Merber* 1948 (1) SA 446 (A) at 453G–H where Greenberg JA had stated: "[W]hen a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule and if there are no such grounds, then ordinarily it will interfere".

4.4.1 *The majority decision*

Mynhardt J commenced by emphasising a fairly broad interpretation of the first principle applicable to costs. In order to succeed, Mynhardt J held, Biowatch needed to show that the court *a quo* failed to exercise a judicial discretion in making the costs orders, affirming a line of authority that stretches back to the English decision in *Ritter v Godfrey*⁹⁶ where it was said: "The discretion must be judicially exercised and therefore there must be *some* grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be *any* grounds, the question of whether they are *sufficient* is entirely for the Judge at the trial and this court cannot interfere with his discretion".⁹⁷ Mynhardt J assumed that "any grounds" in this passage meant "any grounds on which a reasonable person could come to the conclusion arrived at".⁹⁸ As such, a judge had a "wide unfettered discretion" to make a costs order after taking into account all of the relevant factors or circumstances of the case. There was no "normal rule" or "general rule". The mere fact that an appellate judge would have given more weight to the grounds did not mean that the trial judge had acted arbitrarily, that is, without a judicial discretion.⁹⁹

Mynhardt J aligned himself with the test for interference in a costs order made by a court *a quo* formulated by Cloete J *Naylor II* and pointed out that the principle that an appeal court will interfere with the exercise of a narrow or "true" or "strong" discretion only in limited circumstances had also been affirmed by the Constitutional Court in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions*.¹⁰⁰ Relying on a laconic

96 1920 2 KB 47.

97 Quoted in *Biowatch II* (Majority) par 21 (my emphasis).

98 *Ibid.*

99 *Ibid.*

100 2007 (1) SA 523 (CC). He did not point out that the discretion here related to s 173 of the Constitution according to which Supreme Court of Appeal and High Courts are required "to regulate their own processes". This case concerned an application to televise the proceedings of the Shaik trial, and the Constitutional Court, while cautioning that the exercise of the powers in s 173 may well not be capable of a single characterisation for purposes of determining the correct approach on appeal, found that the nature of the discretion the Supreme Court of Appeal was asked to exercise in this particular case was a narrow one (par 41). Accordingly, the question was not whether the Constitutional Court would have reached a different conclusion on permitting live radio and television broadcasting of the proceedings, but if the Supreme Court of Appeal had acted judicially in

formulation of the test – as per Cloete J in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council*¹⁰¹ Mynhardt J held that the question was whether Dunn AJ had committed some "demonstrable blunder" or reached an "unjustifiable conclusion".¹⁰²

In applying these principles to the facts in *Biowatch II*, Mynhardt J firstly disposed of the argument advanced by Biowatch that the "traditional test" for interference in costs orders, as formulated in *Naylor II*, applied only where a court had followed the general rule that a successful litigant should be awarded costs, by pointing out that in *Naylor II* the Supreme Court of Appeal was dealing with a case where the general rule had indeed *not* been followed, and yet the court affirmed the traditional test, rather than holding that it would "ordinarily interfere" on the authority of *Merber*.¹⁰³ He failed, however, to take into account the constitutional jurisprudence where the Constitutional Court interfered in the costs orders of lower courts without resorting to this test.

In response to Biowatch's argument that Dunn AJ had acted capriciously in making the first and second costs orders, Mynhardt J noted that in essence Dunn AJ had disapproved of the manner in which the relief was formulated in the four letters written by Biowatch and in the notice of motion and had decided to deprive Biowatch of its costs against the statutory respondents "as a mark of his disapproval". In Mynhardt J's view Dunn AJ was entitled to do so and he could find no fault with his decision.¹⁰⁴ He therefore did not consider the propriety of this rationale within a constitutional context.

Mynhardt J also dismissed Biowatch's contentions that Dunn AJ had failed to take relevant considerations into account as regards the "trend" relating to costs orders in constitutional litigation. Mynhardt J's position was that the

exercising its discretion. It would thus interfere only where the Supreme Court of Appeal had not acted judicially, or had based the exercise of its discretion on wrong principles of law or a misdirection on the material facts (*Ibid*).

101 1999 (4) SA SA 799 (W) at 808B.

102 *Biowatch II* (Majority) par 22.

103 *Ibid* par 21.

104 *Biowatch II* (Majority) par 25.

courts' tendency not to make costs orders against parties litigating on the basis of an important constitutional principle was a trend and not a "rule" that fettered the discretion of the trial judge to make an order as to costs. In this regard he relied in particular on Ackermann J's statements in *Motsepe*¹⁰⁵ (where, as noted above, the applicant had been unsuccessful in obtaining the constitutional relief sought) and rejected Biowatch's reliance on the *Sanderson* case¹⁰⁶ finding that the *dictum* here related only to criminal proceedings.

4.4.2 *Minority decision*

Contrary to Mynhardt J, Poswa J emphasised both the first and second principles on costs. He noted that according to the "traditional test" for interference in the award of costs by the court of first instance, an appeal court will not readily interfere. However, while the trial court has a discretion, this is not unlimited, being subject to the general principle stated in *Fripp v Gibbon* 1913 AD 354 that 'to the successful party should be awarded his costs'.¹⁰⁷ Acknowledging Cloete J's restatement of the traditional test for judicial interference in *Naylor II*, the judge then emphasised that while the case was a good example of how a successful party (*in casu* the defendant) was denied costs contrary to the general principle stated in *Fripp v Gibbon*, it also illustrated *the need to indicate reasons* why this had been done.¹⁰⁸ Poswa J pointed out how Cloete J had found that the trial judge in the *Naylor* matter, Willis J, had been acutely aware that he was exercising a discretion as well as the parameters thereof. Willis J had justified his decision on costs with reference to the nature of the action (that in defamation actions the *quantum* essentially takes the form of a *solatium*), the motive of the plaintiff (that the plaintiff needed to persist with the application in order to vindicate his reputation), and the attitude of the defendant in making the without-prejudice tender (that the tender contained no acknowledgement that a defamatory statement had been made and no apology).¹⁰⁹ These, Poswa J found, were substantive reasons as to why

105 1997 (2) SA 898 (CC).

106 See n 53 above.

107 *Biowatch II* (Minority) par 23.

108 *Ibid* par 29.

109 *Ibid* par 28.

there was a departure from one of the two general principles relating to costs.¹¹⁰ While Willis J was fully conscious of the fact that he was exercising a discretion and gave reasons for his departure from the general rule, "Dunn AJ did not, *in his judgment*, when dealing with costs, mention the question of public interest action, and give reasons, *therein*, why he was disregarding that factor" (my emphasis).¹¹¹

Poswa J comprehensively reviewed the approach towards costs in constitutional and public interest litigation in foreign jurisdictions as well as in the Constitutional Court, Supreme Court of Appeal and High Courts,¹¹² and came to the conclusion that the Constitutional Court adopts the trend, in vogue in numerous foreign jurisdictions, of not awarding costs against applicants in public interest litigation. This approach amounted to more than a "trend" and could be characterised as a "flexible rule".¹¹³

Poswa J essentially found that Dunn AJ had done more than depart from this "flexible rule" in an unjustifiable manner – he had completely failed to take it into account. Poswa J examined the exchange that had taken place between Dunn AJ and counsel for Monsanto in respect of Biowatch's affidavit indicating the effect of an adverse costs order upon it and found that as a matter of fact Dunn AJ had not taken into account that Biowatch was an NGO acting in the public interest when making the costs order. The judge therefore concluded: "I do not, therefore, agree with the majority judgment that, that omission on Dunn AJ's part does not show 'that [he] had committed a demonstrable blunder'. In my view, it demonstrates just that".¹¹⁴

4.4.3 *An assessment*

While both Mynhardt and Poswa JJ proceeded from the first principle on costs, Mynhardt J relied upon it heavily, barely mentioning the second principle and

110 *Ibid* par 29.

111 *Ibid*.

112 *Ibid* par 43-61.

113 *Ibid* par 61.

114 *Ibid* par 42.

holding that no third principle relating to costs in constitutional litigation had been recognised. On the other hand, Poswa J held that the judicial discretion as to costs was subject to both the second principle and, evidently, a third principle relating to costs in constitutional litigation which had, by now, been recognised as a "flexible rule". Quite clearly, these judges held different views on the relationship between the first principle and the second and third principle (assuming the latter has such a status for this discussion) and it is difficult to say who was correct according to the existing law. As noted above, the weight of authority lies behind the proposition that the second principle yields to the first, but does not indicate the circumstances in which this may occur, while the view put forward in *Levben Products* is that the second principle may be departed from only on "good grounds".

However, for Mynhardt J, it is clear that "good grounds" would be equivalent to "any rational ground". He was satisfied that Dunn AJ had exercised his discretion as to costs judicially because there were *some* grounds for its exercise, which a reasonable person could accept. In the majority opinion, the cryptic¹¹⁵ manner in which Dunn AJ justified his departure from the principle that a successful party should be awarded his costs was sufficient. The judicial exercise of the discretion did not require that Dunn AJ should have expressly taken into account the public interest motive of the litigant and constitutional nature of the litigation or justified his departure from the trend toward costs in these matters. By contrast, in highlighting cases in which judges had given express reasons for their departure from the fundamental rules on costs, Poswa J implied that the judicial exercise of a discretion on costs requires, at least, taking into account the second and third principle and expressly providing substantive reasons when departing from them.

While both judges affirmed the traditional test for interference in costs orders (and thereby also the characterisation of costs as broad in the court *a quo* and narrow in the court of appeal) their application of this test to the facts yielded different results. Bringing in the test for interference in the exercise of such

115 *Biowatch II* (Majority) par 14.

discretion, as formulated by Cloete J, the aspect of the test which seems most applicable to the judges' reasoning is the failure by the judge *a quo* to act for "substantial" reasons. Again, for Mynhardt J what counted as a "substantial reason" was equated with a reason which a reasonable person could accept, viz the "unreasonable" manner in which Biowatch had formulated its requests for information and notice of motion. *Any* rational reason would have sufficed. In contrast, Poswa J evidently regarded the reasons Dunn AJ did put forward as insufficient and held that his failure both to take into account and to expressly justify his departure from the trend toward costs in constitutional litigation vitiated the discretion as "judicial". In this view, there are potential reasons which a judge should take into account and, where they are relevant, he or she should expressly account for failing to apply them in the making of a costs order. A "substantial" reason is therefore not simply any rational reason, but the reasons one would expect a judge to take into account in the particular circumstance.

Neither judge expressly considered the propriety, in a constitutional context, of the reasons Dunn AJ did present in justification of his award on costs, in particular the propriety of an order that essentially sought to punish Biowatch, as a mark of the court's disapproval, for the manner in which they had conducted the litigation.

5 Reconceptualising the Fundamental Rules on Costs to meet new needs in constitutional and/or public interest litigation

5.1 *An unsatisfactory situation*

The fundamental rules on costs currently fail to meet new needs which arise in constitutional and/or public interest litigation and the reasons for this are essentially four-fold, based on the right of access to justice, the right to equal protection and benefit of the law, the need for proportionality, and the accountability of the judiciary.

5.1.1 Access to justice

The fundamental rules on costs currently fail to effectively engage with the insight that the rules and principles governing costs orders – including security for costs – have a *critical* impact on access to justice. In this regard, the discretion on costs differs from the other types of discretion which Greenberg JA identified in *Ex Parte Neethling* and *Rex v Zackey*, such as an amendment of pleadings, the granting of a postponement, or the alteration of a sentence on this ground. In the context of environmental litigation, Lord Justice Brooke has written that there are three immediately obvious obstacles to public access to the courts: "The costs of the courts (in terms of high court fees); the cost of lawyers (in terms of even higher professional fees) and, above all, the risk of having to pay one's opponent's costs if one loses, and the uncertainty at the outset of litigation as to how large those costs will be".¹¹⁶ Arguments based on the so-called "chilling" effect adverse costs orders may have on public interest and constitutional litigation are in fact understated because these three obstacles, as recognised in a number of the cases and academic articles cited by Poswa J in his minority judgment,¹¹⁷ do more than "chill" such actions – they kill them at the root, because they deter the individuals and public interest organisations that would otherwise institute an action from even arriving at the court's doors out of fear that the financial burden of the litigation will effectively destroy them.¹¹⁸ In this instance the use of the word "chill" is a euphemism that covers the true effect of the court's application of costs principles and rules.

Further, the potential of an adverse costs order can be used in a way that undermines the objectives underlying the relaxation of *locus standi*, as has occurred in respect of constitutional litigation by virtue of section 38 of the Constitution and in environmental litigation in particular by section 32(1) of the

¹¹⁶ See Brooke (n 2) 345.

¹¹⁷ See, for instance, the sources cited in par 45 and 46 and the decisions in *Coalition of Citizens for a Charter Challenge v Metropolitan Authority* (1993) 122 NSR (2d) 1; 103 DLR (4) 409 (SCTD) and *British Columbia (Minister of Forests) v Okanjan Indian Band* [2003] 3 SCR (SCC).

¹¹⁸ At a workshop on public interest environmental litigation held at Wits University during June 2008 and at which a number of the larger environmental NGOs were represented, this sentiment was expressed very strongly.

National Environmental Management Act 107 of 1998. In *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism*,¹¹⁹ a case decided before *locus standi* in environmental matters was broadened through the right to environment in section 24 of the Constitution, case law that invoked this right as the basis for standing and section 32(1), the Pickering J stated:

It was not certain that to afford locus standi to a body such as the [Wildlife Society of Southern Africa] in circumstances such as these would open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Neither was it certain, given the exorbitant costs of Supreme Court litigation, that, should the law be so adapted, cranks and busybodies would flood the Courts with vexatious or frivolous applications against the State. Should they be tempted to do so, an appropriate order of costs would soon inhibit their litigious ardour.¹²⁰

Based on this quotation, one has to wonder if the courts, at least in some quarters, view costs orders as a "weapon" that can be invoked against their oft-quoted fear of opening the "floodgates" of litigation.¹²¹ But as Mr Justice Toohey, a member of the High Court of Australia, said during his address to a conference of the National Environmental Law Association in 1989:

There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation) with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.¹²²

In *Napier v Barkhuizen*¹²³ the Constitutional Court reaffirmed its position on the importance and purpose of section 34 of the Constitution,¹²⁴ the constitutional right arguably most pertinent to the issue of access to justice. They held that the orderly and fair resolution of disputes by courts (or other independent and impartial tribunals) is fundamental to the stability of an orderly society and

119 1996 (3) SA 1095 (Tks).

120 At 1106F–G.

121 See also the remarks by Ackermann J in *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 par 30.

122 Quoted in Brooke (n 2) 346.

123 2007 (5) SA 323 (CC), 2007 (7) BCLR 691.

124 S 34 provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

indeed vital to a society that is based on the rule of law.¹²⁵ Further (as they were testing the constitutionality of a contractual provision) they held that section 34 "not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy".¹²⁶ One could contend that as the fundamental rules on costs omit to provide *certainty* that the nature of the litigation and the position of the litigant *will be considered* when a judge exercises his discretion on costs, this constitutes an infringement of section 34, and there would be no bar (as was the case in *Napier*) to subjecting the fundamental rules on costs – as law of general application – to a limitation analysis. Dugard has already shown the extent to which there is a demand for access to justice (and the extent to which this is *not* being met by direct access to the Constitution Court).¹²⁷ And in a recent paper, Heywood and Hassim have pointed to the disjuncture between the realisation of section 35 rights and the progressive erosion of section 34 rights, as measured in terms of funds directed to criminal and civil matters respectively by the Legal Aid Board.¹²⁸ They have also argued convincingly that "unless the need for justice and remedies for injustice are met by the courts and the law, there will be negative consequences for the popular legitimacy of the courts and indeed the Constitution itself".¹²⁹

In the light of all this, it is surely time that the courts *acknowledged* the linkages between costs and access to justice and *reformed* the laws on costs in a manner that favours access to justice rather than undermines it, as would appear to have been the case in the *Biowatch* matter.

5.1.2 *Equal protection and benefit of the law*

If section 34 not only reflects the foundational constitutional values but also reflects public policy, then the same must hold true of section 9(1) of the Constitution – the right of equality before the law and the right to equal

¹²⁵ *Ibid* par 31.

¹²⁶ *Ibid* par 33.

¹²⁷ See Dugard 2006 *SAJHR* 261.

¹²⁸ Heywood and Hassim "Remedying the maladies" par 25.

¹²⁹ *Ibid* par 34.

protection and benefit of the law. But unless there are mechanisms in the process of litigation whereby the *inequality* of contending parties can be taken into account, the law benefits only those who are most powerful and well-resourced to invoke its protection. The *Biowatch* matter is typical in this regard. Biowatch depended upon advocates and attorneys willing to offer their services *pro bono* or had to undertake public fundraising to secure the services of an able legal representative, yet was pitted against an assembly of lawyers – being the very best that money could buy – representing the government and each of the biotechnology companies; a situation Lord Brooke has described as "a cadre of Goliaths with their clubs and battle axes" in one corner, and "a squad of Davids, with their slings and peashooters" in the other.¹³⁰ If the trial judge is to make a costs award that is "fair and just between the parties" (to adopt De Villiers' formulation in *Fripp v Gibbon*), then this requires closer regard to the actual status of the parties, the effect of an adverse costs order upon them and the differing roles they play in upholding a constitutional democracy. An NGO such as Biowatch fulfills an important constitutional function in both representing and encouraging a diversity of views on the issue of GMOs in South Africa. Is it in the interests of a constitutional democracy that an adverse costs order can be both made and upheld against Biowatch (or any other similarly situated institution) where it raises an important constitutional issue and is *at least* partially or even substantially successful, and the effect of that order is to end or at least substantially strain its ability to function?¹³¹ I think not.

Further, there seems to be little appreciation of the debt owed by society to the individuals and organisations who institute litigation, not for their own personal financial gain, but in the interest of a significant section of the public (if not the public as a whole) and who through their success – and sometimes even their failure – secure a benefit for those who had no part in the litigation. In fact, in

130 Brooke (n 2) 344.

131 See in this regard also Heywood and Hassim (n 127) on the effects of the decision in *NM v Smith* 2007 (5) SA 250 (CC). Although the applicants were ultimately successful in upholding their constitutional rights to privacy and dignity, this took place "at great personal cost to them and financial cost to the [Aids Law Project]".

other jurisdictions the inherent *unfairness* of this situation has been recognised and attempts to remedy it through making funds available through other means, predominantly legal aid, have been made.¹³² However, given the de facto situation regarding legal aid in South Africa, a duty is imposed on the courts to do everything in their power to facilitate access and, towards this end, to reduce the burden of litigation on poor people and poorly-resourced organisations.

5.1.3 Proportionality

Proportionality is a value implicit in the Constitution. It is specifically associated with the test for limitations of rights,¹³³ but has over time been applied to discretions exercisable in other areas of law.¹³⁴ Proportionality, in essence, requires a balancing of different interests¹³⁵ and, as Mokgoro and Sachs pointed out in the *Bel Porto* case, a specific understanding of justifiability, i.e. one which requires "more than a mere rational connection between the reasons and the decision ...",¹³⁶ but rather a substantiation of necessity and suitability in the light of certain factors. According to the present understanding of "judicial discretion", at least as proposed by the majority in *Biowatch II* in the making of a costs award, one rational reason is as good as any another. Thus, in the reasoning of the court *a quo*, the first and second costs orders were justified on the basis that Biowatch had acted improperly in the manner in which it had formulated its relief. The unarticulated moral foundation of this reason is the integrity of the legal process and the time-worn professional rules that have developed around "fairness" in litigation. Judges are steeped in the ethos of these rules and guard them vigilantly, such that what would appear to a layman

132 See the Brooke's (n 2) 347-349 description of the English *Access to Justice Act* 1999 and the work of the Legal Services Commission as well as Preston 1991 *JELL* 61-62.

133 *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 par 105.

134 For instance, the use of force, in terms of the *Criminal Procedure Act* 51 of 1977 in effecting an arrest (see *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (7) BCLR 663 (CC)) and the right to just administrative action (see in particular *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 par 162 ff).

135 *Makwanyane* (n 132) par 104, *Bel Porto* (n 130) par 162.

136 *Bel Porto* (n 133) par 164-165. As the comments of the minority in this case make clear, a proportionality test is particularly suited to considering the question of costs on appeal because it effects a compromise between a test based purely on a rational connection and one where the judiciary substitutes its decision for that of the decision-maker of first instance.

as a minor error or oversight in any court document would be viewed in a very serious light by a judge and could justify the matter being thrown out of court. These rules are not unimportant because they are closely bound up with the integrity of the legal system as a means of resolving disputes between different parties in a manner that is "fair". However, since the advent of democracy even these rules are subject to the overriding objectives of the Constitution to create a society that is open, democratic and diverse, in which ordinary people are able, through the courts, to vindicate their constitutional rights. The necessity and suitability of this reason should therefore be subjected to scrutiny in the light of these broader considerations.

5.1.4 Accountability of the judiciary

The final reason is that currently the fundamental rules on costs do not adequately capture the accountability of the judiciary to fundamental constitutional norms and standards, which includes the norm of accountability itself. In the *South African Broadcasting Corporation* case, the Constitutional Court stated: "The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government".¹³⁷ The present formulation of the nature of the judicial discretion in awards of costs does not adequately specify whether that discretion is fettered or unfettered and, more importantly, if fettered by principles such as the second principle on costs or a principle on costs in constitutional and/or public interest litigation, the circumstances in which such principles can be departed from and the standards of justification that then apply.

¹³⁷ *South African Broadcasting Incorporation v National Director of Public Prosecutions* 2007 (1) SA 523 par 32.

5.2 *Suggestions for possible reform*

The parameters for possible reform have already been foreshadowed in my critique above.¹³⁸ It seems sound to maintain that a judicial discretion to award costs inheres in the judge of the first instance, on the basis that he or she is well positioned to evaluate the relative success of the parties in the light of their overall behaviour and conduct in the court. However, this discretion is not unfettered and is subject to both the traditionally recognised second principle on costs as well as the principle that has emerged in the context of constitutional litigation, which is that where a party has raised an important constitutional principle, an adverse costs order should generally not be made. In exceptional circumstances, it may even be justified to order the successful party to pay such a party's costs. These considerations are all the more compelling where the litigation is of a public interest nature. A departure from either the second or "third" principle on costs should be justifiable in the light of the values, norms and standards of the Constitution and not merely on the basis of rationality. Moreover, in order to demonstrate accountability to such norms, values and standards, a judge's reasons for departure must be set out *expressly*. The traditional categorisation of costs as one which vests the court of appeal with only a narrow discretion for interference should be expressly re-evaluated in the light of the significant role that costs orders play in access to justice and to account for the *de facto* practice in the Constitutional Court in certain cases. A test formulated more along the lines of a proportionality analysis may be more appropriate. At the very least, the reference to "substantial reasons" in the existing test should be taken to refer to reasons which are justifiable in the light of the value framework established by the Constitution.

In conclusion, in making costs orders courts wield considerable power. This is a power that operates "in advance," in the sense that it is a critical factor in the decision to launch litigation. Courts should exercise this power in a manner that

¹³⁸ I am assuming that the power to effect such reform lies with the courts' power to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights, as per s 39(2) of the Constitution.

is conscious of its effects, particularly of its *differential* effects on different classes of litigant, and should be held accountable for their costs decisions in the light of constitutional values, norms and standards.

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ch chapter(s)

GMO	Genetically Modified Organisms
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisation(s)
PAIA	Promotion of Access to Information Act
par	paragraph(s)
s	section(s)